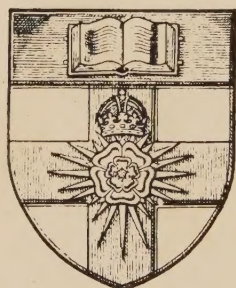


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CORRIGENDA

- P. 21. R.M.R. HOUSING SOCIETY, LTD. v. COMBS. Line E.3: for "p. 24" read "p. 148."
- P. 58. *Re HUNTER (decd.)* Counsel for the defendants: for "*McMullan*" read "*McMullen*."
- P. 101. BIGGS v. BOUSTED. Line B.3: for "plaintiff's wife" read "defendant's wife."
- P. 139. PRESTON-JONES v. PRESTON-JONES. Line C.4: for "founded" read "founded." P. 140 line 4: for "more, but" read "more. But."
- P. 173. R. v. GATENBY. Counsel: for "The appellant did not appear" read "*Spafford* for the appellant." Solicitors: read "Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown)." instead of as printed.
- P. 535. MINISTRY OF NATIONAL INSURANCE v. BARRE. Solicitors: for "*Solicitor, Ministry of Health*" read "*Solicitor, Ministry of National Insurance*."
- P. 539. *Re MEYERS (decd.)*. For the appearances of counsel as published read: "*P. H. B. W. Foster* for the plaintiffs, the executors of the will. *V. M. C. Pennington, J. A. Brightman, H. E. Francis and O. R. W. W. Lodge (R. E. Megarry with him)* for various corporations which formerly administered certain hospitals. *Cross, K.C.*, and *Monckton* for next of kin. *Denys B. Buckley* for the boards of governors of hospitals, regional hospital boards, hospital management committees and the Attorney-General."
- P. 693. BUTLER v. MOUNTVIEW ESTATES, LTD. For the second "held" as printed read: "(ii) the breach by the vendors of the covenant to repair contained in the lease gave the landlord a right of action for damages even if he had waived his right of re-entry, and, as the implied covenant contained in the latter part of sched. II, Part II, to the Act of 1925 (*viz.*, that all the covenants contained in the lease had been observed up to the time of conveyance) was another branch of the covenant for title, the breach thereof by the vendors occurred at the time of the assignment even though the landlord had made no claim, and, therefore, *prima facie*, the purchaser had a right of action against the vendors for damages in respect of the breach immediately on the execution of the assignment, the fact that he knew of the breach being immaterial, as the covenant was unqualified."
- P. 804. JONES v. MAYNARD. Solicitors: for "*Burn & Berriage*" read "*Kingsford, Dorman & Co.*"
- P. 911. *Re MCARDLE (decd.)*. Solicitors: after "*Routh, Stacey, Hancock & Willis*" read "agents for *Maslen & Maslen, Bournemouth*."
- P. 921. *In the Estate of DAVIES*. Counsel: for "*G. O. Heron*" read "*C. G. Heron*."

THE ALL ENGLAND LAW REPORTS

INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

INLAND REVENUE COMMISSIONERS *v.* BARCLAYS BANK, LTD. AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), November 13, 14, 15, December 14, 1950.]

Surtax—Private company—Undistributed income—Apportionment to members—Member a married woman living with her husband—Liability of husband—Income Tax Act, 1918 (c. 40), All Schedules Rules, r. 16, proviso (1)—Finance Act, 1922 (c. 17), s. 21 (1) (2) (as amended by the Finance Act, 1927 (c. 10), s. 31 (2))—Finance Act, 1927 (c. 10), s. 42 (7)—Finance Act, 1936 (c. 34), s. 19 (5).

During the period of twenty-one months ending on Dec. 31, 1936, a company, to which the Finance Act, 1922, s. 21, applied, made large profits. In 1937 a small dividend on its shares was declared and in 1938 the company went into liquidation. Subsequently, the Special Commissioners of Income Tax made a direction under s. 21 of the Act of 1922 that the income of the company for the said period of twenty-one months should be deemed to be the income of its members, between whom the income was later apportioned. The only shareholders, apart from a comparatively small number of shares held by a public company, were three married women, on whose husbands assessment to surtax were made by the commissioners in respect of the apportioned sums. The husbands did not elect to pay the tax, and notice of the charge was served on the company in liquidation. The company did not pay within the time limited by the Finance Act, 1936, s. 19 (5), and the commissioners now sought payment from the husbands.

HELD: proviso (1) to r. 16 of the All Schedules Rules of the Income Tax Act, 1918 (by which it is provided that the profits of a married woman living with her husband shall be deemed the profits of the husband) was applicable to surtax and must be read into s. 21 (2) of the Act of 1922; the words "with any necessary modification" in s. 21 (2) did not operate to alter the proviso in any material respect, the word "member" being construed, where the proviso so required, to include a reference to the husband of a member living with that member; and, therefore, the tax on the apportioned income was payable by the husbands.

Decision of the COURT OF APPEAL, sub nom. Latilla v. Inland Revenue Comrs. ([1949] 2 All E.R. 589), *reversed*.

[AS TO SURTAX IN RESPECT OF UNDISTRIBUTED PROFITS OF COMPANIES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 289-299, paras. 574-595; and FOR CASES, see Digest Supp.]

Cases referred to:

- (1) *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (No. 2), [1945] 1 All E.R. 492; [1946] A.C. 38; 114 L.J.K.B. 203; 172 L.T. 278; 28 Tax Cas. 209; 2nd Digest Supp. A
- (2) *Partington v. A.-G.*, (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370; 18 Digest 35, 344.
- (3) *Penang and General Investment Trust, Ltd. v. Inland Revenue Comrs.*, [1943] 1 All E.R. 514; [1943] A.C. 486; 112 L.J.K.B. 356; 169 L.T. 93; 25 Tax Cas. 219; 2nd Digest Supp. B

APPEALS by the Crown from an order of the Court of Appeal dated July 27, 1949, and reported, *sub nom. Latilla v. Inland Revenue Comrs.*, [1949] 2 All E.R. 589, allowing appeals by the taxpayers from orders of ATKINSON, J., dated Mar. 24, 1947, affirming decisions of the Special Commissioners of Income Tax. C

The taxpayers were the husbands of three members of a private company, in respect of the undistributed income of which assessments to surtax had been made under the Finance Act, 1922, s. 21. Having regard to the Income Tax Act, 1918, All Schedules Rules, r. 16, the Crown claimed to assess the husbands of the members in the name of the company in respect of proportions of the undistributed income. The Special Commissioners confirmed the assessments. The facts and relevant statutory provisions are set out in the opinion of LORD MACDERMOTT. D

Sir Andrew Clark, K.C., J. H. Stamp and R. P. Hills for the Crown.
Grant, K.C., Graham-Dixon, K.C., and John Creese for the taxpayers.

The House took time for consideration. E

Dec. 14. The following opinions were delivered.

LORD SIMONDS: My Lords, finding myself unable to uphold the decision of the Court of Appeal in these cases I was prepared to give my own reasons for taking a different view of the complicated provisions of the various Acts which we have had to consider, but having had the advantage of reading the opinion which my noble and learned friend, LORD MACDERMOTT is about to deliver I shall content myself with saying that I am in full agreement with his reasoning and conclusions and cannot usefully add anything on my own behalf. I move that the appeals be allowed and that the order of ATKINSON, J., affirming the determination of the Commissioners for the Special Purposes of the Income Tax Acts be restored, and that the respondents do pay the costs of the appellants in this House and the Court of Appeal. F G

LORD NORMAND: My Lords, were it not that we are differing from the Court of Appeal I would content myself with expressing my full concurrence with my noble and learned friend, LORD MACDERMOTT, whose opinion I have had the advantage of reading in print. As it is, I shall detain your Lordships as briefly as may be with a statement of my reasons for concluding that the appeal should be allowed. I shall find it necessary for this purpose to refer to the Income Tax Act, 1918, the Finance Act, 1922, s. 21, and the Finance Act, 1936, s. 19 (5), but it is not necessary for me to consider the earlier legislation, or to refer to the Finance Act, 1927, which substituted surtax for super-tax and applied to surtax the provisions applicable to super-tax. H

Rule 16 of the Income Tax Act, 1918, is an income tax rule applicable to all schedules and it is universally applicable for the purposes of income tax

unless an application is made under r. 17 for the separate assessment of the income of husband and wife. Rule 16 enacts that

“ . . . a married woman . . . being entitled to any . . . profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried.”

I pause there to say that “profit” is equivalent to income, and that “chargeable” in that context includes liability to pay. But there are attached to the enactment two provisos of which the first alone is relevant. It provides that the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name and not in her name or the name of her trustee. The effect as matter of construction seems to me clear. The profits of a married woman living with her husband, instead of being assessed on her as they would have been under the enacting part of the rule, shall be assessed in her husband’s name; instead of being chargeable on her as they would have been under the enacting part of the rule, they shall be charged, which must mean charged to tax, in her husband’s name, with the effect that instead of being exigible from her as it would have been under the principal enactment the tax will be exigible from her husband. The proviso, it must be noted, overrides other provisions in the schedules by which the tax is charged on a person under a particular description. I shall give only one example. Under sched. E the tax is charged on every person exercising certain offices of profit. If a married woman living with her husband exercises one of these offices, the tax is, in spite of the express term of sched. E, charged on her husband and it is from him that it is exigible. Another example of the effect of the proviso is that a statement of total income under s. 27 (1) of the Act of 1918 is made by the husband and includes as part of his income the income of his wife if living with him.

I turn now to the super-tax provisions of the Income Tax Act, 1918. It is an additional duty of income tax on the income of individuals in excess of a certain amount. Therefore, the total income of the individual is the basis for it and the individual must furnish a statement of his total income: s. 5 (1), and s. 7 (2) and (3). All the provisions of the Act relating to persons who are to be chargeable with income tax and to income tax assessments and to the collection and recovery of income tax are made applicable to super-tax. Rule 16 is thus made applicable in its entirety to super-tax, so that the husband has to include in his statement of his total income the income of his wife living with him, and he has to pay the super-tax on this total income. The wife makes no return and pays no part of the tax. Her income is aggregated with her husband’s, because the proviso to r. 16 overrides the word “individual.”

The Finance Act, 1922, s. 21, deals with a notional income. Under sub-s. (1), when a direction is made, the income of the company shall for the specified year be deemed to be the income of the members and the amount thereof shall be apportioned among them. Furthermore, the member shall for the purposes of the tax be deemed to have received the amount apportioned to him: sched. I, para. 9; and it shall be included in the statement of his total income or in any amended statement of his total income, and it shall be deemed to be the highest part of that income: sched. I, para. 8. Section 21 (2) requires that super-tax chargeable under the section in respect of the amount of the company’s income apportioned to a member “ . . . shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company . . .” It also provides that all the provisions of the Income Tax Acts relating to super-tax assessments and the collection and recovery of super-tax shall with any necessary modification apply to super-tax assessments and to the collection and recovery of super-tax charged under the section. Rule 16 with its proviso is, therefore, *ex figura verborum* made

part of the rules applicable to the assessment, collection and recovery of the super-tax charged under the section, but that does not greatly advance the Crown's case because the problem for decision lurks under the words "with any necessary modification." It is also important to note (s. 21 (3)) that the member is given an option to pay, but the super-tax is not exigible from him—only from the company, after service on it of a notice of charge. That was, however, changed by the Finance Act, 1936, s. 19 (5). The sub-section provides that when a notice of charge has been served on a company or its liquidator under s. 21 (3) of the Act of 1922 and the tax has not been paid by the company before a certain period, the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed.

My Lords, s. 19 of the Finance Act, 1936, is a series of amendments of s. 21 of the Act of 1922, and s. 19 (5) takes its place as a proviso added to s. 21 (3) of the Act of 1922 and has been from the date at which it came into operation within the outlook of the words "subject as hereinafter provided" in s. 21 (2) of the Act of 1922. When a married woman living with her husband is a member of a company which has been the subject of a direction under s. 21 of the Act of 1922, how far does proviso (1) to r. 16 apply? In my opinion, it applies in its totality with slight modification. In the first place, the apportioned income is profits of the wife. There is an express statutory enactment that it is to be deemed to be so and that she is to be deemed to have received it for the purpose of super-tax under s. 21. Secondly, the tax, instead of being assessed on her as it would have been under the enacting part of r. 16 and under the provisions of s. 21 (2), is to be assessed on her husband under the proviso to r. 16, but it is to be assessed in the company's name. Thirdly, instead of being chargeable on and payable by her as it would have been under the enacting part of r. 16, it is to be chargeable on and payable by her husband, not, it is true *primo loco*, but secondarily and conditionally on the company's failure to pay. There are, therefore, two modifications of r. 16. The first is that the proviso did not contemplate a charge on the husband in any name but his own in respect of his wife's income, but as applied to super-tax under the Finance Act, 1922, s. 21, the peculiar mode of assessment on the husband in the company's name is requisite. Here no contradiction is involved. The effect of r. 16, proviso (1), is that it overrides the word "member," so that "shall be assessed upon that member in the name of the company" must be read "shall be assessed upon the husband of that member (if she is living with her husband) in the name of the company." No more violence is done to the language than when the person who exercises an office is read as the husband of a person living with him as his wife who exercises an office. The second modification is that the proviso applies when the husband's obligation is subsidiary and conditional and not as formerly only when the sole and absolute obligant would under the principal enactment be the married woman and under the proviso be her husband. But with these modifications the proviso applies in its entirety. It is an anomaly that the husband of a member and not the member herself should have power to affect the company's liabilities by accepting or refusing the option to pay: s. 21 (3); but anomalies are inevitable when the legislature is attempting to deal with the machination of tax evasion.

I am not to be taken as suggesting that, before the passing of the Act of 1936, r. 16, proviso (1), did not apply to income deemed under s. 21 of the Act of 1922 to be the income of a member who was a married woman living with her husband. I am inclined to think that it did apply to the effect that the total income under s. 22 was the total income returnable by the husband including the wife's actual income and her deemed income, but it is not necessary to decide that question in this case, and to avoid unnecessary complication and extension of the discussion, I have abstained and shall abstain from entering on it or referring to further provisions of the relevant Acts which seem *prima*

facie to support the view which I am inclined to favour. I, therefore, agree with the motion proposed by my noble and learned friend on the Woolsack.

LORD OAKSEY: My Lords, I have come to the conclusion after some hesitation and doubt that this appeal ought to be allowed. It appears to me that it is possible to read the Finance Act, 1922, s. 21, with r. 16 of the General Rules applicable to scheds. A, B, C, D and E of the Income Tax Act, 1918, in such a way that the sum apportioned to a married woman living with her husband who is a member of a company to which s. 21 applies shall be assessed on her husband for the purposes of super-tax.

Section 21 (1) provides that such a sum shall for super-tax purposes be deemed to be the income of the married woman, and s. 21 (2) provides that all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments shall with any necessary modification apply to super-tax assessments under the section. Rule 16 is one of such regulations and if it is applied to the super-tax assessment of a married woman living with her husband under s. 21, it seems to me to be a proper and necessary modification that for the purposes of super-tax the husband should be assessed in the name of the company instead of his wife. If this modification is not made there is a conflict between the provision of s. 21 (2) that the assessment shall be on the wife who is the member of the company and the provision of r. 16 that the profits of a married woman living with her husband shall be assessed in the husband's name. Further, I think it is necessary and proper to modify the provision in r. 16 that the profits shall be charged on the husband since by the express terms of s. 21 (3) they are charged on the company. If this construction is right, r. 16 comes in for the purpose of assessment and aggregation for super-tax, but that part of his super-tax which is referable to the sum apportioned is chargeable to the company.

In my view, the Finance Act, 1936, s. 19 (5), which provides that the tax shall be recoverable from the member on whom it was assessed if the company does not pay, neither helps nor harms the appellants. It is true the husband is not a member of the company, but he has been assessed by virtue of the modification of r. 16 introduced by s. 21 (2) of the Act of 1922, and this section makes him also chargeable if the company does not pay.

Leading counsel for the respondents, in his able argument, contended that r. 16 only applies to profits of a married woman which satisfy three conditions: (i) that she is entitled to such profits; (ii) that she would be assessable on them in her own name but for proviso (1); and (iii) that she would be liable to income tax on them but for proviso (1); and he said that, none of these conditions being satisfied, r. 16 could have no application. Whether or not these three conditions are conditions of the applicability of r. 16 in other cases, it appears to me that they are necessarily modified by s. 21 of the Act of 1922 which can only be harmonised with r. 16 by assessing the husband in respect of the income in question which is deemed to be his wife's by s. 21 (1).

LORD MORTON OF HENRYTON: My Lords, in my view, the Special Commissioners and ATKINSON, J., were right in upholding the assessments made on the respondents in these three appeals. I agree with the opinion which is about to be expressed by my noble and learned friend LORD MACDERMOTT, but, as we are differing from the views of the Court of Appeal, I shall state my reasons shortly in my own words.

I think it is convenient, first, to endeavour to discover the true meaning and intent of the Finance Act, 1922, s. 21, at the time of its enactment, and for this purpose to disregard, for the time being, any subsequent amendments in the section. Turning to sub-s. (1) I find that in the events there stated the commissioners may,

“ . . . by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the

year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members . . .”

With this sub-section should be read para. 9 of sched. I to the Act of 1922 which provides that:

“The income apportioned to a member of a company under s. 21 of this Act shall, for the purposes of super-tax, be deemed to have been received by him at the date to which the accounts of the company for the year or period were made up.”

The result so far is that the sums apportioned to Mrs. Latilla, Mrs. Mayo and Mrs. Latilla-Campbell respectively were deemed to be the income of these ladies respectively and were deemed to have been received by them. I now turn to sub-s. (2), which is in the following terms:

“Any super-tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company, and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments and the collection and recovery of super-tax shall, with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged under this section.”

At this stage the vital question arises: Is r. 16 of the All Schedules Rules in sched. I to the Income Tax Act, 1918 (hereafter referred to, for the sake of brevity, as “r. 16”) one of the provisions which, by the latter part of this sub-section, are made applicable “to super-tax assessments and the collection and recovery of super-tax charged under this section”? In order to ascertain what are the “provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments and the collection and recovery of super-tax” which are made applicable by sub-s. (2), I turn to the Finance Act, 1927, s. 42 (7). That section relates to surtax, which was substituted for super-tax by the Act of 1927, but it is common ground between the parties that it is unnecessary, for the present purpose, to draw any distinction between the two taxes. Section 42 (7) provides, *inter alia*, that

“ . . . all the provisions of the Income Tax Acts relating—(a) to persons who are to be chargeable with income tax at the standard rate and to assessments to such tax . . . (c) to the collection and recovery of such tax . . . shall, so far as they are applicable, apply to the charge, assessment, collection and recovery of surtax . . .”

I do not think there can be any doubt that r. 16 is one of the provisions thus described, and thus r. 16 applies, “so far as it is applicable” to super-tax assessments and to the collection and recovery of super-tax charged under s. 21 of the Act of 1922, but I must next consider what is the effect of the words “so far as applicable”? Turning again to the Finance Act, 1922, s. 21 (2), is there any reason why r. 16 should not apply to super-tax assessments and to the collection and recovery of super-tax charged under that section?

My Lords, I shall try the experiment of applying r. 16 to the provisions of s. 21 (2) and see whether such application gives rise to any difficulties. Rule 16, so far as material, is as follows:

“A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the

husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee . . ."

For the sake of simplicity, I shall take the case of income apportioned to Mrs. Latilla. She was at all material times a married woman living with her husband, and the income apportioned to her must be deemed to be her income and to have been received by her in accordance with s. 21 (1) and para. 9 of sched. I to the Act of 1922. This "deeming" must, in my view, have the effect of making this income "profits of a married woman living with her husband" within r. 16. Counsel for the respondents did not contend that there was any distinction, for this purpose, between the word "income" and the word "profits." These profits, pursuant to r. 16, "shall be deemed the profits of the husband, and shall be assessed and charged in his name." I think it follows that, *prima facie* and subject to the two difficulties which I am about to mention in the case of Mrs. Latilla, a married woman living with her husband, the assessment must be on her husband and not on her.

It was said, however, on behalf of the respondents, that the words "that member" in s. 21 (2) can only refer to Mrs. Latilla, since she and not her husband was the "member of the company" to whom the amount in question was apportioned. I agree that the word "member" refers to Mrs. Latilla, but as soon as the sum in question was apportioned to her it was deemed to be her husband's income under r. 16. For this reason I think that whenever s. 21 is dealing with assessment, it should be read as if the words "or, in the case of a married woman living with her husband, the husband" were inserted after the word "member." So to read the section does not, in my view, do any violence to the language of the section; it is the inevitable result of the latter part of sub-s. (2), which applies r. 16 "so far as it is applicable." On the other hand, at the beginning of sub-s. (2), where the reference is to apportionment and not to assessment, there is no need for the notional insertion of these words, since r. 16 has no effect on an apportionment under s. 21. Another difficulty relied on by counsel for the respondents arises from the fact that under sub-s. (2) the super-tax is to be assessed "upon that member in the name of the company." They pointed out that, under the proviso to r. 16, the profits there mentioned are to be assessed and charged in the name of the husband. Here, they say, a contradiction arises if "member" is given the suggested construction in s. 21 (2). I think the simple answer to this difficulty is that r. 16 is to be applied "with any necessary modification" and that sub-s. (2) imposes a necessary modification by providing that the assessment, on the member or her husband, as the case may be, shall be made in the name of the company.

I now turn to sub-s. (3) of s. 21. That sub-section deals with assessment, and, in accordance with the principle which I have just stated, it should be read as if the words "or, in the case of a married woman, etc." were inserted throughout after the word "member." So read, it gives rise to no difficulty. The second sentence of sub-s. (4), in my judgment, strongly supports the view that the provisions of r. 16 should be imported into s. 21 in the manner which I have suggested. That sentence deals with the case in which

" . . . a member of a company has been assessed to and has paid super-tax otherwise than under this section in respect of any income which has also been assessed and upon which super-tax has been paid under this section . . ."

As the reference is to the assessment of a member, the words "or, in the case of a married woman, etc." should be inserted if the principle already stated is to be applied. If the words "member of a company" are read with the addition of these words the provision has a sensible and natural result; the person who has borne double taxation, *i.e.*, the husband, gets the relief specified in the sub-section. If, however, these words are not inserted, the provision is

wholly inoperative in the case of a married woman living with her husband, since such a married woman can never be assessed to or pay super-tax "otherwise than under this section." I do not think that sub-ss. (5) and (6) assist at all, nor does the extended definition of "member" in sub-s. (7); but sub-s. (8) is important because it brings into play sched. I to the Act. I have already referred to para. 9 of that schedule, and para. 8, with its reference to "the statement of his total income" strongly supports the view that r. 16 must be applied to the provisions of s. 21. There is no provision in income tax law for a married woman living with her husband to make any return of total income, and any such provision would be inconsistent with r. 16. Thus, para. 8 of sched. I works smoothly if the husband is the person to be assessed, but does not work at all if the assessment is made on the married woman.

My Lords, so far I have failed to find any reason why r. 16 should not be applied to the provisions of s. 21 in the manner which I have indicated, and s. 49 of the Act of 1922 supplies yet another reason why they should be applied. That section provides that "Part II of this Act shall be construed together with the Income Tax Acts and the Acts relating to inhabited house duty" and Part II includes s. 21. I need not refer in detail to the later statutes, which will be dealt with by my noble and learned friend, LORD MACDERMOTT. For the reasons which I have given, in my view, s. 21 of the Act of 1922 fixed the liability to be assessed for super-tax, in the case of a married woman living with her husband, on the husband. By the Finance Act, 1927, surtax replaced super-tax and certain amendments were made in s. 21, but, in my view, none of the amendments had the effect of placing on the wife the liability to be assessed, or of exempting the husband from that liability. The Finance Act, 1936, s. 19 (5), makes the tax recoverable from the husband, in the events there specified, whereas under the earlier Acts the husband could not be compelled to pay if he did not elect to pay. Again, the phrase "member on whom the tax was assessed" must, in my view, be read with the application of the provisions of r. 16, so as to refer to the husband in the case of a member who is a married woman living with her husband. In the Court of Appeal, SINGLETON, L.J., pointed out ([1949] 2 All E.R. 595) that in sub-s. (1) of s. 21, both in its original form and as amended by the Act of 1927, the word "member" was

"... sometimes to be read literally and at other times as meaning 'husband of the member, if the member is a married woman living with her husband'."

I agree, but regret that the learned lord justice did not apply this reasoning to the vital sub-s. (2) and sub-s. (3). I would allow the appeal and restore the order of ATKINSON, J., affirming the assessments.

LORD MACDERMOTT: My Lords, these three appeals by the Inland Revenue Commissioners all raise the same question. It may be stated thus: Is a husband living with his wife liable to pay surtax in respect of undistributed income of a company notionally attributed to his wife, as a member of the company, under the terms of the Finance Act, 1922, s. 21, notwithstanding that those terms are on their face confined to members of the company and the husband himself is not such a member? The Special Commissioners and ATKINSON, J., have answered this question in the affirmative. The Court of Appeal has unanimously answered it in the negative.

It will be convenient before referring to the facts to set out or summarise the more important provisions of the relevant enactments all of which are to be construed (so far as they are not part thereof) together with the Income Tax Acts.

The Finance Act, 1922, s. 21 (as amended by s. 31 (2) of the Finance Act, 1927, by the addition of the words shown in square brackets in sub-s. (1)), provides:

"With a view to preventing the avoidance of the payment of super-tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that for purposes of assessment to super-tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members [and super-tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super-tax]:

Provided that . . .

(2) Any super-tax chargeable under this section in respect of the amount of the income of the company apportioned to any member of the company, shall be assessed upon that member in the name of the company, and, subject as hereinafter provided, shall be payable by the company, and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments and the collection and recovery of super-tax shall, with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged under this section.

(3) A notice of charge to super-tax under this section shall in the first instance be served on the member of the company on whom the tax is assessed, and if that member does not within twenty-eight days from the date of the notice elect to pay the tax a notice of charge shall be served on the company and the tax shall thereupon become payable by the company:

Provided that nothing in this sub-section shall prejudice the right to recover from the company the super-tax charged in respect of any member who has elected as aforesaid but who fails to pay the tax by Jan. 1 in the year of assessment or within twenty-eight days of the date on which he is so elected, whichever is later.

(4) Any undistributed income which has been assessed and charged to super-tax under this section shall, when subsequently distributed, be deemed not to form part of the total income from all sources for the purposes of super-tax of any individual entitled thereto.

Where a member of a company has been assessed to and has paid super-tax otherwise than under this section in respect of any income which has also been assessed and upon which super-tax has been paid under this section, he shall, on proof to the satisfaction of the Special Commissioners of the double assessment, be entitled to repayment of so much of the super-tax so paid by him as was attributable to the inclusion in his total income from all sources of the first-mentioned income."

Sub-section (6) defines the companies to which s. 21 applies; sub-s. (7) enacts that the expression "member" shall include any person having a share or

interest in the capital or profits or income of a company; and sub-s. (8) applies for the purposes of the section the provisions of sched. I.

Schedule I, by para. 1 and para. 10 thereof, provides for an appeal by the company, but not by a member, in respect of any direction or apportionment given or made under s. 21 (1). It also provides, by para. 11, that any person in whose name any shares of a company are registered shall, if required by notice in writing by the Special Commissioners, state whether or not he is the beneficial owner of such shares, and if not the beneficial owner that he shall furnish the names and addresses of those on whose behalf the shares are registered. Paragraph 8 and para. 9 of the schedule, as amended by the Finance Act, 1927, run as follows:

"8. The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in accordance with the respective interest of the members, and the income as apportioned to each member [so far as assessable and chargeable to super-tax under s. 21 of this Act] shall, for the purposes of super-tax, be deemed to represent . . . income from his interest in the company for the year or other period and shall be included in the statement of his total income or in an amended statement of total income which the Special Commissioners are hereby authorised to require and shall be deemed to be the highest part of that income.

9. [The income apportioned to a member of a company so far as assessable and chargeable to super-tax under s. 21 of this Act shall for the purposes of that tax be deemed to have been received by him on the date to which the accounts of the company for the year or period were made up or, if an application in that behalf is made by the company to the Special Commissioners at any time within the period limited by this schedule for giving notice of appeal against the direction to the Special Commissioners, on such date as those commissioners determined to be just, having regard to the dates on which distributions of income have been made by the company, and so as to avoid, as far as possible, the inclusion for the purposes of super-tax for any year of income referable to more than one year.]"

By the Finance Act, 1927, s. 38 (1), surtax was imposed as an additional income tax on higher income, in substitution for super-tax, in terms which make the ascertainment of the "total income" of the subject a necessary pre-requisite to his assessment to surtax. By s. 38 (2) the expression "total income" in relation to any person means

" . . . the total income of that person from all sources estimated, as the case may be, either in accordance with the provisions of the Income Tax Acts as they apply to income tax chargeable at the standard rate or in accordance with those provisions as they apply to surtax."

By s. 42 provision is made as to the payment and assessment of surtax, and sub-s. (7) thereof enacts (*inter alia*) that

" . . . all provisions of the Income Tax Acts relating—(a) to persons who are to be chargeable with income tax at the standard rate and to assessments to such tax . . . shall, so far as they are applicable, apply to the charge, assessment, collection and recovery of surtax . . ."

Sub-section (9) provides for the separate assessment of a husband and wife on an application being made for that purpose in the prescribed manner.

The Finance Act, 1936, s. 19, provides:

"(5) Where a notice of charge is served on a company or the liquidator of a company under sub-s. (3) of the said s. 21 and the tax thereupon becoming payable is not paid by the company before the expiration of

three months from the date of service or before Jan. 2 following the year of assessment (whichever is the later), the tax shall thereupon, without prejudice to the right to recover it from the company, be recoverable from the member on whom the tax was assessed."

The Income Tax Act, 1918, ss. 4 to 8, inclusive, dealt with super-tax, but it is unnecessary to set them out as they were repealed by the Act of 1927 and it is conceded that in all relevant respects there is no material difference between their provisions and those now relating to surtax.

Rule 16 of the General Rules applicable to all schedules to the Income Tax Act, 1918, provides:

"A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried:

Provided that—

(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee; . . ."

The material facts are as follows. The company immediately concerned (hereinafter called "the company") was F.P.H. Finance Trust, Ltd. It was a finance company, financing and dealing in the shares of gold-mining companies. Its capital at all relevant times consisted of one thousand £1 ordinary shares and ten thousand £1 preference shares. The respective rights of the two shareholding classes were unusual. The preference shareholders had the voting control of the company. They were entitled to a fixed cumulative dividend of five per cent. and, subject thereto, the ordinary shareholders were entitled to the whole of the profits declared for distribution as dividends. On a winding-up the ordinary shareholders were entitled to repayment of the nominal amount of their shares and, after that, the whole of the surplus assets were divisible among the preference shareholders. The one thousand ordinary shares were held by a public company, the National Mining Corpn., Ltd., and the ten thousand preference shares were held by three married ladies living with their husbands. They were (i) Mrs. E. M. Latilla, the wife of Mr. H. G. Latilla, an original appellant who has died since the commencement of these proceedings and whose executors (Barclays Bank, Ltd. and his widow, the said Mrs. E. M. Latilla) are respondents in one of the present appeals; (ii) Mrs. G. Latilla-Campbell, daughter of the said Mr. H. G. Latilla and the wife of Mr. E. C. Latilla-Campbell, the respondent in another of these appeals; and (iii) Mrs. E. Mayo, another daughter of Mr. H. G. Latilla and the wife of Mr. Eric S. Mayo, the respondent in the remaining appeal. The company made very large profits during the period of twenty-one months ending on Dec. 31, 1936, at which date the amount standing to the credit of its profit and loss account was £939,167. In 1937 a small dividend was declared amounting in all to £100 on the ordinary and £46 11s. 6d. on the preference shares. In 1938 the company went into liquidation, the National Mining Corpn., Ltd., was paid £1,000 in respect of its ordinary shares, and the remaining assets were distributed to Mrs. Latilla, Mrs. Latilla-Campbell and Mrs. Mayo as the holders of the preference shares. Subsequently, the Special Commissioners, acting under s. 21 (1) of the Act of 1922, made a direction that the income of the company for the said period of twenty-one months should be deemed the income of the members of the company, and they proceeded to apportion this income between the members. The company appealed against the direction and apportionment so made and after much litigation, which need not now be traced, the matter came to your Lordships' House where, on Mar. 22, 1945, the direction was confirmed, as was also the following apportionment: to the National Mining Corpn., Ltd., £1,000 0s. 0d.; to Mrs. Latilla, £285,996 5s. 0d.; to Mrs. Latilla-

Campbell, £285,910 7s. 6d.; to Mrs. Mayo, £285,910 7s. 6d. It may be observed in passing that this apportionment did not reflect the position as it would have been had the income of the company for the relevant period been actually distributed in accordance with the dividend rights of the two shareholding classes. The Special Commissioners in apportioning had construed the words of para. 8 of sched. I to the Act of 1922—"in accordance with the respective interests of the members"—as entitling them to take into account all the different interests of the members under the company's constitution, including the rights to undistributed profits on a winding-up, and this view was confirmed by this House in the proceedings to which I have referred: see *F.P.H. Finance Trust, Ltd. v. Inland Revenue Comrs.* (No. 2) (1). A

In the meantime, in 1943, the Special Commissioners had made assessments to surtax for 1936-37 in respect of the sums apportioned to the three ladies as above set out. These are the assessments now under appeal. Each assessment was made on the husband of the lady concerned in the sum apportioned to her. The husbands were duly served under s. 21 (3) with notice of charge. They did not elect to pay the tax. Notice of charge was then served on the company in liquidation. It did not pay within the time limited by s. 19 (5) of the Act of 1936, and as a result the present position is that, if the assessments were duly made on the husbands, the tax is now recoverable from them or, in the case of Mr. H. G. Latilla, from his executors. It is agreed that the company was a company to which s. 21 of the Act of 1922 applied, and of a number of questions raised during the earlier stages of the litigation only that mentioned at the beginning of this opinion remains for decision. Were the Special Commissioners entitled to assess the husbands in respect of the sums apportioned to their wives under s. 21? B C D

My Lords, the general purpose of s. 21 appears from its introductory words, and, as respects members of a company who are not married women living with their husbands, its subsequent provisions are now reasonably clear. Difficulty does arise, however, where the members concerned are married women living with their husbands and beneficially entitled, but even in that case there are two points which may be regarded as beyond controversy. In the first place, it was plainly the intention of the legislature to make each of the sums apportioned to individuals subject to super-tax if, when the sum is reckoned in the total income, such tax is attracted. The question is not whether the sum apportioned to a married woman escapes the net altogether and in any event. It is whether the person to be assessed is the lady or her husband. And, secondly, it is, I think, no less clear that s. 21, if regarded in isolation and without reference to the enactments said to be incorporated therewith, contains nothing to authorise the assessment of the husband. The person to be assessed, if the language of sub-s. (2) is to be taken in its natural meaning and without qualification, is the member to whom an amount of the income of the company has been apportioned under sub-s. (1). Such member need not be the registered holder of shares, for he or she may be the beneficial owner having regard to the definition in sub-s. (7); but the husband of a member is not a member within that definition and there is nothing else to put him in the position of a member if one does not look beyond s. 21. This was conceded by the Crown, and its case before your Lordships was based entirely on the ground that r. 16 of the General Rules was brought into operation by s. 21 with the result for which it contended, namely, that the husbands were properly assessed. For the respondents, on the other hand, it was submitted that r. 16 was not brought into play at all, and, alternatively, that, if it was, it did not justify the assessment of the husbands. E F G H

The first question to be considered, therefore, is whether r. 16 has been made applicable to assessments under s. 21. If it has, it must be by virtue of that part of sub-s. (2) of that section which provides:

" . . . and all the provisions of the Income Tax Acts and any regulations made thereunder relating to super-tax assessments . . . shall, with any necessary modification, apply to super-tax assessments and to the collection and recovery of super-tax charged under this section."

Now, by s. 42 (7) of the Act of 1927 (which in this respect echoed one of the repealed provisions of the Act of 1918 as to super-tax) all the provisions of the Income Tax Acts relating to persons chargeable with income tax at the standard rate and to assessments to such tax are directed to be applied to the assessment, collection and recovery of surtax "so far as they are applicable." But r. 16 is, undoubtedly, applicable to surtax, as it was to super-tax, and, accordingly, it must, in my opinion, be regarded as a provision "of the Income Tax Acts . . . relating to super-tax assessments," and, therefore, as a provision which "shall, with any necessary modification," apply to surtax assessments under s. 21.

The next and more difficult question is as to the effect of this incorporation. There can be no doubt that the expression "members" is used in some places in s. 21 in nothing but its ordinary meaning as extended by the definition in sub-s. (7), that is to say, as signifying only the persons in whose names or on whose behalf shares in the company are held. Such, for example, seems to be the plain meaning of "members" on the first, third and fourth of the occasions on which the word is used in sub-s. (1). The conflict, then, is between, on the one hand, a construction which ascribes to the word throughout a meaning limited, as in places it must be limited, to its natural signification as extended by the definition, and, on the other, a construction by which the word is capable of including, where r. 16 so requires, a reference to the person who is the husband of and lives with the member to whom part of the company's income has been apportioned. The choice to be made between these rival interpretations must depend on the nature and force of the impact which r. 16 and the other incorporated provisions make on the structure of s. 21. The next step will be to examine this, but before doing so it will be well to refer to two general considerations which have to be kept in mind at this stage of the inquiry. First of all, s. 21 is, on the Crown view—at any rate since s. 19 (5) of the Act of 1936 became law—a most drastic enactment for the husbands of members of companies to which s. 21 relates, and that all the more as neither they nor their wives are accorded any right of appeal against the apportionment made, though such apportionments may well be the subject of acute controversy between different classes of shareholders. For this reason, if for no other, the natural meaning of the language used by the legislature ought only to be departed from on clear and cogent grounds. And, secondly, taxation is imposed by the language and not merely by the trend or habit of the relevant legislation. As LORD CAIRNS said in *Partington v. A.-G.* (2) (L.R. 4 H.L. 122):

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

By the terms of s. 21 (1) the sum apportioned to the wife of each of the original appellants was deemed to be her income, and, by para. 9 of sched. I to that Act, to have been received by her on Dec. 31, 1936, the end of the relevant accounting period. Apportioned income being, as was conceded, "profits" within the meaning of r. 16, it must, I think, follow from the wording of proviso (1) to that rule that this income had to be regarded as the profits of the husband. I do not forget that a proviso must be construed as such, nor yet that what I may call the double deeming necessitated by this application of r. 16 is a highly notional process. None the less, I think as a process it is described in

terms sufficiently clear to leave no real doubt about the result. The terms of the proviso are mandatory—the apportioned income “shall be deemed the profits of the husband, and shall be assessed and charged in his name,” and *not* in the name of the wife. That being the position, what is the necessary effect on s. 21? Here attention may conveniently be focused on sub-s. (2) of that section and in particular on the part thereof which reads “shall be assessed upon that member in the name of the company,” for whichever construction prevails there will necessarily prevail at the other points where dispute may arise, including s. 19 (5) of the Act of 1936.

My Lords, having got this length it seems to me no longer possible to regard the conflict as merely one between the natural meaning of “member” as applied to a married woman living with her husband and the general proposition of income tax law that a husband living with his wife is assessable in respect of her profits. That general proposition has now, as it were, become specific and as much a part of sub-s. (2) as the words “shall . . . apply” can make it, for there seems no good reason why the intervening expression “with any necessary modification” should operate to alter the terms of proviso (1) to r. 16 in any material respect. Such a reason certainly cannot, in my opinion, be found in the words “in the name of the company” which occur in sub-s. (2). It was suggested in the course of the argument that these words were incompatible with the words in proviso (1) “shall be assessed and charged in his name,” but I do not think there is substance in this. Whatever the exact import of the words “in the name of the company” may be, the assessment under sub-s. (2) must also be on the individual and, therefore, in his name as well. If, then, the imperative terms of proviso (1) to r. 16 are, as I would hold, to be read into sub-s. (2), the tax on the apportioned income must be assessed on the husband and cannot be assessed on the wife, and the only way of accommodating the language of the sub-section to this state of affairs is to read “member” as the Crown contends. This, there is no denying, involves an interpretation which does not ride elegantly on the language of the enactment, but if I am right in my view as to the applicability and effect of r. 16, I see no escape from it.

On the contrary, there are to be found in the relevant legislation several further considerations which, to my mind, lend considerable support to this construction. These I regard as secondary rather than primary grounds for the conclusion I have reached, and I will, therefore, state them shortly. They may be enumerated as follows. (i) The contention of the respondents, if sound, would entirely stultify the purpose of s. 21 as regards the income apportioned to married women members living with their husbands, because the taxing Acts provide no means of compelling such members to make the return of total income without which surtax cannot be computed, or of assessing them separately from their husbands in the absence of an application by either spouse in that behalf. (ii) Unless the husband is assessed in respect of his wife's income, or there has been an application for separate assessment, there is no provision for the aggregation of the incomes of husband and wife which is necessary for the assessment of surtax. The respondents endeavoured to meet this difficulty by an alternative submission to the effect that r. 16 applied to the extent, but only to the extent, of procuring such aggregation. I do not think one can halt there. If r. 16 is applicable to that extent, it is, I think, impossible not to apply it completely and with the results I have mentioned above. (iii) Apart altogether from r. 16, it seems fairly clear that the true construction of s. 21 does not require that the word “member” should be read as referring to the same individual throughout it. As VISCOUNT SIMON, L.C., said in *Penang and General Investment Trust, Ltd. v. Inland Revenue Comrs.* (3) ([1943] 1 All E.R. 516), after a reference to the definition of “member” in sub-s. (7):

“I incline to think that, inasmuch as the apportionment is ‘amongst

the members,' it would be legitimate for the Special Commissioners to apportion a proper fraction to the beneficiary in the first instance, if they already knew that the shareholder on the register was a bare trustee. Information as to this could be obtained under para. 11 of sched. I, but whether the Special Commissioners have the information, and act upon it, in the first instance, or not, it seems to me clear that an original apportionment to a trustee may properly be followed up by an assessment on the beneficiary."

Though this may not take the present matter any great distance it at least serves to indicate that the words "upon that member" in sub-s. (2) have a wider scope than might at first appear to be the case. (iv) An examination of the Income Tax Acts shows that proviso (1) to r. 16 (like its forerunner, s. 45 of the Income Tax Act, 1842) is the only means of effecting the substitution of husband for wife under charging provisions which are no less clearly referable in their terms to the wife than is the word "member" in the present case. Thus—tax under scheds. A and B "shall be charged on and paid by the occupier for the time being": see r. 1 of Case VII of sched. A, and r. 4 of sched. B. Tax under sched. D

" . . . shall be charged on and paid by the persons or bodies of persons receiving or entitled to the income in respect of which tax under this schedule is hereinbefore directed to be charged."

See r. 1 of the Miscellaneous Rules applicable to sched. D. And, again, tax under sched. E, r. 1, "shall be annually charged on every person having or exercising an office or employment of profit . . ." In all these cases, though the married woman living with her husband may be the occupier of the lands or tenements subject to assessment under sched. A or sched. B, or the person actually receiving and entitled to the income chargeable under sched. D, or having or exercising a particular office or employment of profit within the meaning of sched. E, it is on her husband and not on her that (in the absence of an application for separate assessment) the tax is charged. Rule 16 has always been regarded as justifying this procedure and nothing very different is asked of it by the Crown in this case. For these reasons I would allow the appeals and confirm the assessments.

Appeals allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Churchill, Clapham & Co.* (for the respondents).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

R.M.R. HOUSING SOCIETY, LTD. v. COMBS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton, L.J., and Vaisey, J.), November 29, 1950.]

Rent Restriction—"Obligation of the tenancy"—*Undertaking by tenant to remain in employment of third party—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), sched. I, para. (a).*

A tenancy agreement relating to a dwelling-house to which the Rent Restrictions Acts applied contained a clause providing that the tenancy was conditional on the tenant being and remaining in the employment of a third party and that the determination of that employment from any cause whatsoever should terminate the tenancy. The landlords and the company employing the tenant were associated companies, but neither company was acting as the agent of the other. The tenant left the employment, and the landlords claimed possession of the dwelling-house on the ground that the tenant had broken an "obligation of the tenancy" within the meaning of para. (a) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

HELD: the words "obligation of the tenancy" in para. (a) of sched. I to the Act of 1933 referred to an obligation binding on the tenant in his capacity as tenant, as distinct from an obligation which was purely personal and collateral to the tenancy agreement; consequently, the undertaking by the tenant to remain in the employment of a third party was not an "obligation of the tenancy," within para. (a), but, even if it were, it would be inconsistent with the provisions of the Rent Restrictions Acts; and, therefore, the landlords were not entitled to possession.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-585, Nos. 7256-7348.]

Cases referred to:

- (1) *Barton v. Fincham*, [1921] 2 K.B. 291; 90 L.J.K.B. 451; 124 L.T. 495; 85 J.P. 145; 31 Digest 579, 7280.
- (2) *Remon v. City of London Real Property Co.*, [1921] 1 K.B. 49; 89 L.J.K.B. 1105; 123 L.T. 617; 31 Digest 556, 7032.
- (3) *Artizans, Labourers and General Dwellings Co. v. Whitaker*, [1919] 2 K.B. 301; 88 L.J.K.B. 859; 121 L.T. 243; 31 Digest 577, 7259.
- (4) *Brown v. Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 2nd Digest Supp.
- (5) *Bute v. Prenderleith*, 1921 S.C. 281; 31 Digest 556, a.

APPEAL by the tenant from an order of His Honour JUDGE DALE, made at Aylesbury County Court on Sept. 21, 1950, granting the landlords possession of a dwelling-house to which the Rent Restrictions Acts applied, on the ground that the tenant was in breach of an obligation of the tenancy within the meaning of para. (a) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The facts appear in the judgment of SINGLETON, L.J.

Hannay for the tenant.

D. C. Thompson for the landlords.

SIR RAYMOND EVERSLED, M.R.: I will ask SINGLETON, L.J., to deliver the first judgment.

SINGLETON, L.J.: This is an appeal by Mr. Ernest Addison Combs, the tenant of a house, 17 Meadow Close, Tring, Hertfordshire, against an order for possession made against him by the learned county court judge at Aylesbury at the suit of the landlords, R.M.R. Housing Society, Ltd.

The tenant came into possession of the house under an agreement dated July 2, 1948, and made between the landlords, of the one part, and the tenant,

of the other part. The landlords are one of the associated Rothschild companies, as also is R.M.R. Engineering, by whom the tenant was to be employed. The agreement of tenancy sets out, in para. 1, that:

"The society in consequence of the employment of the tenant by R.M.R. Engineering of Brook Street, Tring, Herts . . . and for the purpose of enabling the tenant more conveniently and efficiently to perform the duties of the said employment but subject always to compliance with the condition hereinafter mentioned hereby lets and the tenant hereby takes the premises known as 17 Meadow Close, Tring, Herts., To hold the same from Saturday, July 3, 1948, from week to week until the condition hereinafter mentioned in para. 2 hereof shall cease to be satisfied or until the tenancy shall be determined in the manner hereinafter provided [at a weekly rent]."

Paragraph 2 of the agreement provides:

"This tenancy is conditional on the tenant being and remaining in the said employment and it shall be an obligation of the tenancy on the part of the tenant that he shall be and remain so employed. Determination of such employment from any cause whatsoever shall terminate the tenancy."

The only other material paragraph of the agreement is para. 5:

"Either party may terminate the tenancy at the end of the second or any subsequent week by giving to the other party two weeks' previous notice in writing expiring on a Friday Provided always that upon the event of the conditions mentioned in para. 2 hereof ceasing to be satisfied the tenancy shall thereupon terminate automatically without the need for either party to give any notice to the other."

The learned judge stated the reasons for his judgment in these terms:

"The defendant was employed by R.M.R. Engineering, a subsidiary Rothschild company, until June, 1950, when he left this employment at his own request in order, as he said, to better himself. He was then tenant of a house owned by the plaintiff landlords under a written agreement of July 2, 1948. One of the conditions of this agreement was that he should remain tenant only so long as he was in the employment of R.M.R. Engineering. After leaving this employment he continued in possession under s. 15 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It was argued by counsel for the defendant that this condition of tenancy was inconsistent with the provisions of the Rent Acts, and that, therefore, sched. I, para. (a), to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, did not apply. I did not accept this argument and held that the condition continued to be binding on the tenant under s. 15 (1) of the Act of 1920 and that the tenant had broken an obligation of the tenancy within the meaning of sched. I, para. (a), to the Act of 1933. After fully considering the question whether it was reasonable to make the order for possession, I found on the facts that it was so and ordered possession in six weeks."

The argument of counsel for the tenant in this court was that the case did not fall under sched. I, para. (a), of the Rent Act of 1933. Schedule I is in these terms:

"A court shall, for the purposes of s. 3 of this Act, have power to make or give an order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejection of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if—(a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy

(whether under the contract of tenancy or under the principal Acts), so far as the obligation is consistent with the provisions of the principal Acts, has been broken or not performed."

Counsel for the tenant said that in the circumstances of this case there was no obligation of the tenancy which had been broken or not performed, and that no order could be made under that part of the schedule. He submitted further that, if it could be said that the obligation to work or to continue working for R.M.R. Engineering was an obligation of the tenancy, that obligation was not consistent with the provisions of the principal Acts, and, consequently, that that part of the schedule did not apply. A

We were referred to a number of authorities. In *Barton v. Fincham* (1) this court had to deal with a case under s. 5 (1) of the Act of 1920, which was in terms very similar to those of para. (a) of sched. I to the Act of 1933. The provision was: B

"No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejection of a tenant therefrom, shall be made or given unless—(a) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act has been broken or not performed . . ."

It was held in that case that the jurisdiction of the court to make an order for possession was restricted by the above enactment, that if the conditions on which alone an order could be made were not fulfilled an order could not be made *in invitum* notwithstanding any agreement of the parties to the contrary, and that, consequently, the landlord could not recover. The importance of that decision lies in words used by BANKES and SCRUTTON, L.JJ. BANKES, L.J., said ([1921] 2 K.B. 295): D

"The language used is so clear and precise that there is in my opinion no room for cutting down or restricting the operation of the section. The legislature has definitely declared that the court shall exercise its jurisdiction only in the instances specified in the section, and in no others."

The lord justice added (*ibid.*, 296): E

"In my opinion s. 5 is an instance of a case where the legislature has in clear and unmistakable language restricted the jurisdiction of the court, and where no agreement between parties can give the court a jurisdiction which the legislature has said it is not to exercise. This is by no means the only statute in which the legislature has secured the object it had in view by limiting the exercise by the courts of their full jurisdiction."

SCRUTTON, L.J., said (*ibid.*, 297): F

"The position of a tenant who, having agreed in his contract of tenancy to give up possession on a named day, holds over and stays in possession after that day, has been explained by this court in *Remon v. City of London Real Property Co.* (2), and I do not repeat it. It is enough to say that he becomes a statutory tenant at his own will and cannot without his consent be ejected either by peaceable entry or by the order of a court unless the conditions mentioned in s. 5 of the Act of 1920 are present and the court makes an order . . . if he is in possession and unwilling to give it up, possession can only be obtained by order of a court which order can only be made if certain specified facts are proved. One of these facts is that an obligation of the tenancy, so far as the same is consistent with the provisions of this Act, has been broken. This qualification was necessary, for every tenancy contains an obligation to deliver up possession at the end of the tenancy, of which obligation staying in possession is a G H

breach. The qualification was not contained in the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, but was held, I think rightly, by ASTBURY, J., in *Artizans, Labourers and General Dwellings Co. v. Whitaker* (3) to be necessarily implied, as without it the whole sub-section would be meaningless. A tenant who agrees in the contract of tenancy to give up possession on a named day does not contract out of the Act, and the agreement does not prevent the provisions of the Act from applying, and it is difficult to see why an agreement to the same effect made after the contract of tenancy should have any better results."

In *Brown v. Draper* (4) LORD GREENE, M.R., said of a tenant ([1944] 1 All E.R. 248):

" . . . he cannot contract to give up his right to claim protection . . . "

The sole question in this appeal arises on the meaning of the words "obligation of the tenancy." If the tenant in the present case is shown to have broken an obligation of the tenancy, it was right to make an order for possession against him. Unless that was shown, it was not. The submission on behalf of the tenant was that no obligation of the tenancy was broken—in other words, that the undertaking, obligation, condition, covenant, or whatever one may call it, that the tenant should give up possession if he ceased to be employed by R.M.R. Engineering, was not an obligation of the tenancy. It was submitted that before one could have an obligation of the tenancy there must be an obligation arising out of the tenancy and relating to the subject-matter of the tenancy. In other words, that it must be binding on the tenant as tenant, and not merely something binding on him as an individual. In my view, that submission is right. If it was not so, a very wide breach would be made in the Rent Acts. The words "obligation of the tenancy" appear in para. (a) of sched. I, and there must be some purpose in them. The words are not "obligation of the tenant," but "obligation of the tenancy." That denotes that the obligation must be an obligation arising out of the tenancy itself. It is not enough to say that the tenant has broken some covenant or failed to fulfil some obligation which he undertook. There must be a breach of an obligation of the tenancy. Paragraph 2 of the agreement in its first part says that the tenancy is conditional on the tenant being and remaining in the said employment. There follow the words "and it shall be an obligation of the tenancy on the part of the tenant that he shall be and remain so employed." I think it would be better to describe that as an undertaking by the tenant or an obligation of the tenant. It is not strictly an obligation of the tenancy, and it does not become so merely by those words being inserted into the agreement. They are words taken from para. (a) of sched. I. Thus, it has not been shown that there was any breach of an obligation of the tenancy.

That is sufficient for the purposes of this appeal, but counsel submitted further that if one were to read para. (a) of sched. I in the way in which the landlords would have it read and the learned county court judge has read it, para. (g) of the schedule would become unnecessary. Paragraph (g) provides for the case of a landlord who has a workman working for him and lets to that workman a dwelling-house in consequence of the employment. In such a case, if the tenant ceases to be employed by the landlord, the landlord can obtain an order for possession if he shows that the dwelling-house is reasonably required by him for occupation as a residence for some person engaged in his whole-time employment, etc. It was argued that the landlord would be able to avoid having to give proof of this additional fact if a clause such as that in the present case was inserted in the agreement and it was held to have the effect given to it by the learned county court judge.

I do not consider that it has been shown that the landlords brought themselves within the provisions of para. (a) of sched. I, and, therefore, the order for

possession ought not to have been made. The landlords were seeking to protect the houses they had because they were required for workmen employed on work for associated companies. In the circumstances of this case I do not think the method adopted succeeds. There is no suggestion that the one company was acting as the agent of the other. In my view, the appeal should be allowed.

SIR RAYMOND EVERSHED, M.R.: I am of the same opinion. Although we have heard no argument on it, I see no reason whatever to doubt the validity of that part of the learned judge's judgment in which he said that the making of an order, if he had power to make it, would be reasonable. Counsel for the landlords stated that there may be difficulties in the way of reaching a proper result by the way which was suggested by the court. That, however, is not to say that there may not be other means of achieving what, on the face of it, would seem, in such circumstances as those of this case, to be a fair result from the point of view both of the landlords and of the tenants, but for the purposes of our decision the case must, as I think, be examined on the footing that the employer was some third person in no way connected with the landlords. Further, it must never be forgotten that it has many times been laid down that in all cases of this kind there are two conditions which the landlord must satisfy—(i) that the court has jurisdiction to make the order, and (ii) that it is reasonable so to do. In the present appeal we are concerned only with the first condition, and it is no answer to an argument on that condition that the tenant would be protected by reliance on the second matter, *i.e.*, of reasonableness only.

The relevant term of the lease here in suit is expressed so as to consist of a condition, an obligation, and a limitation. In so far as it is a limitation (*i.e.*, in so far as it provides that the tenancy is to determine on the happening of a particular event) that is something outside para. (a) of sched. I altogether. It would wholly defeat the object of the Rent Acts if it were otherwise, for it is of the essence of the Rent Acts that, on the happening of the event which determines the contractual tenancy, nevertheless in certain circumstances the tenant is entitled to remain in possession. In so far as the clause consists of a condition or obligation, it is at least open to doubt whether such an obligation is enforceable at law at all, for it appears on the face of it to be an obligation to continue to serve a particular individual. Whatever be the answer to that question, however, for reasons which have already been stated and with which I agree, I think that the clause, in so far as it is a condition or obligation, is not within para. (a) because it is not "an obligation of the tenancy." I agree with counsel for the landlords that those words "obligation of the tenancy" must not be given a restricted or narrow meaning. They should be construed according to their ordinary sense, but, so construed, I take the phrase "obligation of the tenancy" to mean something binding on the tenant as such, *i.e.*, in his capacity as tenant as distinct from an obligation purely personal and collateral to the contract of tenancy. I think the matter may be usefully tested—and it is a legitimate method of testing this particular form of lease—by considering what the position would be in the event of an assignment of the term during its contractual subsistence.

I also agree with SINGLETON, L.J., that if this obligation were an "obligation of the tenancy"—and I add that for present purposes I think no useful distinction can be made between that phrase in para. (a) and the phrase "terms and conditions of the original contract of tenancy" in s. 15 of the Act of 1920—I still think it is not an obligation consistent with the provisions of the principal Acts. It has been laid down in the authorities which SINGLETON, L.J., has quoted that parties to a tenancy cannot so contract that, although the conditions are present which, Parliament has declared, cause the Acts to apply to the premises, nevertheless those Acts shall not apply. If this condition was treated as effective, the result would inevitably be to produce

a contracting out of the Act within the meaning of the formula which I have just given, and I think that the application of that formula provides the answer to the point counsel for the landlords urged, that here it was of the essence of the contract, it was indeed the basis of the contract, that cesser of the relevant employment should disentitle the tenant from the right to further occupation. As SINGLETON, L.J., has pointed out, if that is not an obligation inconsistent with the Acts, it will be apparent that in all cases where there is a landlord employer and a tenant employee—a common case—para. (g) of sched. I is, so to speak, wholly circumvented. Moreover, I can see no distinction in principle between a provision to the effect that the tenancy shall determine automatically on the tenant ceasing to be employed by A. B. and a provision that the tenancy shall determine automatically on the tenant receiving notice to quit. It would be possible to frame a clause which would, if the argument is right, render the Act wholly inoperative in every case that can be imagined, and then the parties would have done that which the courts have said they cannot do—contracted themselves out of the ambit of the Act.

In *Bute v. Prenderleith* (5), a case in the Inner House of the Court of Session, it was decided that, the true relationship between the Marquis of Bute and Mr. Prenderleith being that of master and servant, the occupation of the latter was a service occupancy and not a service tenancy. The Lord President (LORD CLYDE), however, in the course of his judgment, undoubtedly used language which seems to indicate that he thought s. 5 (1) (a) of the Act of 1920 might apply in a case between a landlord and a tenant if the tenant, having been in the employment of the landlord and having taken his tenancy on the terms that he continued to serve the landlord, then determined his contract of service. The Lord President appears to have thought that, if he had put it out of his power to perform his obligations as to service, he might not be able to rely on the Rent Acts because of the terms of s. 5 (1) (a). So far as I can see, however, the point in the present case was not adumbrated. The various considerations which we have had in mind are not indicated in the judgment, this part of it being purely *obiter*. Moreover, the decision related to the effect of the Act of 1920 and to a case where the landlord was the employer, which is not the present case. As at present advised, I am inclined to share the doubt which I think Mr. MEGARRY in his work on the RENT ACTS, 5th ed., p. 24, has entertained, but it is unnecessary to express any final view on the correctness or applicability of that decision because the circumstances were different. It certainly is not an authority which compels, or, as I think, advises, us, to decide otherwise than in the way SINGLETON, L.J., has suggested.

For these reasons, as well as those stated by SINGLETON, L.J., I think that this appeal must be allowed.

VAISEY, J.: For the reasons stated by my Lords, I agree that this appeal succeeds.

Appeal allowed with costs.

Solicitors: *Wodehouse & Furneaux* (for the tenant); *Ellis & Ellis*, agents for *Horwood & James*, Aylesbury (for the landlords).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

HAWKS v. McARTHUR AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 21, 22, 1950.]

Company—Private company—Charging order absolute on shares standing in name of judgment debtor—Transfers executed before date of order—Articles of company in regard to transfers not complied with—Shares still registered in name of judgment debtor—Rights of purchasers as against judgment creditor. A

Execution—Charging order absolute—Shares in private company—Transfers executed by judgment debtor before date of order—Articles of company in regard to transfers not complied with—Shares still registered in name of judgment debtor—Rights of purchasers as against judgment creditor. B

By an agreement, made on Aug. 12, 1949, between M. and W. L. & Sons, Ltd., a private company, it was agreed that M. should resign from his office of director of the company, that he should receive a sum of money as compensation for loss of office, and that the company should find a purchaser for his five hundred ordinary shares of £1 each in the company at a price of £3 per share. On Sept. 7 F., the chairman of the board of directors, agreed to purchase three hundred of the shares and to hold them as beneficial owner if no other member of the company wished to purchase them, or, if any other member or members desired to exercise the right of pre-emption under art. 13 of the company's articles, to hold the shares as trustee for such member or members. On the same day R., the company's manager, entered into a similar agreement in respect of the remaining two hundred shares held by M. The company's articles contained stringent provisions restricting the transfer of shares. By art. 12 no shares should be transferred until the rights of pre-emption contained in art. 13 had been exhausted, and one of the requirements of art. 13 was that, on receiving the transfer notice from the vendor, the board should forthwith give notice of the intended transfer to all the members of the company, stating *inter alia* the price of the shares to be sold (such price to be agreed by the vendor and members, or, in default of agreement, to be fixed by the auditors), and invite each member to state in writing, within one month from the date of the transfer notice, whether he was willing to purchase any, and, if so, how many, of the shares. None of these provisions was complied with. On Sept. 16 M. executed a transfer of two hundred shares in favour of R., and on Sept. 21 he executed a transfer of three hundred in favour of F. R. and F. paid to M. the full purchase price for the shares, but the shares were still registered in the name of M. On Oct. 4, 1949, the plaintiff (who was also a member of the company) recovered judgment for £539 2s. 4d. and costs in an action against M., and was granted leave to proceed under the judgment. On the same day he obtained a charging order *nisi* on the shares in the company standing in M.'s name, and on Oct. 17 the charging order was made absolute. F. and R. claimed that by Oct. 4 the beneficial interest in the shares was in them and that M. had no interest therein on which the charging order could operate. C D E F G

HELD: notwithstanding the complete failure to comply with the company's articles in regard to the procedure to be followed before shares could be transferred, F. and R., having paid to M. the full consideration for the shares, had obtained equitable rights therein, and, as their rights accrued earlier than the equitable right of the plaintiff under the charging order, their rights must prevail over his claim. H

Principle in Gill v. Continental Gas Co., (1872) (L.R. 7 Exch. 332), applied.

Hunter v. Hunter ([1936] A.C. 222), distinguished.

[AS TO EFFECT OF CHARGING ORDER ON STOCKS AND SHARES, see HALSBURY, Halsham Edn., Vol. 14, pp. 126-129, paras. 201-204; and FOR CASES, see DIGEST, Vol. 21, pp. 651-653, Nos. 2298-2311.]

Cases referred to:

- (1) *Jeffryes v. Reynolds*, (1882), 52 L.J.Q.B. 55; *sub nom. Jeffryes v. Reynolds*, *Ex p. Reynolds*, 48 L.T. 358; 21 Digest 654, 2329.
- A (2) *Gill v. Continental Gas Co.*, (1872), L.R. 7 Exch. 332; 41 L.J.Ex. 176; 27 L.T. 424; 21 Digest 652, 2302.
- (3) *Hunter v. Hunter*, [1936] A.C. 222; 105 L.J.Ch. 97; 154 L.T. 513; Digest Supp.
- (4) *Re Hafner*, [1943] I.R. 426; 2nd Digest Supp.

B ADJOURNED SUMMONS asking *inter alia* (i) that an account be taken of what was due to the plaintiff from the first defendant under a charging order absolute, dated Oct. 17, 1949, and made in an action between the plaintiff and the first defendant; (ii) that the shares affected by the order be sold; and (iii) that the right to transfer the shares and to receive the dividends due or to accrue thereon be vested in the plaintiff or in the purchasers of the shares under the sale.

C The shares were five hundred ordinary shares of £1 each in a private company standing in the name of the first defendant. In August, 1949, the first defendant agreed with the company to sell his shares to a purchaser to be found by the company. On Sept. 16 he executed a transfer of two hundred of the shares to the second defendant, the manager of the company, and on Sept. 21 he executed a transfer of the remaining three hundred to the third defendant, the chairman of the board of directors, but the provisions laid down by the company's articles of association in regard to the transfer of shares were not complied with. The shares were still registered in the name of the first defendant, but the second and third defendants had paid in full the purchase money for them. Judgment in the action between the plaintiff and the first defendant was signed on Oct. 4, 1949. The charging order *nisi* was made on the same day, and on Oct. 17 it was made absolute. The second and third defendants contended that the beneficial interest in the shares was already vested in them before the charging order was granted, and that the first defendant had no interest in the shares on which the order could operate. The plaintiff contended that the whole property in the shares remained in the first defendant, as the purported transfers were completely void, the requirements of the company's F articles in regard to transfers not having been complied with.

Articles 11, 12, 13 of the company's articles of association were as follows:

G "11. The directors may in their absolute discretion and without assigning any reason therefor or without specifying any grounds therefor, decline to register any transfer of shares (whether fully paid up or not) and no transfer shall be registered which if registered would make the number of members exceed the limit hereinbefore prescribed, and cl. 19 of Table 'A' shall be modified accordingly.

"12. Save as in these presents otherwise provided no seven per cent. cumulative preference shares or ordinary shares in the capital of the company shall be transferred unless and until the rights of pre-emption hereinafter conferred shall have been exhausted.

H "13. (a) Every member or other person entitled to the said cumulative preference shares or ordinary shares (hereinafter called 'the vendor') who intends to transfer such seven per cent. cumulative preference shares or ordinary shares shall give notice in writing (hereinafter referred to as a 'transfer notice') to the board of directors of his intention. Such transfer notice shall specify the number and class of shares which the vendor desires to transfer and shall constitute the board his agent for the sale of the said shares in one or more lots at the discretion of the board

to such members of the company as are hereinafter referred to at a price to be agreed upon by the vendor and such members of the company as are hereinafter referred to or in default of agreement at a price which the auditor or auditors of the company for the time being shall certify by writing under his or their hand to be in his or their opinion the fair selling value thereof as between a willing vendor and a willing purchaser. A transfer notice shall not be withdrawn except with the consent of the board. (b) Upon receipt of a transfer notice and the price being fixed as aforesaid the board shall forthwith give notice to all the members of the company (other than the vendor), stating the number class and price of the shares to be sold and invite each of them to state in writing within one month from the date of the transfer notice whether he is willing to purchase any and if so what maximum number of the said shares. (c) At the expiration of the said period of one month the board shall allocate the said shares (or such number thereof as shall have been sold as aforesaid) first to or amongst the member or members holding shares of the same class who shall have expressed his or their willingness to purchase the said shares as aforesaid and (if more than one) so far as practicable *pro rata* according to the number of shares of the class already held by them respectively and any balance of the said shares not accepted by the holders of shares of the same class shall be allocated to or amongst the other member or members who shall have expressed his or their willingness to purchase the said shares as aforesaid and (if more than one) so far as practicable *pro rata* according to the number of shares (irrespective of class) held by them respectively. No member shall be obliged to take more than the said maximum number of shares so notified by him as aforesaid. Upon any such allocation as aforesaid being made the vendor shall be bound on payment of the said price to transfer the shares so sold to such purchaser or purchasers. The purchaser or purchasers shall be registered as the holder of the said shares and he or they shall not be bound to see to the application of the purchase money, nor shall his or their title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale. (d) In the event of any of the said shares remaining unsold at the expiration of the said period of one month the vendor may at any time within three calendar months thereafter transfer the shares not so sold to any person or persons whether approved by the board or not at any price; providing such transfer will not increase the number of members beyond the legal maximum for a private company."

Maurice Berkeley for the plaintiff.

The first defendant did not appear.

Raymond Walton for the second and third defendants.

VAISEY, J.: The plaintiff is the holder of a charging order affecting five hundred ordinary shares of £1 each in a private company called W. Lucas & Sons, Ltd., which stand in the name of, and were originally the property of, the first defendant, Mr. Theodore Hunter McArthur, who has not entered an appearance in these proceedings. He claims that that charging order operates on Mr. McArthur's interest in those shares, which, he says, is a complete interest, both legal and equitable. The second and third defendants, Mr. Roberts and Mr. Fraser, claim that the beneficial interest in the shares in question has passed to them as a result of transfers executed in their favour by Mr. McArthur in pursuance of certain agreements entered into between themselves and Mr. McArthur prior to the execution of those transfers, and they allege that Mr. McArthur had no interest in the shares at the date of the charging order on which the charge could operate.

On Oct. 4, 1949, the plaintiff recovered judgment against Mr. McArthur for a sum of £539 2s. 4d. and costs, and the total amount for which he signed

judgment was £552 2s. 4d. At the same time he was granted leave to proceed under that judgment, and, on the same day, he obtained a charging order *nisi* on the shares in question to the amount of the judgment together with the costs of the application for the charging order. On Oct. 17 the charging order *nisi* was made absolute and it was ordered that the sum of six guineas, being the amount incurred on the application for the charging order, should be added to the sum of £552 2s. 4d., the total amount, therefore, being

A £558 8s. 4d. There is no question that the final judgment and the order making the charging order absolute are in order. The only question is what benefit, if any, the plaintiff can get out of it. He alleges that under the orders the five hundred shares stand charged for the payment of £558 8s. 4d. which carries interest from Oct. 4, 1949, the date of the charging order *nisi*, at four per cent. per annum. There is no question that the money has not been paid and it seems

B fairly obvious, too, that Mr. McArthur cannot pay it. On this summons the plaintiff asks (i) that an account be taken of what is due to him under the charging order absolute and for his costs in this action; (ii) that the shares be sold and the money to arise by such sale be lodged in court to the credit of this action subject to further order; (iii) that the right to transfer the shares and to receive the dividends due or to accrue due thereon be vested in him or

C in the purchasers of the shares under the sale directed pursuant to para. (ii); (iv) such further or other relief as may be necessary; and (v) the costs of the application.

I must first consider the position of the second and third defendants, Mr. Roberts and Mr. Fraser. They depose to facts which I may summarise very briefly as follows. They say that until Aug. 12, 1949, Mr. McArthur was

D managing director of W. Lucas & Sons, Ltd. On that date an agreement was made between him and the company the effect of which was that he should resign from his office of director, that he should receive £1,500 compensation for loss of office, and—this is the really material point—that the company should find a purchaser for his five hundred ordinary shares in the company (*i.e.*, the shares in question) at a price of £3 per share. In pursuance of that agreement,

E and in conjunction, I think, with some agreement which must by necessary implication have been made between Mr. McArthur, on the one hand, and Mr. Roberts and Mr. Fraser, on the other hand, transfers of the shares in question were executed, as to two hundred of them in favour of Mr. Roberts, the transfer in that case being dated Sept. 16, 1949, and as to the remaining three hundred in favour of Mr. Fraser, the transfer in that case being dated Sept. 21, 1949.

F It is pointed out with truth that the dates of those two transfers are considerably earlier than the date of the charging order *nisi*.

There is, undoubtedly, a basic principle that a charging order only operates to charge the beneficial interest of the person against whom the order is made, and that it is not possible, for instance, to obtain an effective charging order over shares where the person against whom the order is made holds them as

G a bare trustee. The charging order affects only such interest, and so much of the property affected, as the person whose property is purported to be affected could himself validly charge. *Jeffryes v. Reynolds* (1) would seem superficially, to throw some doubt on that general basic proposition, but I think that the only effect of that decision is that the true owner of shares cannot, as a matter of procedure, discharge the charging order after it has been made absolute, and

H his remedy for asserting and establishing his true rights must be of some other character. For the general proposition it will be sufficient for me to refer to *Gill v. Continental Gas Co.* (2). The headnote, which I think is accurate, reads:

“In an action, under [the Judgments Act, 1838], s. 15, against a company for permitting the transfer of shares after notice of a charging order *nisi*, and before the making of it absolute, it is a good answer to show that the judgment debtor in whose name the shares stood had no beneficial interest in them.”

In that case the judgment debtor was nothing more than a bare trustee.

The evidence in this case is very unsatisfactory. In an affidavit by Mr. Fraser, sworn on Nov. 7, 1949, not in these proceedings, but in the King's Bench Division, Southport District Registry, in opposition to the application by the plaintiff to have the charging order *nisi* made absolute, some very loose statements are made. Mr. Fraser says:

"On or about Sept. 7, 1949, I agreed that I would purchase three hundred of the said shares at a price of £3 per share."

He does not, however, say with whom he agreed. Looking at the other sentences in the same paragraph, I think that he means to say that he agreed with the company to relieve it from its obligations under the agreement of Aug. 12, 1949, with Mr. McArthur, that he would himself become a purchaser of some of the shares. Then he says that on or about the same date a similar agreement was made by Mr. Roberts. There, again, I think he means an agreement between Mr. Roberts and the company. It is material to observe that Mr. Fraser was the chairman of the board of directors of the company and that Mr. Roberts was at the material times its manager. In his affidavit Mr. Fraser goes on to say:

"It was understood and agreed between me and the company that if no other member of the company desired to purchase any part of the said shares I should hold the same as beneficial owner and for my own account; if, on the other hand, any member or members should desire to exercise the option of pre-emption contemplated by . . . cl. 13 of the . . . articles, then I should hold the appropriate proportion of the said shares as nominee or trustee for such member or members . . ."

I must now deal with the stringent provisions in the articles of the company for restricting the transfer of shares. Article 11 empowers the directors, in their absolute discretion, to decline to register any transfer of shares. By art. 12 no share

" . . . shall be transferred unless and until the rights of pre-emption hereinafter conferred shall have been exhausted."

Article 13 contains an elaborate scheme for dealing with shares which are to be transferred or are proposed to be transferred. Among the requirements to be complied with is the following, *viz.*, that, on receiving the transfer notice from the vendor, the board shall forthwith give notice of the intended transfer to all the members of the company, stating *inter alia* the price of the shares to be sold (such price to be agreed by the vendor and members, or, in default of agreement, to be fixed by the auditors), and invite each member to state in writing, within one month from the date of the transfer notice, whether he is willing to purchase any, and, if so, how many, of the shares. These requirements, however, were not complied with, having been either forgotten or overlooked.

The real question in this case, I think, is whether the alleged agreements (which, I think, I must consider to be the agreements between Mr. McArthur and Mr. Roberts and between Mr. McArthur and Mr. Fraser, respectively) operated so as to amount in equity to a transfer of the shares held by Mr. McArthur, as to two hundred of them to Mr. Roberts, and as to three hundred of them to Mr. Fraser, or whether the failure or neglect to follow the code laid down by arts. 11, 12 and 13 completely vitiates the whole transaction, so that the transfers are worthless and there has been a total failure of consideration for the moneys which were admittedly paid over by Mr. Roberts and Mr. Fraser to Mr. McArthur. It is suggested on behalf of Mr. Roberts and Mr. Fraser that, notwithstanding the complete failure to comply with the articles, the transfers and the antecedent agreements which must have been made—for one does not execute a transfer without a previous intention to do so—

did, in fact, operate as a sale by Mr. McArthur to Mr. Roberts and Mr. Fraser of, at any rate, the beneficial interest in the shares—otherwise the result would be that Mr. Roberts and Mr. Fraser paid their money and got nothing for it. *Hunter v. Hunter* (3), a decision of the House of Lords, was cited to me as an authority for the conclusion that Mr. Roberts and Mr. Fraser got nothing for their money or from the transfers executed in their favour. I have, of course, endeavoured to accept the guidance afforded to me by that case, as it is my duty to do, but the facts there were not the same as in this case, and I think that the basic difference is that in *Hunter v. Hunter* (3), the sale was by a mortgagee. That essential difference is emphasised in *Re Hafner* (4), in which BLACK, J., in the court of first instance in Ireland, considered that the fact that *Hunter v. Hunter* (3) was dealing with a sale by a mortgagee was of the first importance, and that the case must be read with that characteristic in mind. There is a statement in LORD ATKIN's speech in *Hunter v. Hunter* (3) which might seem to be conclusive in favour of the plaintiff. LORD ATKIN said ([1936] A.C. 261):

"The effect of art. 17 in my opinion is to provide the means and the only means by which a member of the company can form an agreement for the sale of shares, which can only be constituted by the act of the secretary as agent for seller and purchaser declaring a contract to be concluded at the price fixed by the auditor. That was not done in this case, and in my opinion no rights arose between the bank and Harry Hunter under any contract of sale either equitable or legal."

LORD ATKIN meant, of course, "no rights either equitable or legal." Article 17, to which he referred, was the article in that case restricting transfer of shares.

I find the very greatest difficulty in seeing how I ought to apply the decision in *Hunter v. Hunter* (3) to the facts of this case. On general principles, in such circumstances as those of the present case where a man who has an interest in shares in a company receives something for the sale of those shares and executes under seal a transfer of those shares for that purpose, I cannot bring myself to suppose that *Hunter v. Hunter* (3) constrains me to hold that everything done in that transaction is a complete nullity. The facts here are curious. Whether Mr. Fraser and Mr. Roberts thought they were doing something by agreement with the company, of which they were officers, or whether they thought they were doing something by agreement with Mr. McArthur, I do not know. I think, probably, they thought that they were doing what they were doing under an agreement both with the company and with Mr. McArthur. The one thing, however, which seems to me to be important is that they paid Mr. McArthur the money, and I cannot bring myself to suppose that they got nothing by their bargain and that the whole property in the shares remained in Mr. McArthur, notwithstanding the transfers which had been executed and the money which he received. I should, however, have been content to come to the opposite conclusion because I think that there is something almost scandalous in the way in which Mr. Roberts, Mr. Fraser and Mr. McArthur all seem to have disregarded the articles of association, by which they and the other members of the company were bound. I think it very regrettable that this muddle, for which the plaintiff was certainly not responsible—although he was a shareholder in the company—should have resulted in all the litigation which has led up to the judgment which I am now giving.

Admittedly, Mr. McArthur is still the legal owner of the shares. Admittedly, the plaintiff's rights under this charging order are in the nature of equitable rights. And admittedly, the rights of Mr. Roberts and Mr. Fraser, if they have any rights, are also equitable rights. As I have come to the conclusion that Mr. Roberts and Mr. Fraser have some rights and that what they did was not a complete nullity, the question is whose rights should prevail. A not irrelevant

circumstance is that the equitable rights of Mr. Roberts and Mr. Fraser precede the equities or quasi-equitable rights under the charging order. In my opinion, the rights of Mr. Roberts and Mr. Fraser had already accrued at the time the charging order was obtained, and I think, as between the merits (not moral merits, but legal merits) of the plaintiff and the defendants, the rights of the second and third defendants, Mr. Roberts and Mr. Fraser, must prevail over the claims of the plaintiff. As a result of my decision, the only thing I can do is to dismiss this summons. The result is, I suppose, to record my decision that the charging order is nothing but a charging order *nisi*. I propose, however, to dismiss the summons without costs, because I think that the trouble has arisen largely through the fault of Mr. Roberts and Mr. Fraser.

Order accordingly.

Solicitors: *Pritchard, Englefield & Co.*, agents for *W. & R. Hodge & Halsall*, Southport (for the plaintiff); *Slaughter & May* (for the second and third defendants).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. GRANT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.), December 5, 1950.]

Criminal Law—Sentence—Corrective training—Notice of previous convictions—Committal for sentence—Service of notice three days before sentence by quarter sessions—Criminal Justice Act, 1948 (c. 58), s. 23 (1).

The appellant pleaded Guilty before a court of summary jurisdiction to two charges of larceny, and the court committed him to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. On the same day he was served with a notice of intention to prove previous convictions under s. 23 (1) of the Act. The appellant now appealed against the sentence imposed by quarter sessions on the ground that the notice did not comply with s. 23 (1) as it should have been served three days before the hearing by the court of summary jurisdiction.

HELD: an offender committed for sentence under s. 29 (1) was to be treated in all respects as though he had been committed for trial at quarter sessions and had then pleaded Guilty before that court, and, therefore, the notice of previous convictions, having been served on the appellant at least three days before the day on which he had been sentenced by quarter sessions, was good and the sentence passed on the appellant was valid.

APPEAL against sentence.

The appellant, Ronald Morrison Grant, pleaded Guilty to two charges of larceny before a court of summary jurisdiction at Swindon and was committed to quarter sessions for sentence. On the same day he was served with the notice of intention to prove previous convictions required by s. 23 (1) of the Criminal Justice Act, 1948. On Aug. 30, 1950, he was sentenced to two years' corrective training and appealed with the leave of the court on the ground that the notice was invalid because it had not been served three days before his appearance before the court of summary jurisdiction.

Huntley for the appellant.

E. R. Mills for the Crown.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21 and s. 23, see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1948, pp. 175, 178; and for s. 29, see *ibid.*, Vol. 14, p. 1013.]

Cases referred to:

- (1) *R. v. Sheridan*, [1936] 2 All E.R. 883; [1937] 1 K.B. 223; 106 L.J.K.B. 6; 155 L.T. 207; 100 J.P. 319; Digest Supp.
- A (2) *R. v. Grant*, [1936] 2 All E.R. 1156; 106 L.J.K.B. 9; 155 L.T. 209; 100 J.P. 324; Digest Supp.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant pleaded Guilty before a court of summary jurisdiction at Swindon to two charges of larceny. The justices consented to deal with the case summarily, but, in view of the appellant's record, committed him to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. The sentence passed by the appeal committee at quarter sessions was two years' corrective training. The point now taken on behalf of the appellant was this. Section 23 (1) of the Act of 1948 provides that notice of intention to prove previous convictions, with a view to showing that the offender is liable to be sentenced either to preventive detention or corrective training, must be served "three days before the trial." The appellant's contention was that he was "tried" by the Swindon justices and was only sentenced by quarter sessions and, therefore, as the notice was not served on him before the hearing before the Swindon justices, he could not receive a sentence of corrective training.

In the opinion of the court, it would be giving far too narrow, and a most unfortunate, construction to s. 29 (1) of the Act if that contention were upheld. It would mean that quarter sessions, which have to deal with many young offenders who have had two or three convictions recorded against them, could practically never sentence them to corrective training which has been introduced with a view to continuing for a definite period the sort of treatment which young men get at Borstal after they are no longer, by reason of their age, qualified for Borstal. Section 29 (1) provides that where there has been a conviction before a court of summary jurisdiction and the justices find that the record of the offender is such that he deserves a heavier sentence than they can give, they can commit him for sentence to quarter sessions. When he is so committed, he is, in the case of a county quarter sessions, dealt with by the appeal committee of those sessions. The reason for that procedure is well known. It was introduced to get rid of the effect of the two decisions of this court—*R. v. Sheridan* (1) and *R. v. Grant* (2)—in which the court was obliged to hold that, if an offender had been convicted by justices, they could not then commit him for trial, because when he got to trial he could plead *autrefois convict*. This new power has, therefore, now been given to justices so that if, when they have decided to convict after hearing the evidence, they feel that the sentence which they can impose is inadequate, they can commit the offender for sentence to quarter sessions. Section 29 (3) provides:

"Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:—(a) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment."

In our opinion, that section clearly means that once an offender is committed for sentence to quarter sessions he is to be treated in all respects as though he has been committed for trial to quarter sessions and come before quarter sessions as a prisoner who has pleaded Guilty. It is also to be noticed that an express provision is inserted to provide for an appeal in such a case to this court. Section 29 (3) (d) provides:

"if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment; and the provisions of the Criminal Appeal Act, 1907, shall apply accordingly."

Everyone knows that an appeal against a conviction by justices does not come to this court. Counsel for the appellant relies on s. 29 (5), which provides:

"In relation to an offender committed for sentence under this section, sub-s. (1) of s. 23 of this Act shall have effect as if for the words 'by the verdict of a jury' there were substituted the words 'by the appeal committee or the court of quarter sessions, as the case may be, and not by the verdict of a jury'."

That sub-section is inserted because s. 23 (1) provides that, if the prisoner disputes the convictions of which notice has been given, that issue is to be tried by a jury, and it was sought to provide that where an offender was sent to quarter sessions for sentence the appeal committee or the court of quarter sessions should try the issue instead of it being tried by a jury. These provisions seem clearly to show that Parliament intended that every proceeding which took place before quarter sessions should be treated in exactly the same way as if the offender was being tried originally and not merely being dealt with on the question of sentence.

In our opinion, it is open to the police or other appropriate authority in such circumstances as those of the present case to serve notice of previous convictions at any time up to three days before the offender is brought before quarter sessions for sentence, and, if that is done, quarter sessions can pass any sentence open to them as the result of the previous convictions mentioned in the notices which have been served. We cannot hold in this case that "the trial" referred to in s. 23 (1) is the incomplete proceedings before magistrates. A "trial" is not complete until sentence has been passed or the offender has been ordered to be discharged.

The question whether the sentence was a sentence which ought to have been passed is another matter. We have more than once pointed out that a sentence of two years' corrective training, is, as a rule, inappropriate. A sentence of three years, which, after remission for good behaviour, means two years, is the least which is likely to be of any use. The appellant is a man of thirty-nine years of age, with seven previous convictions. His last sentence was twenty-one months' imprisonment for stealing a Post Office savings bank book and obtaining £100 by means of a forged instrument, four other offences being taken into consideration. We only refrain from increasing the sentence because the appeal was based, not on the ground of the length of the sentence, but on the contention that the sentence was one which quarter sessions had no power to pass. The sentence will be altered to one of two years' imprisonment, and, as we have held that the notices were properly served, there will also be an order under s. 22 (2).

Sentence varied.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Tarry, Sherlock & King, agents for Messrs. Townsends, Swindon (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

OPPENHEIM v. TOBACCO SECURITIES TRUST CO., LTD.
AND OTHERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), November 2, 3, 6, December 13, 1950.]

Charity—Education—Public character—Public nature of bond between beneficiaries—Gift for the education of the children of past and present members of limited company.

On Mar. 24, 1930, J.P. and his wife, E.M.P., executed a settlement whereby they assigned to a trustee certain investments in the B.A. Co., Ltd. and certain real property to be held on certain trusts during the joint lives of the settlors and the life of the survivor of them and thereafter on trust to apply the income of the trust premises "in providing for or assisting in providing for the education of children of employees or former employees of B.A. Co., Ltd. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit and also at the discretion from time to time of the acting trustees to apply all or any part of the corpus of the said trust for the like purposes." On Oct. 8, 1940, E.M.P. died and on June 26, 1947, J.P. died. In view of the perpetuity created by the settlement, the question arose whether the trust was charitable. The number of persons employed by B.A. Co., Ltd. and its subsidiary and allied companies exceeded 110,000.

HELD (LORD MACDERMOTT *dissentiente*): the common employment of the beneficiaries would not be a quality which constituted them a section of the community so as to afford to the trust the necessary public character to render it charitable, and, there being for this purpose no distinction between the employees and their children, the gift was void for perpetuity.

Re Compton ([1945] 1 All E.R. 198) and *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* ([1946] 1 All E.R. 501), *approved*.

Re Rayner (1920) (122 L.T. 577), *doubted*.

Per LORD SIMONDS: It was at one time suggested that the element of public benefit was not essential except for charities falling within LORD MACNAGHTEN's fourth class "other purposes beneficial to the community." This is certainly wrong except in the anomalous case of trusts for the relief of poverty. It is not for me to say what fate might await the "poor relations" cases if in a poverty case this House had to consider them.

[AS TO GIFT FOR THE EDUCATION OF A PARTICULAR CLASS, see HALSBURY, Hailsham Edn., Vol. 4, pp. 117, 118, para. 154; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.]

Cases referred to:

- (1) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
- (2) *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.
- (3) *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 2nd Digest Supp.
- (4) *Jones v. Williams*, (1767), Amb. 651; 27 E.R. 422; 8 Digest 244, 36.
- (5) *Income Tax Special Purposes Comrs. v. Pemsel*, [1891] A.C. 531; 61 L.J.Q.B. 265; 65 L.T. 621; 55 J.P. 805; 3 Tax Cas. 53; 8 Digest 241, 1.
- (6) *Re Grove Grady*, [1929] 1 Ch. 557; Digest Supp.
- (7) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, 28.

- (8) *Re Rayner*, (1920), 89 L.J.Ch. 369; 122 L.T. 577; 84 J.P. 61; Digest Supp.
- (9) *Admiralty Comrs. v. Valverde (Owners)*, [1938] 1 All E.R. 162; [1938] A.C. 173; 107 L.J.K.B. 99; 158 L.T. 281; Digest Supp.
- (10) *Hall v. Derby Sanitary Authority*, (1885), 16 Q.B.D. 163; 55 L.J.M.C. 21; 54 L.T. 175; 50 J.P. 278; 8 Digest 243, 26.
- (11) *Isaac v. Defriez*, (1754), Amb. 595; 27 E.R. 387; 44 Digest 890, 7479.
- (12) *Gibson v. South American Stores (Gath and Chaves), Ltd.*, [1949] 2 All E.R. 18; [1949] Ch. 572; [1949] L.J.R. 1228; *affd. in part and revsd. in part*, [1949] 2 All E.R. 985; [1950] Ch. 117; 2nd Digest Supp.
- (13) *Spiller v. Maude*, (1881), 32 Ch.D. 158 n; 8 Digest 348, 1412.
- (14) *Re Gosling*, (1900), 48 W.R. 300; 8 Digest 244, 27.
- (15) *Re Buck*, [1896] 2 Ch. 727; 65 L.J.Ch. 881; 75 L.T. 312; 60 J.P. 775; 8 Digest 262, 246.
- (16) *Re Sir Robert Laidlaw's Will Trusts*, (1935), unreported.
- (17) *Verge v. Somerville*, [1924] A.C. 496; 131 L.T. 107; *sub nom. A.-G. for Australia v. Somerville*, 93 L.J.P.C. 173; Digest Supp.

APPEAL by an "acting trustee" of a settlement made on Mar. 24, 1930, by John Phillips and his wife, Elizabeth Miller Phillips, from an order of the Court of Appeal dated July 4, 1949, affirming an order of ROXBURGH, J., dated Feb. 10, 1949.

Both in the Court of Appeal and at first instance the court's decision was formal, the question being regarded as concluded against the "acting trustee" by the decisions of the Court of Appeal in *Re Compton* ([1945] 1 All E.R. 198) and *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* ([1946] 1 All E.R. 501). The relevant facts appear in the opinion of LORD SIMONDS, and are summarised in the headnote.

Pennycuick, K.C., and *Arthur Bagnall* for the appellant.

Russell, K.C., and *Droop* for the respondent, Barclays Bank, Ltd., personal representative of John Phillips.

Denys B. Buckley for the Attorney-General.

The House took time for consideration.

Dec. 13. The following opinions were read.

LORD SIMONDS: My Lords, once more your Lordships have to consider the difficult subject of charitable trusts, and this time a question is asked to which no wholly satisfactory answer can be given. On Mar. 24, 1930, John Phillips and Elizabeth Miller Phillips, his wife, executed a settlement whereof the respondent, Tobacco Securities Trust Co., Ltd., were and are the trustees, and thereby assigned to them certain investments in the British-American Tobacco Co., Ltd. (which I will call "the company"), and its subsidiary and allied companies and certain real estate in Trinidad (together with certain heritable property in Scotland as to which no question arises in this appeal) to be held on certain trusts during the lives of the grantors and the survivor of them and thereafter on trust to apply the income of the trust premises

"in providing for or assisting in providing for the education of children of employees or former employees of British-American Tobacco Co., Ltd. . . . or any of its subsidiary or allied companies in such manner and according to such schemes or rules or regulations as the acting trustees shall in their absolute discretion from time to time think fit and also at the discretion from time to time of the acting trustees to apply all or any part of the corpus of the said trust for the like purposes."

The expression "acting trustees" meant the grantors during their lives and

the directors for the time being of the company, or, in the event of the re-construction or amalgamation of the company, such other persons as were therein mentioned, in which event a variation was made also in the beneficiaries under the trust. Elizabeth Miller Phillips died on Oct. 8, 1940, leaving John Phillips, her universal legatee and devisee. He died on June 26, 1947, and his will was duly proved by the respondent, Barclays Bank (Dominion, Colonial and Overseas). The probate value of the trust premises was over £125,000, including £2,000 which represented the proceeds of the property in Scotland. It appears that in Trinidad the English common law and doctrines of equity have been in force since 1848.

In these circumstances the question arose whether the trust that I have set out is a valid trust. It is clear that it creates a perpetuity. It is, therefore, invalid unless it can be supported as a charitable trust. The appellant, as one of the directors of the company, and, accordingly, an "acting trustee," contends in favour of its validity. The contrary is contended by the respondent bank, since in the event of invalidity there is a resulting trust of the trust premises to the estates of the grantors. No evidence was given of any connection of the grantors with the company except that John Phillips was clearly a large stockholder. It appears that the number of employees of the company and its subsidiary and allied companies was large. It exceeded 110,000. This question coming before ROXBURGH, J., in the Chancery Division, it was conceded, and he held, that, having regard to the decisions of the Court of Appeal in *Re Compton* (1), and *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (2), he was bound to declare the trust void except as to the property in Scotland, and on Feb. 10, 1949, he made an order accordingly. On appeal to the Court of Appeal the same view was taken and the appeal was dismissed. In neither court was more than a formal decision given. Your Lordships must look to the cases that I have cited for the reasoning which led to it.

Before I turn to these authorities I will make some preliminary observations. It is a clearly established principle of the law of charity that a trust is not charitable unless it is directed to the public benefit. This is sometimes stated in the proposition that it must benefit the community or a section of the community. Negatively it is said that a trust is not charitable if it confers only private benefits. In the recent case of *Gilmour v. Coats* (3) this principle was re-asserted. It is easy to state and has been stated in a variety of ways, the earliest statement that I find being in *Jones v. Williams* (4) in which LORD HARDWICKE, L.C., is briefly reported as follows ((1767) (Amb. 652)):

"Definition of charity; a gift to a general public use, which extends to the poor as well as to the rich . . ."

With a single exception, to which I shall refer, this applies to all charities. We are apt now to classify them by reference to LORD MACNAGHTEN'S division in *Income Tax Special Purposes Comrs. v. Pemsel* (5), and, as I have elsewhere pointed out, it was at one time suggested that the element of public benefit was not essential except for charities falling within the fourth class "other purposes beneficial to the community." This is certainly wrong except in the anomalous case of trusts for the relief of poverty with which I must specifically deal.

In the case of trusts for educational purposes the condition of public benefit must be satisfied. The difficulty lies in determining what is sufficient to satisfy the test, and there is little to help your Lordships to solve it. If I may begin at the bottom of the scale, a trust established by a father for the education of his son is not a charity. The public element, as I will call it, is not supplied by the fact that from that son's education all may benefit. At the other end of the scale the establishment of a college or university is beyond doubt a charity. "Schools of learning, free schools, and scholars in universities" are the very words of the preamble to the Charit-

able Uses Act, 1601 (43 Eliz. c. 4). So also the endowment of a college, university or school by the creation of scholarships or bursaries is a charity, and none the less because competition may be limited to a particular class of persons. It is on this ground, as LORD GREENE, M.R., pointed out in *Re Compton* (1) ([1945] 1 All E.R. 206) that the so-called "founder's kin" cases can be rested. The difficulty arises where the trust is not for the benefit of any institution either then existing or by the terms of the trust to be brought into existence, but for the benefit of a class of persons at large. Then the question is whether that class of persons can be regarded as such a "section of the community" as to satisfy the test of public benefit. These words "section of the community" have no special sanctity, but they conveniently indicate (i) that the possible (I emphasise the word "possible") beneficiaries must not be numerically negligible, and (ii) that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual. It is for this reason that a trust for the education of members of a family or, as in *Re Compton* (1), of a number of families cannot be regarded as charitable. A group of persons may be numerous, but, if the *nexus* between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes.

I come, then, to the present case where the class of beneficiaries is numerous, but the difficulty arises in regard to their common and distinguishing quality. That quality is being children of employees of one or other of a group of companies. I can make no distinction between children of employees and the employees themselves. In both cases the common quality is found in employment by particular employers. The latter of the two cases to which I first referred, the *Hobourn* case (2), is a direct authority for saying that such a common quality does not constitute its possessors a section of the public for charitable purposes. In the former case, *Re Compton* (1), LORD GREENE, M.R., had by way of illustration placed members of a family and employees of a particular employer on the same footing, finding neither in common kinship nor in common employment the sort of *nexus* which is sufficient. My Lords, I am so fully in agreement with what was said by LORD GREENE in both cases and by my noble and learned friend, then MORTON, L.J., in the *Hobourn* case (2), that I am in danger of repeating its purport without improving on their words. No one who has been versed for many years in this difficult and very artificial branch of the law can be unaware of its illogicalities, but I join with my noble and learned friend in echoing the observations which he cited ([1946] 1 All E.R. 510) from the judgment of RUSSELL, L.J., in *Re Grove Grady* (6) ([1929] 1 Ch. 582), and I agree with him that the decision in *Re Drummond* (7) "... imposed a very healthy check upon the extension of the legal definition of 'charity' ..." It appears to me that it would be an extension, for which there is no justification in principle or authority, to regard common employment as a quality which constitutes those employed a section of the community. It must not, I think, be forgotten that charitable institutions enjoy rare and increasing privileges, and that the claim to come within that privileged class should be clearly established. With the single exception of *Re Rayner* (8), which I must regard as of doubtful authority, no case has been brought to the notice of the House in which such a claim as this has been made, where there is no element of poverty in the beneficiaries, but just this and no more, that they are the children of those in a common employment. Learned counsel for the appellant sought to fortify his case by pointing to the anomalies that would ensue from the rejection of his argument. For, he said, admittedly those who follow a profession or calling—clergymen, lawyers, colliers, tobacco-workers and so on—are a section of the public, and how strange then it would be if, as in the case of railwaymen, those who follow a particular calling are

all employed by one employer. Would a trust for the education of railwaymen be charitable, but a trust for the education of men employed on the railways by the Transport Board not be charitable? And what of service of the Crown, whether in the civil service or the armed forces? Is there a difference between soldiers and soldiers of the King? My Lords, I am not impressed by this sort of argument and will consider on its merits, if the occasion should arise, the case where the description of the occupation and the employment is in effect the same, where in a word, if you know what a man does, you know who employs him to do it. It is to me a far more cogent argument, as it was to my noble and learned friend in the *Hobourn* case (2), that, if a section of the public is constituted by the personal relation of employment, it is impossible to say that it is not constituted by a thousand as by 100,000 employees, and, if by a thousand, then by a hundred, and, if by a hundred, then by ten. I do not mean merely that there is a difficulty in drawing the line, though that, too, is significant. I have it also in mind that, though the actual number of employees at any one moment might be small, it might increase to any extent, just as, being large, it might decrease to any extent. If the number of employees is the test of validity, must the court take into account potential increase or decrease, and, if so, as at what date?

I would end, my Lords, where I began—by saying that I concur in the reasoning of the Court of Appeal in the *Hobourn* case (2), but there are certain points in the argument for the appellants about which I should say a few words. It was urged by counsel for the Attorney-General, who was allowed to address the House, that there was here a valid charitable trust created, since there was no private person who could sue to enforce the trust. I am not persuaded that this would be so, if the trust were otherwise enforceable, but, in any case, the test is not a valid one. If this trust is charitable, the Attorney-General can sue to enforce it. It does not follow that it is charitable because no one else can sue to enforce it.

I would also, as I have previously indicated, say a word about the so-called “poor relations” cases. I do so only because they have once more been brought forward as an argument in favour of a more generous view of what may be charitable. It would not be right for me to affirm or to denounce or to justify these decisions. I am concerned only to say that the law of charity, so far as it relates to “the relief of aged, impotent and poor people” (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House had to consider them, but, as was observed by LORD WRIGHT in *Admiralty Comrs. v. Valverde (Owners)* (9) ([1938] 1 All E.R. 174):

“This House has, no doubt, power to overrule even a long-established course of decisions of the courts, provided it has not itself determined the question . . . but in general this House will adopt this course only in plain cases, where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law.”

I quote with respect those observations to indicate how unwise it would be to cast any doubt on decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole. The appeal should, in my opinion, be dismissed with costs.

LORD NORMAND: My Lords, the trust is an educational trust, and, therefore, it satisfies one of the conditions for acceptance as a charitable trust. But there is another condition which must also be satisfied, namely, that it is a trust beneficial to the community or to a section of the community. No general rule has yet been formulated by which to distinguish trusts which have

this essential element of public benefit and those which have not, and the valiant attempts of counsel to arrive at a rule have failed to convince me. I am, however, satisfied that the element of public benefit must be found in the definition of the class of persons selected by the truster as the objects of his bounty. That seems to me to follow from the principle that the trust purpose must be directed to the benefit of the community or a section of the community: TUDOR ON CHARITIES, 5th ed., p. 11, approved by LORD GREENE, M.R., in *Re Compton* (1). The truster may have selected a class of persons which forms an aggregate that is not a section of the community, and if he has done that the trust will fail for perpetuity. All depends on the attribute by which the selection of the class is determined. It is on the difficulty of defining the attribute or qualification which differentiates a section of the public from an aggregate of persons which is not a section of the public that all attempts to define the public element in charitable trusts have foundered.

I will confine myself to educational trusts. It is not obvious *a priori* that a trust for the education of persons having the common qualification that they have already had part of their education at a named school is public. Yet there is no doubt that such trusts are public charitable trusts and are among the most securely established charitable trusts known to the law. On the other hand, a trust for the education of the descendants of A.B., however numerous they may be, is not a charitable trust: *Re Compton* (1), *per* LORD GREENE, M.R., ([1945] 1 All E.R. 201). These difficulties come from the historical development of the law of charity. I remind your lordships of the observations of LORD SIMONDS in *Gilmour v. Coats* (3), that the law of charity has been built up, not logically, but empirically. It is this empirical development which has so often baffled efforts to reduce the law to systematized definitions. In the present instance this House has for the first time to declare whether a trust for the education of the children of the employees of named employers is a charitable trust. If there had been a long and uniform trend of authority in favour of receiving such a trust as a charity, I apprehend that your lordships would have been willing to decide the appeal in accordance with that trend, but, as I shall later show, the authorities are with one exception against the acceptance of trusts of this kind as a charity.

If the issue is to be decided on principle and without reference to authority the question is whether a class with the common attribute that the members are the children of the employees of the same employer is a section of the public or merely an aggregate of persons without public significance. The fact that the children of the employees and not the employees themselves are the beneficiaries does not help the appellants, for there is no public element in the relationship of parent and child. The common attribute that each parent has a contract of service with the same employer remains for consideration. A contract of service is in a high degree personal, and it constitutes a personal and private relationship between the parties. Whatever the number of the employees in the service of the same employer, each still stands independently in this personal and private relationship to the employer. For certain purposes they are in relationship to one another, the relation of common employment with the rights and duties which arise from that relationship. These are private rights and duties and have no public element, except the interest that the community has in the harmonious and efficient operation of its industries and commerce and in the securing of good and safe conditions of labour. But that interest is not concerned with the employees of particular employers as such, but with employees at large or employees generally in particular occupations and is not an element relevant to this issue. In principle I am unable to say that any public element can be born out of the several private contracts between a particular employer and his employees. The appellant would not boldly submit that when the common employer employed two servants the public element at once emerged. He said it was a question

of degree and the courts must take account of the number of employees, the magnitude of the sum settled by the truster, the size of the employers' undertaking, the non-contractual personal relationships (or their absence) between the employer and his employees, and other circumstances. I am unable to find any logical principle in these submissions. If there is no public element to be found in the bare *nexus* of common employment, all attempts to build up the public element out of circumstances which have no necessary relation with it, but are adventitious, accidental and variable, must be unavailing when the truster has chosen to define the selected class solely by the attribute of common employment. I would add that the appellant's argument would lead to a degree of uncertainty in this branch of the law which only compelling authority or logical necessity would induce me to accept. It may be conceded that the distinction inherent in the view I have taken between an educational trust for the children of all employees in the tobacco industry (see *Hall v. Derby Sanitary Authority* (10)) and the present trust may appear to many over-refined and unpractical, but, unless it is accepted that all trusts for education are charitable, that is a criticism which cannot be avoided. If a line must be drawn between public trusts and trusts that are not public, there will always be marginal cases and the appearance of over-refinement.

Of the authorities *Re Drummond* (7), a case on the fourth of LORD MACNAGHTEN'S classes, is adverse to the appellant. *Re Rayner* (8) is the only case which supports the appellant's contention. It was assumed rather than decided by the same learned judge, EVE, J., who decided *Re Drummond* (7), that a bequest to the governors of a commercial company of shares in the company with a direction to apply the income to the education of children of persons who for five years and upwards had been in the employment of the company was a charitable trust. Both these cases were considered in *Re Compton* (1), and *Re Drummond* (7) was approved and *Re Rayner* (8) was disapproved. I respectfully agree with the comments of LORD GREENE, M.R., on both these cases ([1945] 1 All E.R. 204). *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (2) was also a case on LORD MACNAGHTEN'S fourth class. It decided that funds collected by the employees of a company for their own benefit were not a fund applicable for the benefit of the public or any section of the public because the purpose of the subscription was to benefit the subscribers themselves, but MORTON, L.J., discussed ([1946] 1 All E.R. 510, 511) the requirement that a purpose, to be charitable, must be directed to the benefit of the community or a section of the community with special relation to trusts for the benefit of employees of a particular company. With all that he said I respectfully agree. I, therefore, consider that to admit the present trust to the category of charity would be an innovation contrary alike to principle and to the trend of authority and on these grounds I would dismiss the appeal.

LORD OAKSEY: My Lords, I have had the advantage of reading the opinion of the noble Lord on the Woolsack and I agree with it.

LORD MORTON OF HENRYTON: My Lords, I have had the privilege of reading in print the opinions which have just been delivered by my noble and learned friends, LORD SIMONDS and LORD NORMAND. I agree with these opinions, but, as I was a party to the decisions of the Court of Appeal in *Re Compton* (1) and *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (2), it is, perhaps, appropriate that I should say a few words about these and certain other cases. Counsel for the appellant submitted that the observations of LORD GREENE, M.R., (with which I concurred) in *Re Compton* (1), and of myself in the latter case, in regard to trusts for the employees of a particular company, were ill founded. I have re-considered these observations with great care in the light of the argument submitted on this appeal, and I see no reason to qualify any of them.

In the last portion of his speech, my noble and learned friend on the Wool-sack referred to the "poor relations" cases, of which, perhaps, the most notable is *Isaac v. Defriez* (11). In *Re Compton* (1) LORD GREENE, M.R., considered these cases and observed ([1945] 1 All E.R. 206):

"The cases must at this date be regarded as good law although they are, perhaps, anomalous."

In the course of the argument, your Lordships' attention was called to a line of much more modern decisions which might possibly be described as the descendants of the "poor relations" cases. Recently, in *Gibson v. South American Stores (Gath and Chaves), Ltd.* (12), the Court of Appeal had to consider the trusts of a fund called "Employees' Health and Relief Fund" established by the defendant company. The board of the company had executed a deed vesting a fund in trustees and declaring (by cl. 3) that it was to be used for granting, at the discretion of the board, gratuities, pensions or allowances to beneficiaries. By cl. 4 it was declared that the class of beneficiaries included:

"all persons who in the opinion of the London board are or shall be necessitous and deserving and who for the time being are or have been in the company's employ or in the employ of any agents of the company or in the employ of [a subsidiary company] and the wives widows husbands widowers children parents and other dependants of any person who for the time being is or would if living have been himself or herself a member of the class of beneficiaries."

The Court of Appeal first held that, as a matter of construction, the trusts established in cl. 3 and cl. 4 were limited to necessitous beneficiaries. SIR RAYMOND EVERSHED, M.R., having stated the above decision, continued ([1949] 2 All E.R. 992):

"That left as the next point for discussion what, it appeared, might well be a question of law of great difficulty and no little importance. The question may, I think, be put thus: Under the law as it has now been established, and in the light of several recent decisions, both in this court and in the House of Lords, is a trust for a class of poor persons defined by reference to the fact that they are employed by some person, firm, or company, a good charitable gift, a good charitable trust, or does it fail of that qualification through the absence of the necessary public element?"

If one omits the word "poor" the question thus posed is, in substance, the same as the question which arises on the present appeal. The learned Master of the Rolls then went on to consider *Spiller v. Maude* (13), *Re Gosling* (14), *Re Buck* (15), and *Re Laidlaw's Will Trusts* (16), an unreported case decided by the Court of Appeal in 1935, and he felt constrained by the last mentioned authority to decide that the trust in *Gibson's* case (12) was a valid charitable trust, notwithstanding the limited nature of the class of beneficiaries. The element of poverty of the beneficiaries was present in each of the cases considered by the learned Master of the Rolls, and, therefore, each case fell into the first of the four classes of charitable trusts laid down by LORD MACNAGHTEN in *Pemsel's* case (5) ([1891] A.C. 583), whereas the present case falls into the second class. I think that for this reason your Lordships are of opinion that it is neither necessary nor desirable to express any view, on the present occasion, on the cases to which I have just referred. I am content to fall in with this opinion, only observing that they may require careful consideration in this House on some future occasion. I agree that the appeal must be dismissed with costs.

LORD MACDERMOTT: My Lords, it is not disputed that this trust is for the advancement of education. The question is whether it is of a public nature—whether, in the words of LORD WRENBURY in *Verge v. Somerville* (17) ([1924] A.C. 499):

"... it is for the benefit of the community or of an appreciably important class of the community."

The relevant class here is that from which those to be educated are to be selected. The appellant contends that this class is public in character; the respondent bank (as personal representative of the last surviving settlor) denies this and says that the class is no more than a group of private individuals.

- A Until comparatively recently the usual way of approaching an issue of this sort, at any rate where educational trusts were concerned, was, I believe, to regard the facts of each case and to treat the matter very much as one of degree. No definition of what constituted a sufficient section of the public for the purpose was applied, for none existed, and the process seems to have been one of reaching a conclusion on a general survey of the circumstances and considerations regarded
- B as relevant rather than of making a single, conclusive test. The investigation left the course of the dividing line between what was and what was not a section of the community unexplored, and was concluded when it had gone far enough to establish to the satisfaction of the court whether or not the trust was public, and the decision as to that was, I think, very often reached by determining whether or not the trust was private. Now, if it is still permissible to conduct
- C the present inquiry on these broad, if imprecise, lines, I would hold with the appellant. The numerical strength of the class is considerable on any showing. The employees concerned number over 110,000, and it may reasonably be assumed that the children, who constitute the class in question, are no fewer. The large size of the class is not, of course, decisive, but, in my view, it cannot be left out of account when the problem is approached in this way. Then it
- D must be observed that the *propositi* are not limited to those presently employed. They include former employees (not reckoned in the figure I have given), and are, therefore, a more stable category than would otherwise be the case. And, further, the employees concerned are not limited to those in the service of the "British-American Tobacco Co., Ltd., or any of its subsidiary or allied companies"—itself a description of great width—but include the employees, in
- E the event of the British-American Tobacco Co., being re-constructed or merged on amalgamation, of the re-constructed or amalgamated company or any of its subsidiary companies. No doubt, the settlors here had a special interest in the welfare of the class they described, but, apart from the fact that this may serve to explain the particular form of their bounty, I do not think it material to the question in hand. What is material, as I regard the matter,
- F is that they have chosen to benefit a class which is, in fact, substantial in point of size and importance and have done so in a manner which, to my mind, manifests an intention to advance the interests of the class described as a class rather than as a collection or succession of particular individuals.

- Proceeding on the basis I have mentioned, I find no difficulty in distinguishing this trust from that considered by EVE, J., in *Re Drummond* (7). There the
- G class was narrowly defined by reference to the workpeople employed in a particular department in a particular business. I do not question the correctness of the decision that that was a trust for private individuals, and, therefore, not public in the relevant sense, but I do not think there is anything in the judgment of the learned judge to warrant the view that the conclusion he reached should prevail in all cases where, in the qualifications for admission to the class
- H of beneficiaries, there has somewhere to be found, it may be at one remove or more, the fact of employment by one of a number of designated employers. There is another difference to be noted between that case and the present one. Apart from the marked contrast in the scope of the respective trusts, the trust purpose in *Re Drummond* (7) was not, *prima facie*, within any of the well-known classes of legal charity. Here it is otherwise, for the trust is plainly one for the advancement of education. Had EVE, J., been able to hold in *Re Drummond* (7) that the trust was for the relief of poverty I think it is clear

from his subsequent decision in *Re Rayner* (8) that he would have reached a different conclusion. It may be that in this respect the relief of poverty and the advancement of education do not stand on precisely the same footing. I confess I do not see why in principle there should be such a distinction, but, even if there is, it is none the less true to say that in both fields the actual work of the trust advances the public interest in some degree. If, then, the class of potential beneficiaries in an educational trust is substantial, and not obviously private in nature, I think one may reasonably commence, in the kind of investigation I am considering, by assuming, until the contrary appears, that the trust is for the benefit of the community.

The respondent bank, however, contends that the inquiry should be of quite a different character from that which I have been discussing. It advances as the sole criterion a narrower test derived from the decisions of the Court of Appeal in *Re Compton* (1) and *Re Hobourn Aero Components Ltd.'s Air Raid Distress Fund* (2). The basis and nature of this test appear from the passage in the judgment of the court in *Re Compton* (1) where LORD GREENE, M.R., says ([1945] 1 All E.R. 201):

"In the case of many charitable gifts it is possible to identify the individuals who are to benefit or who at any given moment constitute the class from which the beneficiaries are to be selected. This circumstance does not, however, deprive the gift of its public character. Thus, if there is a gift to relieve the poor inhabitants of a parish the class to benefit is readily ascertainable. But they do not enjoy the benefit when they receive it by virtue of their character as individuals but by virtue of their membership of the specified class. In such a case the common quality which unites the potential beneficiaries into a class is essentially an impersonal one. It is definable by reference to what each has in common with the others and that is something into which their status as individuals does not enter. Persons claiming to belong to the class do so not because they are A.B., C.D., and E.F., but because they are poor inhabitants of the parish. If in asserting their claim it were necessary for them to establish the fact that they were the individuals A.B., C.D., and E.F., I cannot help thinking that on principle the gift ought not to be held to be a charitable gift, since the introduction into their qualification of a purely personal element would deprive the gift of its necessary public character. It seems to me that the same principle ought to apply when the claimants, in order to establish their status, have to assert and prove, not that they themselves are A.B., C.D., and E.F., but that they stand in some specified relationship to the individuals A.B., C.D., and E.F., such as that of children or employees. In such a case, too, a purely personal element enters into and is an essential part of the qualification, which is defined by reference to something, *i.e.*, a personal relationship to individuals or an individual which is in its essence non-public."

The test thus propounded focuses on the common quality which unites those within the class concerned and asks whether that quality is essentially impersonal or essentially personal. If the former, the class will rank as a section of the public and the trust will have the element common to and necessary for all legal charities, but, if the latter, the trust will be private and not charitable. It is suggested in the passage just quoted, and made clear beyond doubt in *Re Hobourn* (2), that, in the opinion of the Court of Appeal, employment by a designated employer must be regarded for this purpose as a personal and not as an impersonal bond of union. In this connection, and as illustrating the discriminating character of what I may call "the *Compton* test," reference should be made to that part of the judgment of LORD GREENE, M.R., in *Re Hobourn* (2) in which he speaks of the decision in *Hall*

v. *Derby Sanitary Authority* (10). He says ([1946] 1 All E.R. 509) that the latter case

"... was a trust for railway servants. It was said that if a trust for railway servants could be a good charity, why should not a trust for railway servants in the employment of a particular railway company be a good charity? The reason, I think, is that in the one case it would be it as a criterion of general applicability and conclusiveness. In the first place, I see much difficulty in dividing the qualities or attributes which may serve to bind human beings into classes into two mutually exclusive groups, the one involving individual status and purely personal, the other disregarding such status and quite impersonal. As a task this seems to me no less baffling and elusive than the problem to which it is directed, namely, the determination of what is and what is not a section of the public for the purposes of this branch of the law. After all, what is more personal than poverty or blindness or ignorance? Yet none would deny that a gift for the education of the children of the poor or blind was charitable, and I doubt if there is any less certainty about the charitable nature of a gift for, say, the education of children who satisfy a specified examining body that they need and would benefit by a course of special instruction designed to remedy their educational defects. But can any really fundamental distinction, as respects the personal or impersonal nature of the common link, be drawn between those employed, for example, by a particular university and those whom the same university has put in a certain category as the result of individual examination and assessment? Again, if the bond between those employed by a particular railway is purely personal, why should the bond between those who are employed as railwaymen be so essentially different? Is a distinction to be drawn in this respect between those who are employed in a particular industry before it is nationalised and those who are employed therein after that process has been completed and one employer has taken the place of many? Are miners in the service of the National Coal Board now in one category and miners at a particular pit or of a particular district in another? Is the relationship between those in the service of the Crown to be distinguished from that obtaining between those in the service of some other employer? Or, if not, are the children of, say, soldiers or civil servants to be regarded as not constituting a sufficient section of the public to make a trust for their education charitable? It was conceded in the course of the argument that, had the present trust been framed so as to provide for the education of the children of those engaged in the tobacco industry in a named county or town, it would have been a good charitable disposition, and that even though the class to be benefited would have been appreciably smaller and no more important than is the class here. That concession follows from what the Court of Appeal has said. But if it is sound, and a personal or impersonal relationship remains the universal criterion, I think it shows, no less than the queries I have just raised in indicating some of the difficulties of the problem, that the "*Compton test*" is a very arbitrary and artificial rule.

This leads me to the second difficulty I have regarding it. If I understand it aright, it necessarily makes the quantum of public benefit a consideration of little moment. The size of the class becomes immaterial and the need of its members and the public advantage of having that need met appear alike

to be irrelevant. To my mind, these are considerations of some account in the sphere of educational trusts for, as already indicated, I think the educational value and scope of the work actually to be done must have a bearing on the question of public benefit.

Finally, it seems to me that, far from settling the state of the law on this particular subject, the "*Compton* test" is more likely to create confusion and doubt in the case of many trusts and institutions of a character whose legal standing as charities has never been in question. I have particularly in mind gifts for the education of certain special classes, such, for example, as the daughters of missionaries, the children of those professing a particular faith or accepted as ministers of a particular denomination, or those whose parents have sent them to a particular school for the earlier stages of their training. I cannot but think that in cases of this sort an analysis of the common quality binding the class to be benefited may reveal a relationship no less personal than that existing between an employer and those in his service. Take, for instance, a trust for the provision of university education for boys coming from a particular school. The common quality binding the members of that class seems to reside in the fact that their parents or guardians all contracted for their schooling with the same establishment or body. That the school in such a case may itself be a charitable foundation seems altogether beside the point and quite insufficient to hold the "*Compton* test" at bay if it is well founded in law.

My Lords, counsel for the appellant and for the Attorney-General adumbrated several other tests for establishing the presence or absence of the necessary public element. I have given these my careful consideration and I do not find them any more sound or satisfactory than the "*Compton* test." I, therefore, return to what I think was the process followed before the decision in *Compton's* case (1), and, for the reasons already given, I would hold the present trust charitable and allow the appeal. I have only to add that I recognise the imperfections and uncertainties of that process. They are as evident as the difficulties of finding something better, but I venture to doubt if it is in the power of the courts to resolve those difficulties satisfactorily as matters stand. It is a long cry to the age of Elizabeth and I think what is needed is a fresh start from a new statute.

Appeal dismissed with costs.

Solicitors: *D. M. Oppenheim* (for the appellant); *Hugh-Jones & Flinn* (for Barclays Bank, Ltd.); *Treasury Solicitor* (for the Attorney-General).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

PARIS v. STEPNEY BOROUGH COUNCIL.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), October 26, 30, November 2, December 13, 1950.]

Master and Servant—Liability of master—Workman's special risk of injury—Garage fitter—Need to provide goggles—Workman with only one eye—Injury to other eye.

If, to the knowledge of his employer, a workman is suffering from a disability which, though it does not increase the risk of an accident occurring while he is at work, does increase the risk of serious injury if an accident should befall him, that special risk of injury is a relevant consideration in determining what precautions the employer should take

in fulfilment of his duty to take reasonable care for the safety of each individual workman.

The appellant was employed as a fitter in the garage of the respondent borough council. To the knowledge of the respondents, he had the use of only one eye. While he was using a hammer to remove a bolt on a vehicle, a chip of metal flew off and entered his good eye, so injuring it that he became totally blind. The respondents did not provide goggles for the appellant to wear, and there was evidence that it was not the ordinary practice for employers to supply goggles to men employed in garages on the maintenance and repair of vehicles.

HELD: (i) the condition of the appellant's eyes, the knowledge of the respondents, the likelihood of an accident happening, and the gravity of the consequences if an accident should occur, were relevant facts to be taken into account in determining the question whether or not the respondents took reasonable precautions for the appellant's safety.

(ii) (LORD SIMONDS and LORD MORTON OF HENRYTON *dissenting*) in the circumstances the respondents owed a special duty of care to the appellant, and, whether or not goggles should have been supplied to two-eyed workmen engaged in the same work as the appellant, they should have been provided for the appellant, and the respondents' failure to provide them rendered them liable in negligence.

Decision of the COURT OF APPEAL ([1949] 2 All E.R. 843), *reversed*.

[AS TO MASTER'S DUTY AT COMMON LAW, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-194, paras. 313-328; and FOR CASES, see DIGEST, Vol. 34, pp. 194-220, Nos. 1580-1824.]

Cases referred to:

- (1) *Mackintosh v. Mackintosh*, (1864), 2 Macph. (Ct. of Sess.) 1357; 36 Digest 55, 342 xv.
- (2) *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.*, [1936] A.C. 108; 105 L.J.P.C. 18; 154 L.T. 89; Digest Supp.
- (3) *Daborn v. Bath Tramways Motor Co., Ltd. & Trevor Smithey*, [1946] 2 All E.R. 333; 2nd Digest Supp.
- (4) *Morton v. William Dixon*, 1909 S.C. 807.
- (5) *Wilsons and Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (6) *Smith v. Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest 95, 633.

APPEAL by the workman from an order of the Court of Appeal, dated Oct. 27, 1949, and reported [1949] 2 All E.R. 843, reversing a decision of LYNSEY, J., dated Apr. 11, 1949, in favour of the workman for £5,250 damages and costs. The Court of Appeal held that his employers, the respondents, Stepney Borough Council, were not negligent in failing to provide goggles for the workman, a man with only one effective eye, who, on May 28, 1947, while working in the respondents' garage, suffered an injury to that eye which caused total blindness.

Beney, K.C., *Marven Everett*, and *J. R. B. Fox-Andrews* for the workman. *H. Edmund Davies, K.C.*, and *A. L. Stevenson* for the employers.

The House took time for consideration.

Dec. 13. The following opinions were read.

LORD SIMONDS: My Lords, this is an appeal from an order of the Court of Appeal setting aside a judgment of LYNSEY, J., in favour of the appellant for £5,250 damages and costs. On May 13, 1942, the appellant entered the service of the respondents as a garage hand in their cleansing department. He was then for all practical purposes blind in his left eye, having suffered serious injury in May, 1941, as the result of enemy action, but this fact was

not known to the respondents at that time. On or about July 19, 1946, he was medically examined with a view to his becoming a member of the permanent staff and joining the superannuation scheme, and on July 22, 1946, the medical officer reported to a Mr. Boden, the respondents' public cleansing officer, that the appellant was not fit on account of his disablement to join the superannuation scheme. On May 16, 1947, he was given two weeks' notice expiring on May 30, 1947, to terminate his employment. I will assume that at this date the respondents had notice of his physical disability, including the blindness of his left eye. On May 28, 1947, the accident occurred which gave rise to the present action. The appellant was engaged in dismantling the chassis of a gulley cleaner, a type of vehicle generally used by local authorities for the cleansing and flushing of street gulleys. The vehicle had been raised about four and a half feet from the garage floor by means of a ramp. The appellant had to remove a U-bolt holding the springs of an axle, and, to release it, he hit the U-bolt with a steel hammer. As the result of his doing so a piece of metal flew off and entered his right eye with the disastrous consequence that he lost the sight of it altogether. On Aug. 8, 1947, he commenced his action against the respondents claiming damages for their negligence and breach of statutory duty. The respondents put in a defence denying negligence and raising an alternative plea of contributory negligence which has not been pursued. Nor has the appellant pursued his claim for breach of statutory duty. The single question is whether the appellant proved the negligence of the respondents, a question answered in the affirmative by LYNSEY, J., in the negative by the Court of Appeal.

What, then, was the negligence alleged by the appellant and denied by the respondents? It was that it was the duty of the respondents to supply the appellant with suitable goggles for the protection of his eyes while he was engaged in such work and to require him to use them. I can come at once to the crux of the matter. In the statement of claim this duty is pleaded as a general duty owed by the respondents to their employees engaged in this class of work. The appellant did not allege a particular duty owed to him by reason of his individual infirmity. At what stage this plea emerged is not very clear, but, having more than once read the judgment of LYNSEY, J., I share the view of LORD GODDARD, C.J., in the Court of Appeal that that learned judge decided the case on the ground that a special duty was owed to him as a one-eyed man, and it is clear that in the Court of Appeal and in this House this was the relevant plea. The first formal reason in the appellant's Case asserts the respondents' duty

" . . . to exercise reasonable care not unnecessarily to expose the appellant to the risk of suffering the injurious results likely to follow an accident to his sound eye having regard to the fact that he was known by them to be a one-eyed man."

The issue, my Lords, is thus narrowed down, and I will say at once that I do not dissent from the view that an employer owes a particular duty to each of his employees. His liability in tort arises from his failure to take reasonable care in regard to the particular employee and it is clear that, if so, all the circumstances relevant to that employee must be taken into consideration. I see no valid reason for excluding as irrelevant the gravity of the damage which the employee will suffer if an accident occurs, and with great respect to the judgments of the Court of Appeal I cannot accept the view, neatly summarised by ASQUITH, L.J. ([1949] 2 All E.R. 845), that the greater risk of injury is, but the risk of greater injury is not, a relevant circumstance. I find no authority for such a proposition nor does it appear to me to be founded on any logical principle.

My Lords, the gravity of the injury is, however, only one of the relevant circumstances, and, while I cannot accept the judgment of the Court of Appeal which is based on the view that it is irrelevant, unlike the majority of your

Lordships, I find it impossible to uphold the judgment of the learned trial judge. For he, I think, ignored a consideration which was essential to a proper determination of the duty of the respondents to the appellant. If the gravity of the damage is relevant, so also is the seriousness of the risk, and in the consideration of this question I think that the learned judge fell into error. As I have already said, it is difficult to be sure what was in the mind of the learned judge, for having stated (correctly, as I think) that the respondents owed a duty to the appellant individually, not to a class, he added:

"In this case the real question is whether the employers in adopting this system and not providing or requiring the use of goggles for the workers on this system were taking reasonable care to provide a suitable system of work and provide a suitable plant."

He then, however, without coming to any conclusion on this question, appears to decide in favour of the appellant on the ground of his particular disability, for he concludes by saying:

"I am satisfied here that there was, so far as this particular plaintiff was concerned, a duty on the employers to provide goggles and require the use of goggles as part of their system."

Your Lordships must be left in doubt what view the learned judge held on what he had described as the real question, yet it was, if not the real question, a matter of fundamental importance in determining what was the nature of the risk which was run by two-eyed and one-eyed men alike. It is a question which I will now consider.

My Lords, a study of the evidence leaves me in no doubt that an employer could not be held guilty of negligence if he did not generally provide goggles for the use of his employees engaged in this kind of work. Mr. Boden, to whom I have already referred, a witness of wide experience, was asked:

"Q.—Have you seen in work of this kind workmen wearing goggles to do such work? A.—Not in my experience. I have never seen any mechanic working in any of the repair shops that I have visited during that thirty-seven years wearing goggles doing that repair work."

A Mr. Reay, having served his time in the shops where he had neither himself worn nor seen others wearing goggles for such work, set up in business for himself. He was asked,

"Q.—When you were your own employer, did you wear goggles for such work? A.—No."

The appellant himself gave evidence, which, so far as it bears on the obviousness of the risk and corresponding duty, cannot be disregarded. I make nothing of the fact that he did not complain that goggles were not provided, for he might well hesitate to do so, but he was asked:

"Q.—Have you considered as to whether it was dangerous to do this sort of job without eye protection? A.—Well, we were always working through years doing just the same thing. It became natural to get in there without protection. Q.—You did not think about it? A.—We had been doing it for years and never thought of it."

It is true that he added that, if goggles had been provided and he had been told to use them, he would have done so, but this does not appear to carry the matter any further. For the appellant, a Captain Paterson said, in answer to the learned judge, that in the whole of his experience he had about a dozen times seen a man wearing goggles when he was using a hammer to knock a rusted bolt in dismantling a car, adding that that would be when working under a vehicle. It is not clear whether on these occasions the man was wearing goggles for fear of a splinter of metal piercing his eye or of grit or dirt falling

into it. Mr. Parker, at the relevant time the mechanical superintendent of the respondents' cleansing department, while asserting that it was not normal practice to wear goggles for the work in question, said he had seen men who were working underneath a vehicle wearing goggles. That was "preferably if they were lying on their backs." Of the single instance that he could distinctly remember he assumed that the man was doing it to prevent dust getting in his eyes.

The evidence in regard to practice appears to me overwhelming, but however unlikely such an event may be in such an organised community as ours is to-day, it is possible that the practice, however widespread, is carried on in disregard of risks that are obvious. Let me, then, examine this aspect of the evidence. There was undisputed evidence that, when a piece of steel and particularly of steel corroded with rust is struck with a steel hammer, chips or splinters of steel may fly off. It could hardly be otherwise, but the question is: What is the risk. Captain Paterson, whom I have already mentioned, deposed to having had personal knowledge of about half-a-dozen eye injuries in the course of thirty-two years' experience, the first of them having taken place some six or seven years before. A Mr. Seeley, a fellow employee of the appellant, had a somewhat similar accident, though for him happily the consequences were trivial, at a date which could not be fixed whether before or after the appellant's accident. There is no reason to suppose that the respondents knew or ought to have known of Captain Paterson's experiences, and there was nothing else. On this evidence, my Lords, no other conclusion can be reached than that the respondents were not under a duty to provide goggles for their workmen engaged on this work at least if they were two-eyed men, and the reason why they were under no such duty was because the risk was not one against which a reasonable employer was bound to take precautions. It was from this premise that the inquiry should proceed, whether, nevertheless, in the case of a one-eyed man they were bound to do so. This clearly must depend on whether it should be manifest to the reasonable employer that in the case of a one-eyed workman the possible damage in the event of accident was so much graver than in the case of a two-eyed workman that in the former case he ought to take precautions though in the latter case he need not. I see no justification for such a conclusion. A two-eyed man might, if a splinter struck him in the eye, suffer an injury which in any scale would be considered very grave. He might even suffer injury in both eyes either by immediate damage to both or by the infection of one from the other. The eye which was left to him might have perfect vision or might be defective in a degree varying from the slightest imperfection to almost total blindness, but however grave, even calamitous, the damage that he suffered by the loss of one eye, the two-eyed man would have no remedy. The question, therefore, is not of a contrast between damage in the case of one man trivial and in the case of another very grave, but rather of an accident so serious in its consequence to any man whether one-eyed or two-eyed, that, if the risk of it was appreciable, it would be the clear duty of the employer to provide and enforce the use of proper precautions against it. Yet the risk was not guarded against, for it was regarded, and rightly regarded, as a risk which could reasonably be run, and this was so whatever the posture which the workman assumed in doing his job. Risk cannot be assessed in terms of scientific accuracy. One speaks of "conceivable" danger and "probable" danger and the boundaries are blurred. One must, I concede, have regard to the degree of injury that an accident may cause, a difficult task enough. Taking these things into consideration, and starting, as the learned judge did not, from the fact that, to use the familiar, though inapt, phrase, it was not part of the system of work to provide goggles for two-eyed men because the degree of risk did not demand that precaution in a reasonable employer, I do not think there was evidence on which it could fairly be held

that the same reasonable employer was bound at his peril to provide goggles for one-eyed men. For these reasons I would dismiss this appeal, but, as the majority of your Lordships are in favour of allowing the appeal, the judgment of LYNKEY, J., on liability must be restored, and it will remain for the Court of Appeal to deal with the appellant's appeal on the *quantum* of damages.

LORD NORMAND: My Lords, this appeal involves a question of general importance affecting the common law duty which an employer owes to his employee. It is this. A workman is suffering, to the employer's knowledge, from a disability which, though it does not increase the risk of an accident's occurring while he is at work, does increase the risk of serious injury if an accident should befall him. Is the special risk of injury a relevant consideration in determining the precautions which the employer should take in fulfilment of the duty of care which he owes to the workman?

The appellant, when he entered the respondents' service in 1942, suffered from a permanent defect of the vision of his left eye which made him virtually a one-eyed man. In July, 1946, he was examined, at the instance of the respondents, by their medical officer. The purpose of the examination was to determine whether he was fit to be enrolled in the respondents' permanent staff. On July 22, 1946, the examining doctor reported the defect of the appellant's left eye to the head of the department in which the appellant was employed. The respondents must, therefore, be held to have known of the defect from that date. From 1942 till the accident the appellant worked as a fitter's mate in the garage of the respondents' cleaning department on the maintenance and repair of vehicles. On May 28, 1947, a large vehicle, used for cleaning sewers and gulleys, was brought into the garage to be stripped for examination. It was placed on a platform let into a pit in the floor from which it was raised, after the vehicle had been placed on it, to a height of about four to five feet above the floor level. When the platform was in this position the appellant set to work to strip the vehicle. To do this it was necessary for him to stand with his eyes level with or slightly below the part at which he was working. He first removed the nuts from the U-bolt which held the springs in place and cleared away the dirt from the U-bolt itself. He then used an ordinary hammer to knock out the rusty bolts. While he was doing this a fragment of metal was broken off and lodged in his right eye, which is in consequence now completely blind. The work which the appellant was doing on this occasion was similar to the work that he had been doing for the previous five years.

The appellant's case is that for this sort of work the respondents ought to have supplied him with goggles to protect his eyes. The respondents supplied goggles with tinted glasses to protect the eyes of welders against excessive light and they supplied goggles for men working on grinding machines, but they supplied no goggles for men employed on the maintenance and repair of vehicles. There was evidence from each side on the question whether it was usual for employers to supply goggles to men employed in garages on that sort of work. The weight of the evidence is decidedly against the appellant on that point. On the other hand, there is proof that individual men working under a vehicle in the respondents' garage did occasionally take a pair of goggles from a cupboard in the garage and wear them to protect the eyes, and that it was known to the respondents' responsible officials that dirt did sometimes get into the men's eyes and also that when bolts were removed pieces of metal might sometimes fly. Thus, according to the public cleansing officer, it was a common occurrence that men got dirt into their eyes, and one such accident is proved by the victim, but it is not clear whether it took place before or after the accident to the appellant. The appellant depones that dirt and grit fell on his face and into his hair when he was working under the vehicles, but he never complained about this, and never thought of the danger to his eyes.

LYNSKEY, J., in his judgment, made no reference to the evidence of the practice followed by other employers nor did he hold that the respondents ought to have supplied goggles to all the workers engaged on the same sort of work as the appellant. After mentioning the risk of pieces of metal flying out, and the position in which the men had to work with their eyes on a level with or below the part of the vehicle at which they were working (matters which apply to all the workmen), he emphasised the importance of the appellant's having, to the respondents' knowledge, only one useful eye. His conclusion is: A

"The result is, in my view, in this case on the evidence, that I am satisfied here that there was, so far as this particular plaintiff was concerned, a duty on the employers to provide goggles and require the use of goggles as part of their system."

In the Court of Appeal LORD GODDARD, C.J., said ([1949] 2 All E.R. 844): B

"The way that the learned judge has decided the case and the ground on which counsel for the workman has endeavoured to uphold the judgment is that as this workman had one eye only a greater duty was owed to him than was owed to other persons because the consequences of an accident would be so much more serious."

If I may respectfully say so, I think that the learned Lord Chief Justice correctly interpreted the judgment. The Court of Appeal reversed the judgment for reasons which are very clearly stated by ASQUITH, L.J. (*ibid.*, 845): C

"The disability can only be relevant to the stringency of the duty owed to the workman if it increases the risk to which the workman is exposed. A one-eyed man is no more likely to get a splinter or a chip in his eye than is a two-eyed man. The risk is no greater, but the damage is greater to a man using his only good eye than to a man using two good eyes. The *quantum* of damage, however, is one thing, and the scope of duty is another. The greater risk of injury is not the same thing as the risk of greater injury, and the first thing seems to me to be relevant here." D

Whether that is a correct view is of considerable importance, for the ratio of the judgment will apply not only where the duty of care arises from the relationship of master and servant but in many other cases of alleged negligence. E

It is not disputed that the respondents' duty of care is a duty owed to their employees as individuals. The respondents contend, however, that, though it is not a duty owed to the employees collectively, they must take account in fulfilling the duty only of any disability that increases the risk of an accident's occurring. For that proposition no authority was cited, and, in my opinion, it is contrary to principle. The test is what precautions would the ordinary, reasonable and prudent man take? The relevant considerations include all those facts which could affect the conduct of a reasonable and prudent man and his decision on the precautions to be taken. Would a reasonable and prudent man be influenced, not only by the greater or less probability of an accident occurring but also by the gravity of the consequences if an accident does occur? In *Mackintosh v. Mackintosh* (1) LORD NEAVES, considering a case of alleged negligence in muir burning, said (2 Macph. (Ct. of Sess.) 1362): F

"... it must be observed that in all cases the amount of care which a prudent man will take must vary infinitely according to circumstances. No prudent man in carrying a lighted candle through a powder magazine would fail to take more care than if he was going through a damp cellar. The amount of care will be proportionate to the degree of risk run, and to the magnitude of the mischief that may be occasioned." G H

In *Northwestern Utilities, Ltd. v. London Guarantee & Accident Co., Ltd.* (2) LORD WRIGHT, dealing with the risk of grave damage which may be caused by gas escaping from a main, said ([1936] A.C. 126):

"The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled."

The learned editor of *SALMOND ON THE LAW OF TORTS*, 10th ed., p. 438 f.n., similarly says:

"There are two factors in determining the magnitude of a risk—the seriousness of the injury risked, and the likelihood of the injury being in fact caused."

These are, in my opinion, accurate statements both of the law and of the ordinary man's conduct in taking precautions for his own safety.

"No reasonable man, handles a stick of dynamite and a walking-stick in the same way"

see *WINFIELD'S TEXTBOOK OF THE LAW OF TORT*, 4th ed., p. 407.

The court's task of deciding what precautions a reasonable and prudent man would take in the circumstances of a particular case may not be easy. Nevertheless, the judgment of the reasonable and prudent man should be allowed its common every-day scope, and it should not be restrained from considering the foreseeable consequences of an accident and their seriousness for the person to whom the duty of care is owed. Such a restriction, if it might sometimes simplify the task of the judge or jury, would be an undue and artificial simplification of the problem to be solved. If the courts were now to take the narrow view proposed by the respondents the cleavage between the legal conception of the precautions which a reasonable and prudent man would take and the precautions which reasonable and prudent men do in fact take would lessen the respect which the administration of justice ought to command. To guard against possible misunderstanding it may be well to add here that the seriousness of the injury or damage risked and the likelihood of its being in fact caused may not be the only relevant factors. For example, *ASQUITH, L.J.*, in *Daborn v. Bath Tramways Motor Co., Ltd. & Trevor Smithey* (3), pointed out that it is sometimes necessary to take account of the consequence of not assuming a risk.

I am unable, therefore, to reject the conclusion arrived at by *LYNSKEY, J.*, on the ground on which the Court of Appeal proceeded, but that does not end the appeal. For there remains the question whether, assuming that the fact that the appellant was to the knowledge of the respondents a one-eyed man was a relevant circumstance, the judgment of *LYNSKEY, J.*, was in accordance with the evidence. The kind of evidence necessary to establish neglect of a proper precaution was considered in *Morton v. William Dixon* (4) by *LORD DUNEDIN*, Lord President. That was an action by a miner against his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage. It was, of course, a Scottish case, but, in my opinion, there is no difference between the law of Scotland and the law of England on this point. The Lord President said (1909 S.C. 809):

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances, but it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed



by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

In the present case, as I have already said, the balance of the evidence inclines heavily against the appellant on the question of the usual practice of others, but that evidence necessarily dealt with the normal case when the employee suffers from no special disablement. In the nature of things there could scarcely be proof of what was the usual precautions taken by other employers if the workmen had but one good eye. Since **LYNSKEY, J.**, did not deal with the evidence on practice and made no finding about the precautions which should be taken in the ordinary case and without reference to individual disability, I think that his judgment is essentially a finding that the supply of goggles was obviously necessary when a one-eyed man was put to the kind of work to which the appellant was put. The facts on which the learned judge founded his conclusion, the known risk of metal flying when this sort of work was being done, the position of the workman with his eyes close to the bolt he was hammering and on the same level with it or below it, and the disastrous consequences if a particle of metal flew into his one good eye, taken in isolation, seem to me to justify his conclusion. Even for a two-eyed man the risk of losing one eye is a very grievous risk, not to speak of the foreseeable possibility that both eyes might be simultaneously destroyed, or that the loss of one eye might have as a sequel the destruction of vision in the other. It may be said that, if it is obvious that goggles should have been supplied to a one-eyed workman, it is scarcely less obvious that they should have been supplied to all the workmen, and, therefore, that the judgment rests on an unreal or insufficient distinction between the gravity of the risk run by a one-eyed man and the gravity of the risk run by a two-eyed man. I recognise that the argument has some force, but I do not assent to it. Blindness is so great a calamity that even the loss of one of two good eyes is not comparable, and the risk of blindness from sparks of metal is greater for a one-eyed man than for a two-eyed man, for it is less likely that both eyes should be damaged than that one eye should, and the loss of one eye is not necessarily or even usually followed by blindness in the other. What precautions were needed to protect two-eyed men, and whether it could properly be held, in the teeth of the evidence of the usual practice, that goggles should have been supplied for them, were not questions which the learned judge had necessarily to decide. Therefore, though there might have been advantages of lucidity and cogency if the precautions needed for the protection of the two-eyed men had first been considered and the increased risk of damage to which the one-eyed man is exposed had been expressly contrasted, I would allow the appeal and restore the judgment of **LYNSKEY, J.**

LORD OAKSEY: My Lords, I agree entirely with the opinion just delivered by my noble and learned friend, **LORD NORMAND.**

The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. The fact that the servant has only one eye, if that fact is known to the employer, and that, if he loses it he will be blind, is one of the circumstances which must be considered by the employer in determining what precautions, if any, shall be taken for the servant's safety. The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances. As the circumstances may vary infinitely it is often impossible to adduce evidence of what care an ordinarily prudent employer would take. In some cases, of course, it is possible to prove that it is the ordinary practice for employers to take or not to take a certain precaution, but in such a case as the present where a one-eyed man has been injured it is unlikely that such

evidence can be adduced. The court has, therefore, to form its own opinion of what precautions the notional ordinarily prudent employer would take. In the present case the question is whether an ordinarily prudent employer would supply goggles to a one-eyed workman whose job was to knock bolts out of a chassis with a steel hammer while the chassis was elevated on a ramp so that the workman's eye was close to and under the bolt. In my opinion, LYNSEY, J., was entitled to hold that an ordinarily prudent employer would take that precaution. The question was not whether the precaution ought to have been taken with ordinary two-eyed workmen and it was not necessary, in my opinion, that LYNSEY, J., should decide that question—nor did he purport to decide it, although it is true that he stated the question in one sentence too broadly. The risk of splinters of steel breaking off a bolt and injuring a workman's eye or eyes may be, and I think is, slight, and it is true that the damage to a two-eyed workman if struck by a splinter in the eye or eyes may be serious, but it is for the judge at the trial to weigh up the risk of injury and the extent of the damage and to decide whether, in all the circumstances including the fact that the workman was known to be one-eyed and might become a blind man if his eye was struck, an ordinarily prudent employer would supply such a workman with goggles. It is a simple and inexpensive precaution to take to supply goggles and a one-eyed man would not be likely, as a two-eyed man might be, to refuse to wear the goggles. LYNSEY, J., appears to me to have weighed the extent of the risk and of the damage to a one-eyed man, and I am of opinion that his judgment should be restored.

LORD MORTON OF HENRYTON: My Lords, it cannot be doubted that there are occupations in which the possibility of an accident occurring to any workman is extremely remote, while there are other occupations in which there is constant risk of accident to the workmen. Similarly, there are occupations in which, if an accident occurs, it is likely to be of a trivial nature, while there are other occupations in which, if an accident occurs, the result to the workman may well be fatal. Whether one is considering the likelihood of an accident occurring, or the gravity of the consequences if an accident happens, there is in each case a gradually ascending scale between the two extremes which I have already mentioned. In considering generally the precautions which an employer ought to take for the protection of his workmen it must, in my view, be right to take into account both elements, the likelihood of an accident happening and the gravity of the consequences. I take as an example two occupations in which the risk of an accident taking place is exactly equal. If an accident does occur in the one occupation, the consequences to the workman will be comparatively trivial; if an accident occurs in the other occupation the consequences to the workman will be death or mutilation. Can it be said that the precautions which it is the duty of an employer to take for the safety of his workmen are exactly the same in each of these occupations? My Lords, that is not my view. I think that the more serious the damage which will happen if an accident occurs, the more thorough are the precautions which an employer must take. If I am right as to this general principle, I think it follows logically that if A. and B., who are engaged on the same work, run precisely the same risk of an accident happening, but if the results of an accident will be more serious to A. than to B., precautions which are adequate in the case of B. may not be adequate in the case of A., and it is a duty of the employer to take such additional precautions for the safety of A. as may be reasonable. The duty to take reasonable precautions against injury is one which is owed by the employer to every individual workman.

In the present case it is submitted by counsel for the appellant that, although the appellant ran no greater risk of injury than the other workmen engaged in the maintenance work, he ran a risk of greater injury. Counsel points out that an accident to one eye might transform the appellant into a blind man,

and this event in fact happened. A similar accident to one of his comrades would transform that comrade into a one-eyed man, a serious consequence indeed, but not so serious as the results have been to the appellant. My Lords, the Court of Appeal thought that the one-eyed condition of the appellant, known to his employers, was wholly irrelevant in determining the question whether the employer did or did not take reasonable precautions to avoid an accident of this kind. I do not agree. Applying the general principle which I have endeavoured to state, I agree with your Lordships and with LYNSEY, J., that the condition of the appellant was a relevant fact to be taken into account.

There still remains, however, the question whether the learned judge rightly came to the conclusion that there was "so far as this particular plaintiff was concerned, a duty on the employers to provide goggles and require the use of goggles as a part of their system." He thought, as I read his judgment and as the Court of Appeal read it, that there was no duty on the employers to provide goggles for two-eyed men who were employed on the same work as the appellant. With this latter view the Court of Appeal agreed, and I take the same view. The evidence given at the trial has already been analysed by my noble and learned friend on the Woolsack, and I shall only add that, although Captain Paterson had knowledge of about half-a-dozen eye injuries in the course of thirty-two years' experience, he did not say whether any of them was of a serious nature. The only other eye injury deposed to was that of Mr. Seeley. He was asked by the learned judge:

"Q.—Were you off work at all with your eye? A.—Oh no. Q.—Just that something got into your eye. A.—Yes, and I got it out."

My Lords, is it really possible to draw a distinction, on the facts of the present case, between a two-eyed man and a one-eyed man? If the employers were not negligent in failing to provide goggles for two-eyed men doing this work, during all the years prior to this accident, did they become negligent, so far as regards the appellant alone, as from July 22, 1946, when Mr. Boden, their public cleansing officer, became aware for the first time that the appellant had practically no vision in his left eye? The loss of an eye is a most serious injury to any man, and I can only see two alternatives in this case: (a) that the employers were negligent throughout in failing to provide goggles and insist on their use by all men employed in this type of work, or (b) that the risk of an eye injury to any man was so remote that no employer could be found negligent in failing to take these precautions. My Lords, I think the first alternative must be rejected. Applying the test laid down by LORD DUNEDIN in *Morton v. William Dixon* (4) already quoted by my noble and learned friend LORD NORMAND, I cannot find that the provision of goggles "was a thing which was commonly done by other persons in like circumstances." The evidence is conclusive to the contrary. Nor does the evidence support the view that it was "a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it." Although I recognise that the one-eyed condition of the appellant was a factor to be taken into account, I think alternative (b) is correct. I cannot reach the conclusion that a one-eyed man, but not a two-eyed man, has a remedy against the employer for so serious an injury. I think it must be both or neither, and on the facts of the present case I agree with the conclusion of the Court of Appeal that the evidence does not establish any negligence on the part of the respondents. I would dismiss the appeal.

LORD MACDERMOTT: My Lords, the appellant entered the service of the respondents in 1942 as a fitter's mate or garage hand. He was then, in consequence of injuries received in an air raid, so blind in his left eye as to be a one-eyed man for all practical purposes. He was employed in the garage of the respondents' cleansing department and one of his duties was to assist in

the dismantling of motor vehicles. On occasion this task, according to the usual practice of the garage, involved the use of a steel hammer to remove rusted parts such as bolts. There was a risk of chips of metal flying about when this procedure was followed, but the workmen engaged on it were not supplied with or required to use goggles or any other form of eye protection. On July 19, 1946, the appellant was medically examined on behalf of the respondents with a view to his becoming a member of the permanent staff and joining its superannuation scheme. This examination revealed the state of his left eye and, a further consequence of the appellant's war injuries, limited flexion and loss of power at the right elbow. From that date, if not earlier, the respondents must be taken to have been aware of the defect in the appellant's eye-sight. As a result of the report made by their medical officer the appellant was not accepted as a member of the permanent staff or allowed to join the superannuation scheme, but no further action appears to have been taken on foot of the report until May 16, 1947, when the appellant received notice terminating his employment on May 30, 1947. It is, I think, clear from the evidence that this notice was a consequence of the medical examination, but whether it would have been given had the appellant's left eye not been injured is not made plain. On May 28, two days before the expiry of the notice, the appellant was employed dismantling the chassis of what is known as a gulley cleaner. This vehicle had been raised on a ramp and the appellant was working underneath it when the accident, out of which this litigation arises, took place. The appellant, in an endeavour to remove a rusty U-bolt securing one of the rear springs, was striking it with a steel hammer when a piece of metal flew off and entered his good right eye, destroying the sight of it completely and making him almost entirely blind. It should be added that there was nothing in the evidence to suggest that the appellant's previous disabilities increased in any way the chances of an accident, such as that described, occurring.

The appellant's action for damages in respect of the injury thus sustained alleged negligence and breach of statutory duty on the part of the respondents. The latter cause of action was abandoned at an early stage and the negligence relied on was, to state the substance of the allegation, that the respondents had failed in their duty to the appellant in that he had not been provided with, and required to use, suitable goggles for the protection of his eyes during the work to which I have referred. At the trial *LYNSKEY, J.*, found for the appellant. He held that the respondents, knowing that the appellant had only one useful eye, were, in the circumstances, under a duty to him to provide and require the use of goggles, and that they had failed in that duty. The Court of Appeal took a different view and ordered judgment to be entered for the respondents. This decision appears to have been based on two conclusions—first, that on the evidence there was no duty on the respondents to provide goggles for the ordinary, two-eyed workman engaged on this work, and, secondly, that there was, therefore, no such duty on the respondents in respect of the appellant because, though the consequences for him were more serious, the risk of the accident occurring was no greater in his case than it was in the case of his two-eyed fellows. The proposition underlying this second conclusion is succinctly stated by *ASQUITH, L.J.*, in a passage which, I believe, represented the unanimous opinion of the court. It reads as follows ([1949] 2 All E.R. 845):

“The disability can only be relevant to the stringency of the duty owed to the workman if it increases the risk to which the workman is exposed. A one-eyed man is no more likely to get a splinter or a chip in his eye than is a two-eyed man. The risk is no greater, but the damage is greater to a man using his only good eye than to a man using two good eyes. The *quantum* of damage, however, is one thing, and the scope of duty is another. The greater risk of injury is not the same thing as the risk of greater injury, and the first thing seems to me to be relevant here.”

This view of the law raises a question of far-reaching importance for, if sound, it must, in my opinion, pervade, if not the whole domain of negligence, at least a very large part of it. It was, however, stated only in connection with the duty of care imposed on an employer of labour and it will be sufficient for present purposes to consider it in relation to that particular branch of the law and without engaging on the wider question of its compatibility with the concept of reasonable care.

My Lords, the general nature of the obligation resting on an employer regarding the safety of those who work for him under a contract of service is not in dispute. It is, in the words of LORD WRIGHT in *Wilsons and Clyde Coal Co., Ltd. v. English* (5) ([1937] 3 All E.R. 644):

“ . . . to take reasonable care for the safety of his workmen . . . ”

In *Smith v. Baker & Sons* (6) LORD HERSCHELL described the same duty somewhat more fully but without any material difference when he said ([1891] A.C. 362):

“ It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.”

It is no less clear that the duty is owed to the workman as an individual and that it must be considered in relation to the facts of each particular case. Now, if the law is as stated by the Court of Appeal, it means that this duty of reasonable care can be discharged without regard to the gravity of the harm which is likely to fall on the workman concerned. Reasonable care is, indeed, to be taken in respect of risk that may cause injury, but the requisite degree of care is determinable irrespective of the likely consequences for the particular workman. In short, where the risk of an injury-producing event is the same for all, the standard of reasonable care is the same towards all, and the foreseeable extent of the resulting injury in any given case becomes irrelevant to the issue of liability.

My Lords, this doctrine finds no support in authority, and is, in my opinion, entirely alien to the character of the relationship to which it has been applied by the Court of Appeal. For workman and employer alike such expressions as “ risk,” “ danger ” and “ safety ” would lose much of their everyday meaning if divorced from the results to life and limb. In this sphere they must surely, in the very nature of things, connote consequences as well as causes. If a bricklayer says that the risk is greater at the top of a building, he means that a slip there is more likely to bring him death or injury, and if he says that a particular form of scaffolding is dangerous or not safe, he means not merely that it may fall, but that those who use it may get hurt. What may happen to those engaged is no less important than how it may happen. It is the consequences that necessitate the precautions in this field. The habitual association of cause and effect in workshop and factory is, perhaps, nowhere more clearly recognised than in the nature of some of the safeguards in common use. Suitable goggles, for example, must be worn by those employed at grinding machines. The particles that fly upwards may strike the cheeks as readily as the eyes, but the eyes are protected and the cheeks are not because the eyes are delicate organs and the consequences of their being struck are likely to be serious. Again, special precautions to prevent electric leakage are the usual practice in places like wash-houses where those working are well “ earthed ” and a shock might prove fatal. Instances of this sort could be multiplied, but I think it is enough to say that the employer’s duty to take reasonable care for the safety of his workmen is directed—and, I venture to add, obviously directed—to their welfare, and for that reason, if for no other,

must be related to both the risk and the degree of the injury. If that is so, and if, as was very properly conceded, the duty is that owed to the individual and not to a class, it seems to me to follow that the known circumstance that a particular workman is likely to suffer a graver injury than his fellows from the happening of a given event is one which must be taken into consideration in assessing the nature of the employer's obligation to that workman.

For these reasons I am of opinion that the Court of Appeal was wrong and that LYNSEY, J., was right regarding the relevance of the respondents' knowledge of the appellant's eye defect. It remains to consider whether the learned trial judge's finding of negligence is justified on the evidence. As I read his judgment he did not find that the respondents were under a duty to provide goggles for other workmen engaged on the same work who had, or might be taken as having, the use of both eyes. Whether the evidence would have warranted such a finding is, I think, a question, of some difficulty. On the one hand, the whole trend of the testimony indicates that it was not the general practice in garages and establishments of the kind to provide protection for the eyes in such circumstances. On the other, it is clear that the wearing of goggles would not have hampered the work in question, and there is, I think, material from which it might reasonably be inferred that, for men working underneath these vehicles and in close proximity to the parts they were stripping, the provision of suitable goggles would have been a sensible and obvious way of keeping falling dirt and flying particles out of their eyes. I incline to the view that a jury weighing these considerations would not be perverse in finding that it was the duty of the employers to make such provision. The point, however, is a balanced one and I will proceed on the assumption that the Court of Appeal was right on this aspect of the case and that the respondents were not under any general obligation of this kind. So assuming, the question then arises whether the additional element, the fact that the respondents knew that the appellant was a one-eyed man, made it proper to arrive at a different conclusion regarding their duty to him. In my opinion, it did. Not merely was the risk of this sort of accident occurring to those engaged on this work known; it was also known that that risk was fraught with much graver consequence for the appellant than for his two-eyed companions. His chances of being blinded were appreciably greater and blindness is an affliction in a class by itself which reasonable men will want to keep from those who work for them if there are reasonable precautions which can be taken to that end. To my mind, whatever may be said of the respondents' duty to their two-eyed employees, there was ample evidence to sustain the view that they failed in their duty to the appellant. I would allow the appeal and restore the finding as to liability of the learned judge.

Appeal allowed with costs.

Solicitors: *W. H. Thompson* (for the workman); *Thomas V. Edwards* (for the employers).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

CONWAY v. GEORGE WIMPEY & CO., LTD.

[COURT OF APPEAL (Cohen, Asquith and Denning, L.JJ.), December 4, 1950.]

Legal Aid—Security for costs—Plaintiff not “assisted person” when order first made—Subsequent grant of emergency certificate—Effect on order—Legal Aid and Advice Act, 1949 (c. 51), s. 12 (2) (b) (ii).

On Nov. 6, 1950, an order for security for costs was made against the plaintiff who was then not an “assisted person”. On Nov. 16, 1950, he became an “assisted person”, an emergency certificate being granted him under the Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 10 (1).

HELD: until the regulations envisaged by s. 12 (2) (b) (ii) of the Act of 1949 were made, in the absence of special circumstances an order for security for costs should not be made against an “assisted person”, and, therefore, the order which had been made would be discharged.

[FOR THE LEGAL AID AND ADVICE ACT, 1949, s. 12 (2) (b) (ii), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 548.]

Case referred to:

- (1) *Willé v. St. John*, [1910] 1 Ch. 701; 79 L.J.Ch. 239; 102 L.T. 383; 42 Digest 258, 2919.

MOTION by the plaintiff to discharge an order made by the Court of Appeal, dated Nov. 6, 1950, that he should give security for the costs of his appeal. After the making of the order the plaintiff obtained an emergency certificate under the Legal Aid and Advice Act, 1949, and became an “assisted person”.

Seuffert for the plaintiff.

D. M. Scott for the defendants.

COHEN, L.J.: On Nov. 6, 1950, on the application of the defendants, this court made an order for security for costs in the present case. At that time the plaintiff was not an assisted person. On Nov. 16 an emergency certificate was granted to the plaintiff under the Legal Aid and Advice Act, 1949. His solicitors did not receive notice of that certificate until Nov. 20, which was the day of expiry of the time limit within which security had to be given. The plaintiff's solicitors then wrote to the defendants' solicitors asking whether they would agree that in those circumstances the order for security automatically lapsed, and, as the defendants' solicitors would not agree, the matter comes before us.

It appears from the decision in *Willé v. St. John* (1) that under the old procedure, the effect of the grant of a poor persons' certificate was to cause the order for security to lapse. COZENS-HARDY, M.R., in delivering his judgment, said ([1910] 1 Ch. 704):

“I start with the proposition, established centuries ago by statute and since developed by judicial decisions and now embodied in rules, that a person disabled by poverty is entitled to assert or defend his assumed rights without the liability to pay costs.”

Later, he said (*ibid.*, 705):

“It is inherent in every such order that circumstances may arise which would render it unjust for the court to allow the order to operate according to its terms.”

It is true to say that under the old practice the effect of obtaining leave to conduct the proceedings as a poor person was to suspend an order for security for costs, but it does not necessarily follow that the procedure would be the same now that the Legal Aid and Advice Act, 1949, has come into force and the procedure with regard to poor persons has lapsed. The Poor Persons Rules have been repealed and no rules have taken their place. Moreover, as counsel

for the defendants pointed out, it is plain from s. 12 (2) (b) (ii) of the Act that it is contemplated that in certain circumstances security will be given. Section 12 provides:

“(1) The Lord Chancellor may make such regulations as appear to him necessary or desirable for giving effect to this Part of this Act or for preventing abuses thereof. (2) Without prejudice to the foregoing subsection or any other provision of this Act authorising the making of regulations, regulations may—(a) make provision as to the proceedings which are or are not to be treated as distinct proceedings for the purposes of legal aid, and as to the apportionment of sums recoverable or recovered by virtue of any order for costs made generally with respect to proceedings treated as distinct; (b) regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision . . . (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given.”

I would add that there is a further difference—that, whereas under the poor persons procedure, if the poor person failed, the opposite party could not recover costs, by s. 2 (2) (e), (3) of the Act of 1949, there is a provision under which the court may order the assisted person to pay the costs of his opponent, though the amount which his opponent can recover is regulated. The matter is, therefore, not so plain under the Act of 1949 as it was under the Poor Persons procedure. None the less, until we get the guidance of the regulations which are indicated by the provisions in s. 12, to which I have referred (and no such regulations have yet been published), I think we must proceed on the basis that, generally speaking, and in the absence of special circumstances, it would be inappropriate to make an order for security for costs at a time when an emergency certificate is in force. In those circumstances, I think it is inappropriate that the order for security should stand. For these reasons, I think, in the present case, there being no special circumstances to which our attention has been directed, we should discharge the order made by the court on Nov. 6. On the other hand, I think it was perfectly proper for counsel for the defendants to come and ask for the guidance of the court, particularly as, so far as I know, there is no reported case on the subject. I think, so far as the costs are concerned, the costs of the parties should be costs in the appeal.

ASQUITH, L.J.: I agree.

DENNING, L.J.: I agree.

Order for security for costs discharged.

Solicitors: *J. H. Milner & Son* (for the plaintiff); *Stanley & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re HUNTER (deceased). LLOYDS BANK, LTD. *v.* THE MISTRESS AND GOVERNORS OF GIRTON COLLEGE, CAMBRIDGE, AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), November 23, 24, 1950.]

Will—Legacy—Destruction of object—Gift to hospital—Vesting of hospital in Minister of Health after death of testator, but before legacy paid over—National Health Service Act, 1946 (c. 81), s. 6 (1).

By his will, dated July 4, 1940, a testator, who died on Jan. 10, 1948, directed his executor and trustee to divide his residuary estate into twenty-two equal units. The testator gave one such unit "to the trustees of the Ingham Infirmary and South Shields and Westoe Dispensary" in memory of his father. On July 5, 1948, the National Health Service Act, 1946, came into force and the question arose in whom the right to receive the share of the testator's residuary estate was vested.

HELD: the testator's intention was to promote the carrying on the work of the institution and to commemorate his father, and, although the Act of 1946 had caused a fundamental change in the administration and ownership of the property of the institution, there was not such a difference that the object of the gift could be said to have failed, and the share must be paid to the appropriate management committee to be applied for the purposes of the institution.

[AS TO EFFECT OF CHANGE OF CIRCUMSTANCES AT DEATH, see HALSBURY, Hailsham Edn., Vol. 34, pp. 234, 235, para. 290; and FOR CASES, see DIGEST, Vol. 8, pp. 308-312, Nos. 895-901, 911-927.]

Cases referred to:

- (1) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637.
- (2) *Re Glass' Will Trusts*, [1950] 2 All E.R. 953; [1950] Ch. 643.
- (3) *Re Kellner's Will Trusts*, [1949] 2 All E.R. 774; [1949] Ch. 46; 2nd Digest Supp.

ADJOURNED SUMMONS to determine *inter alia* whether, on the true construction of the will of William Turner Hunter and having regard to the coming into force of the National Health Service Act, 1946, on July 5, 1948, the right to receive a share of the testator's residuary estate bequeathed to the trustees of the Ingham Infirmary and South Shields and Westoe Dispensary (a) was vested in the Minister of Health under s. 6 or s. 7 of the Act or otherwise, or (b) was vested in the South Shields District Hospital Management Committee under s. 7 of the said Act or otherwise; or whether the capital and income of the said share ought to be paid to the Newcastle-upon-Tyne Regional Hospital Board or the South Shields District Hospital Management Committee under s. 60 of the said Act; or whether the said share was held on some other, and, if so, what, trusts.

The Ingham Infirmary and South Shields and Westoe Dispensary was a voluntary hospital to which s. 6 of the Act of 1946 applied and was not designated by the Minister of Health as a teaching hospital or one of a group of hospitals so designated.

J. A. Armstrong for the plaintiff, the executor and trustee of the deceased's will.

F. B. Alcock for the Newcastle-upon-Tyne Regional Board and the South Shields District Hospital Management Committee.

Denys B. Buckley for the Attorney-General.

Beroë A. Bicknell, *Winterbotham*, *McMullan*, *H. A. Rose*, *Droop* and *Sir Norman Touche* for other defendants.

VAISEY, J.: I am inclined to agree that this case is not precisely covered by authority. It is not the same as *ROXBURGH, J.'s case, Re Morgan's Will*

Trusts (1), nor is it exactly the same as *Re Glass' Will Trusts* (2). It is a simple gift to the trustees of a particular infirmary and dispensary of one of the twenty-two units into which the testator directed his residuary estate to be divided. I suppose in one sense there are not any trustees now, but it is obvious, especially with a will of this description, that the reception of the money by the trustee is mere machinery. The gift was really to the infirmary and dispensary, and the object of the gift was, I think, twofold—first, to promote the carrying on of the munificent work of healing conducted in this institution, and, secondly, to commemorate the testator's father who was a missionary.

The passing of the National Health Service Act, 1946, undoubtedly made a great and radical change from some points of view in the position of hospitals in general and this infirmary and dispensary in particular, but, although from many points of view the change was fundamental, from the point of view of an ordinary layman interested in the healing and care of the sick in the district in which he lived—the testator in this case lived in South Shields—and from the point of view of a man who was desirous of commemorating his deceased father in conjunction with a place where such munificent work was carried on, I do not think the difference is very great. There was undoubtedly at one time a feeling that the passing of the National Health Service Act, 1946, made a clean break with the past and that hospitals and dispensaries in the future were not to be like those in the past, but, from many points of view, that is a completely fallacious idea. Although counsel have pointed out grave differences from the administrative point of view—and from the point of view of the ownership of the property of these charities the change is a fundamental one—I do not think from the point of view of the testator making a gift of this kind there is such a difference as would justify me in saying that there is no object of his bounty or that his gift has failed.

I agree that there is no general charitable intent, but, apart from the particular institution and the work carried on there, I think it follows from the two cases which I have quoted and on general principles that here the gift does not fail, but must be applied by paying it to the appropriate management committee, the hospital board not objecting, to be applied for the purposes of the particular infirmary and dispensary, which, I understand, is admittedly still in the same building and carrying on, so far as those who come to it for its assistance are concerned, just as before the Act was passed.

Order accordingly. Costs of all parties as between solicitor and client to be taxed and paid out of the estate in due course of administration.

Solicitors: *Ward, Bowie & Co.*, agents for *George Scott & Son*, South Shields (for the plaintiff); *Sidney Pearlman*, agent for *Grunhut, Grunhut & Makepeace*, South Shields; *Shaen, Roscoe & Co.*; *Hewitt, Woollacott & Chown*, agents for *Scott, Meikle & Pool*, Newcastle-on-Tyne; *Boyce, Evans & Sheppard*; *Neave & Neave*; and the *Treasury Solicitor* (for various defendants).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

LANGDON *v.* HORTON AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton, L.J., and Danckwerts, J.), December 6, 7, 1950.]

Rent Restriction—Death of tenant—“Member of tenant’s family”—First cousins—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (g).

At the date of the death of the statutory tenant of a dwelling-house to which the Rent Acts applied there were living with her, and had been so living for a period of twenty-nine years, two of her first cousins, the defendants, who were of substantially the same age as the tenant. In an action by the landlord for possession,

HELD : first cousins were not “members of the tenant’s family” within the ordinary, popular meaning of those words, and, therefore, the defendants were not entitled to the protection of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

Brock v. Wollams ([1949] 1 All E.R. 715), *applied*.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255.]

Cases referred to :

- (1) *Brock v. Wollams*, [1949] 1 All E.R. 715; [1949] 2 K.B. 388; 2nd Digest Supp.
- (2) *Jones v. Whitehill*, [1950] 1 All E.R. 71; [1950] 2 K.B. 204.
- (3) *Gammans v. Elkins*, [1950] 2 All E.R. 140; [1950] 2 K.B. 328.

APPEAL by the defendants from an order of His Honour JUDGE ARCHER, made at Hastings County Court, on Oct. 10, 1950, granting the landlord possession of a dwelling-house subject to the Rent Restrictions Acts. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

N. Lawson for the defendants, cousins of the deceased tenant.

L. A. Blundell for the landlord.

SIR RAYMOND EVERSLED, M.R.: On May 29, 1950, there died a Mrs. Mary Wakefield Prior, who, at the date of her death, was the statutory tenant of a dwelling-house within the compass of the Rent Acts, known as 33, Alma Villas, St. Leonard’s-on-Sea, Hastings. There were living with her then, and had been so living for twenty-nine years, two of her first cousins—two sisters, Miss Horton and Mrs. Selby, the defendants to the action. All three ladies were substantially of the same age. The question is whether, on the death of Mrs. Prior, the defendants can qualify for protection under the Rent Acts. That they can only do if it can be said of them that they are “members” of Mrs. Prior’s “family” within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

The word “family” is used here, if I may borrow the words used of the soldier in KING HENRY V, in a sense base, common and popular*. It is further established that the right approach is to consider whether, having regard to the facts, the defendants would qualify for protection by securing an affirmative answer to a question put in ordinary conversation by an ordinary man: “Were these ladies, at Mrs. Prior’s death, members of her family?” Observe that it is not sufficient to say that in some sense they and Mrs. Prior were all members of the same family. SINGLETON, L.J., pointed out early in the argument that the fact that for many years they had resided together cannot add much in this case, for under s. 12 (1) (g) residence constitutes a separate qualification. No doubt, as counsel for the defendants points out, the residence qualification

* Act IV, sc. 1 [PISTOL, addressing KING HENRY:] “. . . art thou officer? Or art thou base, common and popular?”

had a limiting effect which would prevent the more extravagant results which otherwise were liable to flow from the construction he put forward. I think, however, that in posing the question, which I have taken from its original formulation in *Brock v. Wollams* (1), there may be two distinct and rather different classes of case. The first is where the only really relevant consideration is that of blood relationship or consanguinity. The second is whether, apart from or in addition to consanguinity, there are special circumstances which require an affirmative answer to the material question.

An illustration of the second class is *Jones v. Whitehill* (2). The claimant there was a niece by marriage of the statutory tenant, but she had by her conduct assumed, as it were, a filial character, and it was in the light of those facts that this court concluded that she qualified within para. (g). I am not sure that certain passages in my own judgment may not have suggested a wider extension of this formula than is justified. Accordingly, the judgment should be read as meaning that I was not expressing any view on the general question whether nephews and nieces as such were within the compass of the formula. Another example of the second class of case, is *Brock v. Wollams* (1), where the claimant was an adopted child. An adopted child is clothed with all the characteristics of a child so far as the outside world is concerned, though it has no connection in blood with the adopting parents.

The present case, I venture to think, is of the first class. It must be determined by considering whether first cousins of the same generation, as these two defendants are, of the statutory tenant can be within the intendment of this phrase "the tenant's family." The matter is, perhaps, largely one of first impression, and I think the learned judge came to the right conclusion, for, if the consanguinity test is satisfied in the present case, it will extend the formula to relations of every degree, and, indeed, would mean that we were substituting for the word "family" in para. (g) the word "relations."

I would add that in one or two of the earlier cases the question was raised whether this is not a question of fact? I am not saying whether or not in the present case or in other cases it is a question of fact. There is much to be said for the view that it is a matter of the construction of the paragraph. On the other hand, where, as here, a county court judge has plainly put to himself the right question, and it is a matter of suggesting the answer that an ordinary man would give to a question put in ordinary conversation, I am disposed to think that this court should be a little slow to reverse him. If it is the policy of the Act to protect persons in the occupation of their homes, I think it also, in general, is the policy of the Act to leave for the determination of the county court the numerous difficult problems requiring, as has been said in connection with the word "reasonable," the application of a broad, common-sense, man-of-the-world view. On these grounds, therefore, as the question posed by the judge was right, I should be slow myself to differ on a matter of this kind from his conclusion. However that may be, I am of opinion that the judge came to a right conclusion, and this appeal must be dismissed.

SINGLETON, L.J.: Let it be noted that the question is not whether all three of these ladies were members of the same family, but is whether the two defendants were members of Mrs. Prior's family. *Prima facie*, I should not have regarded a cousin as a member of the family of another cousin. Yet decisions of this court provided counsel for the defendants with material for argument.

In *Jones v. Whitehill* (2) the defendant, out of love and kindness, went to live with her aunt and her aunt's husband. The aunt died about eighteen months later, and the aunt's husband after another five months or so. The husband had been tenant of the house, and the court held that the defendant was a member of the tenant's family having regard to the fact that she went out of love and kindness to live with the tenant and his wife and look after them in their declining years. At first sight it is not easy to see how Mrs. Whitehill became a member

of the tenant's family in whose house she lived for less than two years before he died and to whom she was not related by blood. It may be said that that decision is in accord with the test laid down by COHEN, L.J., in *Brock v. Wollams* (1) ([1949] 1 All E.R. 718), namely: Would an ordinary man, addressing his mind to the question whether the defendant was a member of the tenant's family, answer "Yes"? The test of COHEN, L.J., seems to me, if I may say so, apt to cover the case of a young relation, not born a member of the tenant's family, who is looked after from youth upwards by the tenant. Such a person may well be regarded as a member of the family, but the position is by no means the same if two middle-aged women decide to live together, or if one accepts an invitation to live in the house of the other, and they remain together for many years. In such a case I do not imagine that the ordinary man would regard the one as a member of the family of the other even if they were cousins.

Counsel for the defendants said that one must ask oneself, first, whether there is a relationship by blood or by marriage, and, if so, and if the one person is living with the other, would an ordinary man, addressing his mind to the question, answer that the one person was a member of the tenant's family? Counsel in that regard is adopting the test of relationship rather than the test laid down by Parliament. He was bound to admit that if for this purpose cousins could be regarded as members of the tenant's family, so must be half-cousins, or cousins twice removed, and, indeed, his argument went further. If one is to introduce the relationship test, cousins many times removed would have to be considered. That is not in accordance with the language of s. 12 (1) (g) of the Act of 1920.

In *Gammans v. Ekins* (3) ASQUITH, L.J., said ([1950] 2 All E.R. 141):

"Counsel for the landlord was right in saying that the material decisions limit membership of the same family to three relationships—first, that of children; secondly, those constituted by way of legitimate marriage between husband and wife; and, thirdly, relationships whereby one person becomes *in loco parentis* to another. Beyond that point the law has not gone."

Respectfully, I agree. Counsel for the defendants submitted that that was too narrow a view, and said that the three classes mentioned by the learned lord justice would not include brother and sister. I think they do, "first, that of children." One would look on them as children of the same parents. It seems to me in the present case that one must ask oneself: Were the two sisters members of their cousin's family? If they were not, they did not become so by living in her house for twenty-nine years. I do not see that one can say that a cousin is a member of another cousin's family merely because she is a cousin. They are members of the same family or stock in the sense that they have the same maternal grandparents, but that is all. The mere fact of cousinship does not make every cousin a member of another cousin's family. The fact that the defendants were residing with the tenant provides for one limb of s. 12 (1) (g) of the Act of 1920, but it cannot be said that they were members of her family even though they lived in the same house for many years. I agree that the appeal must be dismissed.

DANCKWERTS, J.: I also am of the same opinion. In *Brock v. Wollams* (1) COHEN, L.J., suggested that the meaning to be given to the word "family" in s. 12 (1) (g) of the Act of 1920 should be its popular meaning. That test has been approved in several decisions of this court, and it seems to me desirable that the application of that meaning should be maintained. How does that apply in the present case? There were three persons in this case living together who were of the same sex, of the same generation, and of approximately the same age. In my view, their consanguinity was not the decisive test. Rather they were living together for reasons of convenience, in which

respect this case resembles that mentioned by ASQUITH, L.J., in *Gammans v. Ekins* (3), when he referred to the case of two old friends sharing a residence for purposes of convenience. It seems to me that, taking into account the ordinary meaning of the word "family," the present case no more falls within s. 12 (1) (g) than would the case to which ASQUITH, L.J., referred. I, therefore, also think that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Field, Roscoe & Co.*, agents for *Herington, Willings & Penry-Davey*, Hastings (for the defendants); *Thomas Eggar & Son*, agents for *Young, Coles & Langdon*, Hastings (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

EDWARDS v. EDWARDS.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher and Collingwood, JJ.), November 6, 7, 27, 1950.]

Divorce—Re-hearing—Jurisdiction of Divisional Court—Application after decree absolute—No error in court of trial—Procedural regularity—Matrimonial Causes Rules, 1947 (S.R. & O., 1947, No. 523/L/9), r. 36.

A Divisional Court of the Divorce Division has no jurisdiction to entertain, under r. 36 of the Matrimonial Causes Rules, 1947, after the pronouncement of a decree absolute in a divorce suit, an application by a party to the suit for an order for the re-hearing of the suit, if the decree absolute has been pronounced in circumstances of procedural regularity.

Woolfenden v. Woolfenden ([1947] 2 All E.R. 653) and *Everitt v. Everitt* ([1948] 2 All E.R. 545), *distinguished*.

Prince v. Prince ([1950] 2 All E.R. 375), *explained*.

[AS TO APPEAL FROM DECREE ABSOLUTE, see HALSBURY, Hailsham Edn., Vol. 10, p. 775, para. 1226.]

Cases referred to :

- (1) *Peek v. Peek*, [1947] 2 All E.R. 578; [1948] P. 46; [1948] L.J.R. 833; *affmd.*, [1948] 2 All E.R. 297; 2nd Digest Supp.
- (2) *Kemp-Welch v. Kemp-Welch and Crymes*, [1910] P. 233; 79 L.J.P. 92; 102 L.T. 787; 27 Digest 442, 4543.
- (3) *Woolfenden v. Woolfenden*, [1947] 2 All E.R. 653; [1948] P. 27; [1948] L.J.R. 622; 2nd Digest Supp.
- (4) *Everitt v. Everitt*, [1948] 2 All E.R. 545; 2nd Digest Supp.
- (5) *Craig v. Kanssen*, [1943] 1 All E.R. 108; [1943] K.B. 256; 112 L.J.K.B. 228; 168 L.T. 38; 2nd Digest Supp.
- (6) *Meier v. Meier*, [1948] 1 All E.R. 161; [1948] P. 89; [1948] L.J.R. 436; 2nd Digest Supp.
- (7) *Prince v. Prince*, [1950] 2 All E.R. 375.
- (8) *Petty v. Petty*, [1943] 2 All E.R. 511; [1943] P. 101; 112 L.J.P. 97; 169 L.T. 224; 2nd Digest Supp.
- (9) *Crosland v. Crosland*, [1946] 2 All E.R. 91; [1947] P. 12; 175 L.T. 117; 2nd Digest Supp.
- (10) *McPherson v. McPherson*, [1936] A.C. 177; 105 L.J.P.C. 41; 154 L.T. 221; Digest Supp.
- (11) *Marsh v. Marsh*, [1945] A.C. 271; 2nd Digest Supp.
- (12) *Manners v. Manners and Fortescue*, [1936] 1 All E.R. 41; [1936] P. 117; 105 L.J.P. 26; 154 L.T. 271; Digest Supp.

APPLICATION by the wife for leave to apply out of time for the re-hearing of a petition for dissolution of marriage brought by her husband on the ground of desertion. In her notice of motion the wife contended that, though there had been no error at the hearing, she had been taken by surprise and had not received notice of trial. She also alleged that several matters relevant to the charge of desertion had not been brought before the court. The decree *nisi* was granted by Mr. Commissioner TEMPLE MORRIS, K.C., sitting at Newport on May 6, 1948, and it was made absolute on June 18, 1948. The facts appear in the judgment of PILCHER, J. A

William Latey, K.C., and Lerrmon for the wife.
Rowlands for the husband.

Cur. adv. vult.

Nov. 27. The following judgments were read.

PILCHER, J.: This is an application by a wife for leave to apply out of time for a re-hearing of an undefended suit in which, on May 6, 1948, her husband was granted a decree *nisi* by Mr. Commissioner TEMPLE MORRIS, K.C., on the ground of her desertion. The decree *nisi* was made absolute on June 18, 1948, and by her notice of motion the wife asks that this court, if satisfied that a re-hearing should be granted, should set aside the decree *nisi* and decree absolute granted to her husband. Her application is made under r. 36 of the Matrimonial Causes Rules, 1947, and she alleges that both the decrees were wrongfully obtained, although it is not suggested that any error was made by the judge who adjudicated on the suit. C

On Dec. 11, 1947, the husband filed a petition seeking the dissolution of his marriage on the ground of his wife's desertion. On Dec. 19, 1947, the petition was duly served on the wife by registered post together with a form of acknowledgment of service, forms of memorandum of appearance in duplicate, and a form of notice to appear. On Dec. 29 the wife completed and forwarded to the honorary secretary of the local poor persons' committee an application form to be permitted to defend the suit as a poor person. She completed the acknowledgment of service and the two duplicate forms of memorandum of appearance, and sent all these forms to the honorary secretary of the local poor persons' committee, a Mr. J. Alan Wilson, who also happened to be her husband's solicitor. She failed to send the form of notice to appear to the district registrar. Whether she ever completed this form is not known. If she did so, it may be that she also left this form with Mr. Wilson. On Feb. 19, 1948, she received a letter from Mr. Wilson in his capacity as honorary secretary of the poor persons' committee, stating that her application for a poor persons' certificate had been refused. In her completed memorandum of appearance the wife had written in answer to the question, "Do you intend to answer the petition?", the word "Yes." In her affidavit sworn in support of the present motion she says that, having handed all the papers in the case to Mr. Wilson, whom she knew to be her husband's solicitor as well as the honorary secretary of the poor persons' committee, she thought that her husband's petition would not be proceeded with until her defence was put in. She further states that she had no money to employ a solicitor. The next that she knew of the matter was when she read in a local paper of May 15 that on May 6 her husband had been granted a decree *nisi*. D E F G

It is clear that the wife was never notified that the case was to be tried. She had failed to comply with the instructions set out in the printed forms of memorandum of appearance and notice to appear and as a result the district registrar was unaware that she wished to appear and defend the case. Technically, and in fact, she had not entered an appearance, and, accordingly, she was not notified of the date of the hearing. It seems that Mr. Wilson had retained in the file dealing with the wife's application for a poor persons' certificate the duplicate forms of memorandum of appearance, in which the H

wife stated that she wished to defend the suit, instead of returning these documents to the wife, as he should have done, or forwarding them to the district registrar.

On hearing that her husband had been granted a decree *nisi*, the wife consulted solicitors, who, on June 9, wrote a letter to the King's Proctor in which, after setting out the above facts, they said :

"The respondent wishes to do whatever she can to prevent the decree *nisi* being made absolute, as she emphatically denies having deserted her husband, and although the petition alleges desertion since June, 1940, it is also disclosed that on Sept. 14, 1942, the court of summary jurisdiction at Blackwood, Mon., had made an order against the petitioner on the ground of wilful neglect to maintain, and for payment of £2 5s. 0d. per week, and, what is of importance, states in para. 4 of the petition that there has been no resumption of cohabitation since the making of the said order. We are informed by Mr. Wilson that the commissioner at the hearing had before him a copy of the order of 1942, but we cannot say how far the evidence went to support the plea of desertion since 1940 in face of the order of 1942.

The respondent informs us that at a previous court at Abertillery, Mon., on May 16, 1940, an order had been made against the petitioner on the grounds of persistent cruelty and neglect to maintain, and we have that order before us, but presumably there has been a resumption of cohabitation or the order of 1942 would not have been necessary. The respondent also informs us that after the order of 1942 the collecting officer of the court had to take proceedings more than once to enforce payment of the order, which we believe is considerably in arrear. We are also informed by the respondent that since the order of 1942 the petitioner had frequently visited her house, and intercourse had taken place, but he never slept there, nor was it in any way a matrimonial home so far as he is concerned, and on some occasions he paid her a little more than the amount payable under this order. So far no attempt has been made to get the order of 1942 rescinded.

We are not aware of any steps we can take to prevent the decree *nisi* being made absolute as the suit was, in fact, undefended, and it seems to us that only an intervention by you can lead to a proper investigation of the grounds upon which the decree *nisi* was granted. Something must be done before June 17, and we shall be grateful if you will let us know as early as possible whether you think fit to intervene."

To that letter the King's Proctor replied that more evidence would be required before he could intervene. On being informed that the King's Proctor could take no action, the wife wrote a personal letter to the commissioner on June 14, 1948, which contains the following paragraph:

"Mr. Dauncey, solicitor, has been in communication with the King's Proctor. He said he wanted more evidence before he could intervene. There is not enough time to get evidence before Thursday, June 17, as I am given to understand my husband will then have the decree made absolute. He has also committed adultery. My eldest son died at 16½ years, that boy never had a chance with him, and the eldest boy now has bad nerves. In my desperation I decided to write to you, as this is a very bad case of cruelty. I shall be very grateful if you will order a re-trial."

In due course the commissioner answered this letter, saying in effect that the matter was out of his hands. On June 18 the decree *nisi* was made absolute.

In her affidavit the wife states that in his petition her husband had failed to set out, as he should have done, a series of magistrates' orders dating from July, 1939, which she had obtained on the ground of her husband's desertion and persistent cruelty. She also refers to her husband's association with

another woman since 1942. She further states that from 1942 until Sept., 1945, although not living under the same roof as her, he visited her home and induced her to have marital intercourse with him. All these are matters which, if they had been brought to the attention of the commissioner, might well have influenced his mind and possibly led him to dismiss the husband's petition. At the date of the decree absolute the husband was still liable to pay maintenance for his wife and children under the magistrates' order of Sept. 14, 1942. On July 8, 1949, he applied to the magistrates to vary or discharge this order on the ground that since the date of the orders he had obtained a decree absolute against his wife. On this summons the amount payable under the order was reduced. In Oct., 1949, the wife took out a summons asking for the amount payable under the maintenance order to be increased. The husband took out a cross-summons asking for the order to be revoked, again on the ground that his marriage had been dissolved. The magistrates dismissed both summonses, whereupon the husband appealed to this court. The appeal was heard on Dec. 15, 1949, by a Divisional Court consisting of LORD MERRIMAN, P., and PEARCE, J., who varied the magistrates' order by discharging the order in favour of the wife while preserving that portion of the order which concerned the maintenance of the children.

In due course the wife applied for leave to file the present notice of motion. The application, being of an unusual nature, was referred to a Divisional Court consisting of LORD MERRIMAN, P., and HODSON, J. They gave leave to file the present notice of motion without prejudice to any question as to the wife being out of time in so doing.

It is not suggested that there was any error on the part of the commissioner in granting the husband a decree *nisi* on the evidence placed before him in what was, on the face of the papers, an undefended case in which no appearance had been entered. It is, in my opinion, equally clear on the undisputed facts, as they are now known, supplemented by the affidavit evidence of the wife, which for this purpose must be taken to be accurate, that this is a case in which this court would have had little hesitation in rescinding a decree *nisi* and ordering a new trial if application had been made under r. 36 of the Matrimonial Causes Rules, 1947, before a decree absolute had been pronounced. In this connection I need only refer to *Peek v. Peek* (1).

In the present case we are invited by the notice of motion to order a re-hearing of this divorce suit, and as a necessary incident to such an order to rescind, not merely a decree *nisi*, but a decree absolute. A decree absolute is a judgment *in rem* affecting the status of the parties. From the moment when it is pronounced either party to the dissolved marriage may, subject to any right of appeal, re-marry, and it is purely fortuitous that the husband in the present case has not re-married. In *Kemp-Welch v. Kemp-Welch and Crymes* (2) SIR SAMUEL EVANS, P., held that he had no jurisdiction to rescind a decree absolute on the motion of a co-respondent in the suit even on the ground that the verdict and decree *nisi* had been obtained by fraud. Counsel for the wife were only able to refer us to two decided cases in which the rescission of a decree absolute, once pronounced, had ever been ordered. In *Woolfenden v. Woolfenden* (3) the husband, against whom his wife had obtained a decree *nisi*, applied through his solicitors to the divorce registry for a decree absolute, and obtained a certificate that the decree *nisi* had been made absolute. This application was made before the earliest date upon which it was competent for the party against whom the decree *nisi* had been obtained to make such an application under s. 9 of the Matrimonial Causes Act, 1937. The application made in the registry was, moreover, defective in form, and no notice of it was served on the wife. In those circumstances BARNARD, J., held that the decree absolute so obtained was a nullity.

In *Everitt v. Everitt* (4) a husband applied by motion to the Court of Appeal

for leave to appeal against a decree absolute obtained by his wife, notwithstanding that the time for appeal had expired. The hearing of the motion was, by consent, treated as the hearing of the appeal. The husband's case was that he had never been served with the petition in the suit. The Court of Appeal invoked the assistance of the King's Proctor on the question whether they had jurisdiction, in the particular circumstances, to hear the appeal. After it had become apparent that the question of the jurisdiction of the court to entertain the appeal could not be solved until it was ascertained as a matter of fact whether the husband had or had not been served with the petition in the suit, the Court of Appeal themselves heard evidence directed to this point, and found as a fact that it was not established that the husband had ever been served with the petition. In this state of affairs the court held that the husband was not debarred by the provisions of s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, from appealing against the decree absolute obtained by his wife, inasmuch as he had not had "time and opportunity to appeal from the decree *nisi* on which the order was founded." The court, accordingly, gave the husband leave to appeal out of time, allowed the appeal, ordered the decree *nisi* and decree absolute to be set aside, and directed a new trial.

In that case, the petition never having been served, the decrees obtained were mere nullities. The Court of Appeal was satisfied that there had been no error on the part of the judge at the trial, and in the course of his judgment LORD MERRIMAN, P., said ([1948] 2 All E.R. 548):

"On the face of it, therefore, it might seem that r. 36 of the Matrimonial Causes Rules, 1944, covers this case, but there are two further points for consideration. First, whether, after a decree has been made absolute it is appropriate to describe an application to set it aside as an application for a re-hearing, or, in other words, whether r. 36 applies at all after a decree has been made absolute; and, secondly, however that may be, whether s. 31 (1) (e) of the Judicature Act, 1925, does not give a substantive right to appeal to the Court of Appeal from a decree absolute."

Later, after setting out the provisions of s. 31 (1) (e) of the Act of 1925, he said (*ibid.*):

"This provision, read positively, must mean that an appeal will lie from an order absolute for the dissolution of marriage in favour of a party who has not appealed from the decree *nisi* because he has not had the time and opportunity to do so. Manifestly, the lack of time and opportunity to appeal from the decree *nisi* may be due to a failure to serve the petition, so that the decree itself is a nullity: *Craig v. Kanssen* (5); but this need not be so. For example, a respondent who has been served may not have received notice of the hearing to which he is entitled if he has entered an appearance, and this, in turn, may be due either to a failure to give notice or to some accidental miscarriage. Or a respondent who has actually defended the suit may meet with an accident or be stricken with illness before he has been able to appeal. It is unnecessary to multiply examples. It seems to me that the legislature, in imposing this condition on the right to appeal against a decree absolute, cannot have intended to qualify it with reference to the nature of the particular circumstances in which the lack of time and opportunity to appeal against the decree *nisi* arose. In my opinion, this appeal from the decree absolute is placed by the legislature in a class by itself and is permitted whenever the statutory condition is fulfilled and not otherwise."

After referring to s. 184 (1) of the Judicature Act, 1925, which provides for the re-marriage of divorced persons, he said (*ibid.*, 549):

"It may be that the legislature intended that a decree absolute could only be set aside by appeal to the Court of Appeal, and that to avoid uncertainty

in connection with re-marriage, a motion to a judge under the inherent jurisdiction of the court and an application to the Divisional Court under r. 36 are alike ruled out."

This is, apparently, the first occasion on which the Divisional Court has been moved under r. 36 to order a re-hearing of a suit after decree absolute. It is also clear by inference that the Court of Appeal has jurisdiction under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1) (e), to entertain an appeal even after decree absolute when the party against whom the decree *nisi* has been made has not had time or opportunity to appeal against such decree. As LORD MERRIMAN, P., points out in one of the passages I have quoted, there may be cases in which the party against whom the decree *nisi* has been pronounced, although served with the petition, has not received notification of the trial, and, perhaps, does not become aware that his case has been determined until after the decree absolute has been pronounced. The proceedings and the orders made in such circumstances could not be said to have been mere nullities, as in *Everitt v. Everitt* (4). Examples of cases of this type readily spring to the mind, in which it would be clear that there had been no error on the part of the judge and in which the party against whom the decree *nisi* had been pronounced could successfully move the Divisional Court for a re-hearing under r. 36, provided that no decree absolute had been pronounced. LORD MERRIMAN, P., in the passage I have quoted above, questions whether it is appropriate to describe an application to set a decree absolute aside as an application for a re-hearing, but leaves the point open, as it was not necessary to decide it in *Everitt v. Everitt* (4).

We were supplied with a transcript of the judgment delivered on Dec. 15, 1949, by the Divisional Court on the husband's appeal in the present case against the magistrates' refusal to discharge the maintenance order made in his wife's favour. At that hearing the Divisional Court were supplied with some at least of the information which we had before us as to the facts of the case. In the course of his judgment in that case LORD MERRIMAN, P., referred to the various courses which might be open to the wife, as follows :

"We are told that there were circumstances . . . which might conceivably . . . have led this court to listen sympathetically to an application under r. 36 of the Matrimonial Causes Rules to set aside a decree *nisi*. And although, of course, I am expressing no sort of opinion as to what would have happened if a prompt application had been made to the Court of Appeal after the pronouncement of the decree *nisi*, for by that time, of course, jurisdiction in this Division is ousted, and still less any sort of opinion about what may happen if any such application is now made to the Court of Appeal . . ."

In the above passage it is probable from the context that the word *nisi* is an error for absolute. Later in his judgment LORD MERRIMAN, P., said :

"Either this woman does or does not make an application to the Court of Appeal to set the decree absolute aside."

None of those observations by LORD MERRIMAN, P., was necessary for the decision of the point before the court, and he made it clear that he did not express any concluded opinion as to what action, if any, was open to the wife in this case to get the decrees pronounced set aside.

It is clear that, having been duly served with the petition, she cannot hope to contend successfully that the decrees pronounced in her husband's favour are mere nullities. It is equally clear on the admitted facts that she cannot hope to contend successfully that she has a right to appeal to the Court of Appeal against the decree absolute under s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, because, on the admitted facts, she had abundant time and opportunity to appeal against the decree *nisi* if she had taken the

appropriate steps. *Meier v. Meier* (6) decided that the Court of Appeal has no power under its inherent jurisdiction to set aside a decree absolute obtained in circumstances of procedural regularity. It is equally clear that this court has no such power.

A While I feel some sympathy with the wife, I do not forget that she is largely the author of her own misfortunes, because she either failed to read, or, if she read, failed to comply with, the instructions set out in the printed forms of memorandum of appearance and notice to appear. It was in the circumstances unfortunate that the King's Proctor, after receiving a full account of the facts, many of which are not now in dispute, did not feel able to intervene. It was also unfortunate that the wife's solicitors did not, before the decree *nisi* was made absolute, file a notice of motion for a re-hearing under r. 36. None of these matters, however, has any bearing upon the point we have to decide.

B In the recent case of *Prince v. Prince* (7) the Court of Appeal, affirming a decision of a Divisional Court of this Division, decided that r. 36 of the Matrimonial Causes Rules, 1947, was intended, or ought to be treated as having intended, to give or preserve to the Divisional Court the right to order a new trial or re-hearing in cases in which the parties would not in the ordinary course be entitled to appeal to the Court of Appeal. That case only dealt with the

C situation obtaining before the pronouncement of a decree absolute. If it be permissible to draw any inference from the decision in *Prince v. Prince* (7), on what the situation might be after the pronouncement of decree absolute, it would seem that, inasmuch as the Court of Appeal has jurisdiction in an appropriate case to entertain an appeal after decree absolute, the jurisdiction of this court to entertain such an appeal is excluded.

D After careful consideration of all the authorities I am well satisfied that it is not competent to a party after the pronouncement of a decree absolute to apply successfully to this court under r. 36 of the Matrimonial Causes Rules for the re-hearing of a suit in which a decree absolute has already been pronounced in circumstances of procedural regularity. The wife's application in this case will, therefore, be dismissed.

E **COLLINGWOOD, J.:** It was conceded by counsel for the husband that, had the wife applied to the court for a re-hearing under r. 36 of the Matrimonial Causes Rules, 1947, before the decree had been made absolute, it would have been difficult to contend that she would not have been entitled to succeed. Having regard to the contents of her affidavit as to merits and the judgments

F in *Petty v. Petty* (8), and *Peek v. Peek* (1) I think this view was well-founded. It was, however, contended on behalf of the husband that, the decree having been made absolute, this court had no jurisdiction to make the order asked for.

The effect of a decree absolute, as affecting the right of a divorced person to re-marry, is set out in s. 184 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides that:

G "As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed."

H Further, by s. 31 (1) (e) :

"No appeal shall lie . . . from an order absolute for the dissolution or nullity of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* on which the order was founded, has not appealed from that decree."

The effect of a decree absolute was considered in *Crosland v. Crosland* (9). That was an application by the intervener to rescind a decree absolute after it

had been pronounced by the judge in court, but before it had been filed in the registry, on the ground of the non-disclosure by the petitioner of his own adultery. WALLINGTON, J., said:

"I am quite satisfied . . . that when the judge in court has with his lips pronounced a decree absolute, there is an end of the matter, and that the steps which are taken subsequently to that pronouncement are merely ministerial acts which have no relation to the validity of the decree . . . The result . . . is that even though there may have been fraudulent concealment of vital facts throughout the whole of the proceedings of a petition, down to the very moment of the pronouncement of the decree absolute, when once the decree absolute has been pronounced the court is helpless; and the right of appeal is a limited right . . ."

These observations must clearly apply with equal force to the effect of a decree which became absolute under r. 40 of the Matrimonial Causes Rules, 1947, on the filing of the requisite notice of application in the registry.

The powers of the Court of Appeal in regard to setting aside a decree absolute were considered in *Meier v. Meier* (6). In that case a wife who had obtained a decree *nisi* obtained an order for security for her costs of an appeal by her husband, and the Court of Appeal directed that security be provided by a specified date, and that, in the event of failure by the husband to provide such security, the appeal should stand dismissed. Owing to a mistake on the part of the husband's solicitor, payment of the security was not made by the specified date, with the result that the appeal against the decree *nisi* stood dismissed and in due course the decree was made absolute. The husband applied to the Court of Appeal to set aside the decree absolute and reinstate the appeal. In dismissing the application SCOTT, L.J., after referring to the sections of the Judicature Act, 1925, which I have quoted, said ([1948] 1 All E.R. 162):

"The policy of Parliament requires that a decree absolute should be protected unless there is some ground on which the court could reasonably exercise its inherent jurisdiction to vary the order in the interests of justice."

SOMERVELL, L.J., said:

"The question is whether the court has jurisdiction to deprive a party of rights lawfully acquired under an order of the court in circumstances of the most complete regularity on the part of the party whom the court is asked to deprive of her rights. It may well be that there is inherent jurisdiction to do this, but . . . I should want specific authority on the point. There is no such authority, and that fact weighs very strongly against the submission that such a jurisdiction exists. In principle, I think it is impossible to imply such a jurisdiction . . ."

EVERSHED, L.J., said:

"... the present case is not merely concerned with the variation or the modification of the form of an order as such, but relates to a particular order under which, in the events which have happened, a pending appeal properly stood dismissed and the petitioner in the divorce proceedings acquired the status of a person in whose favour a decree absolute for divorce had been granted. To justify this court in taking the step of putting back the clock would require something more than a variation of its order under its inherent jurisdiction."

In *McPherson v. McPherson* (10) the respondent wife sought to have decrees *nisi* and absolute, which had been obtained against her by her husband in Alberta, set aside on the ground, *inter alia*, that at the trial of the divorce the proceedings had not been held in open court and that the resultant decrees *nisi* and absolute were null and void. It was held by the Judicial Committee of the Privy Council that the result of this irregularity in procedure was not to render the super-

vening decrees void, but voidable only, and that, as the time for appealing against the decree absolute had expired, and further, that the petitioner had acquired a new status by re-marrying, the decree absolute, though originally voidable, had become unassailable. *Marsh v. Marsh* (11) is a further illustration of the principle that where there has been a defect in procedure which has not caused a failure of natural justice, the resulting decree is voidable only, and not wholly void.

A In two cases only, apparently, has a decree absolute been rescinded. The first of them is *Woolfenden v. Woolfenden* (3), where the wife was granted a decree *nisi* on the ground of desertion. The husband applied for the decree to be made absolute, and his application failed to comply with the Matrimonial Causes Rules, 1947, r. 40 (3), under which it was made, in that there was no summons taken out, no notice whatever was served on the wife, and application was made before the expiration of the time required by s. 9 of the Matrimonial Causes Act, 1937. The wife moved the court to treat the making of the decree absolute as a nullity, and to set aside the certificate under the seal of the registry. In his judgment, BARNARD, J., after referring to *McPherson v. McPherson* (10) as an instance of irregularity in procedure which rendered the decree voidable only, said ([1947] 2 All E.R. 655):

C “I have also been referred, by counsel for the wife, to *Craig v. Kanssen* (5) in which it was held ([1943] K.B. 256) that ‘... Failure to serve process where service of process is required renders null and void an order made against the party who should have been served. The court can set aside such an order in its inherent jurisdiction, and it is not necessary to appeal from it.’ LORD GREENE, M.R., after citing a number of authorities, stated (*ibid.*, 262), in his judgment: ‘Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. In view of the fact that the husband has not complied with the statute, I have come to the conclusion that I cannot treat the making of this decree absolute as a mere irregularity, and I must treat it as a nullity.’

D [His LORDSHIP cited the extracts from the judgment of LORD MERRIMAN, P., in *Everitt v. Everitt* (4) which were cited by PILCHER, J. (*ante*, p. 68), and continued:] On July 8, 1949, after the decree in this case had been made absolute, the husband applied to the justices to revoke the order for maintenance which his wife had obtained against him in 1942, and this application having been refused, he appealed to the Divisional Court. We have had the advantage of seeing the transcript of the judgment in that appeal, which was heard on Dec. 15, 1949. In his judgment the learned President refers to the failure on the part of the husband to disclose in his petition the four appearances before the magistrates prior to that which he did disclose—the order of 1942—and he went on to say:

G “The fact remains that at the present time this decree absolute on the ground of desertion, with all the implications which follow from a finding of desertion, stands ... In my opinion, really it boils down to this simple point: either this woman does or she does not make an application now to the Court of Appeal to set the decree absolute aside.”

H We were referred to the decision of the Court of Appeal in *Prince v. Prince* (7). This was an appeal from the decision of the Divisional Court that that court had no jurisdiction to entertain an application for a re-hearing under r. 36 where the petitioner alleged that after the dismissal of his petition new evidence had been discovered tending to show that his wife had committed adultery. The Court of Appeal held that r. 36 of the Matrimonial Causes Rules, 1947, was intended, or ought to be treated as having been intended, to give or preserve to a Divisional Court the right to order a new trial or re-hearing in cases in which

the parties would not in the ordinary course be entitled to go to the Court of Appeal. By the provision in the rule that an application for the re-hearing of a cause where "no error of the court at the hearing is alleged" shall be made to the Divisional Court of the Probate Division, it was intended to exclude all cases in which an aggrieved party might seek, upon application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the trial or hearing in the court below.

I am unable to derive from the judgment of SIR RAYMOND EVERSHED, M.R., in that case support for the contention that this court has jurisdiction to rescind the decree absolute in the present case. In the present case it is not suggested that the decree absolute was a nullity, either by reason of failure to comply with statutory requirements which were conditions precedent to the right to the decree, as in *Woolfenden v. Woolfenden* (3), or as being the result of a procedural irregularity which caused a failure of natural justice, as in *Everitt v. Everitt* (4). So far as procedural requirements on the part of the petitioner are concerned, there is no ground for complaint. In my opinion, having regard to the judgments to which I have referred, there is no power in this court to set aside the decree absolute and order a re-hearing in the present case. I agree that the application should be dismissed.

Application dismissed without costs.

Solicitors: *Kinch & Richardson*, agents for *W. Ebsworth*, Bargoed (for the wife); *Gibson & Weldon*, agents for *D. J. Treasure & Co.*, Pengam (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

CLIFFORD v. CHARLES H. CHALLEN & SON, LTD.

[COURT OF APPEAL (Cohen, Asquith and Denning, L.JJ.), December 1, 4, 1950.]

Master and Servant—Duty of master—Provision of safe system of working—Dermatitis contracted through use of synthetic glue—Protective cream kept in store, but not in workshop—No insistence by foreman on its use.

A workman, who was employed by radio and piano manufacturers in their piano fitting shop, had to use synthetic glue in sticking pieces of wood together. It was well known that this glue could cause dermatitis if allowed to dry on the skin, and that a protective cream should be applied to the hands before starting work and that the hands should be washed if, during work, any glue got on to the skin. These precautionary measures were set out in a government notice on the danger of dermatitis from synthetic glue, and a copy of the notice was put up in the employers' radio cabinet shop, where the workman had been employed for the first six months of his service with the employers and where the protective cream was brought to the men and regularly used by them. The cream was kept in the factory store, to which the workmen had access, but none was kept in the piano fitting shop. The foreman of this shop did nothing to enforce the use of the cream or to encourage the men to use it, and none of them used it. The workman contracted dermatitis from using the glue and claimed damages from the employers on the ground that his injury resulted from their having failed to supply a safe system of working.

HELD: the protective cream should have been provided in the shop itself, and a system should have been established whereby the men used it in accordance with the government notice; by failing to take these measures, the employers were guilty of a breach of duty to the workman,

and were liable to him in damages; but the workman was guilty of contributory negligence, and, therefore, the amount of damages should be borne by the parties equally.

Per COHEN, L.J.: "Where an employer is making use of a dangerous process, it is not enough for him to have available somewhere in the factory the appliances necessary to minimise the danger. The system of working must be one in which the appliances are available at the place where they are needed, and the man in charge of the work should be responsible for seeing, so far as he can, that the workers make use of the appliances provided."

Per DENNING, L.J.: "When [an employer] asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must, therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself."

[AS TO MASTER'S DUTY TO PROVIDE A SAFE SYSTEM OF WORK, see HALSBURY, Hailsham Edn., Vol. 22, pp. 187-190, paras. 313-317; and FOR CASES, see DIGEST, Vol. 34, pp. 194-198, Nos. 1583-1623.]

Case referred to:

(1) *Finch v. Telegraph Construction & Maintenance Co., Ltd.*, [1949] 1 All E.R. 452; 2nd Digest Supp.

APPEAL by the workman from an order of SELLERS, J., dated June 22, 1950, dismissing an action by him against his employers claiming damages for negligence.

The workman contracted dermatitis from using synthetic glue at his work, and he contended that the employers had not taken sufficient precautions to prevent him contracting the disease. The learned judge held that the employers were not guilty of any breach of duty. The facts appear in the judgment of DENNING, L.J.

Edgedale, K.C., and *C. J. A. Doughty* for the workman.

Beney, K.C., and *Stephen Chapman* for the employers.

COHEN, L.J.: I will ask DENNING, L.J., to deliver the first judgment.

DENNING, L.J.: In 1949 the workman suffered from dermatitis, which was caused by his working with a synthetic glue while he was employed by the defendants, who are manufacturers of radio sets and of pianos. He used to get the glue on his hands when he was sticking pieces of wood together, and his case is that the employers did not take sufficient precautions to prevent him contracting dermatitis. The principal points that he makes are (a) that they did not provide a special protective cream called "barrier cream," and (b) that they did not provide running water for him to wash with.

The case raises questions of some importance as to the proper duty of employers in regard to the use of synthetic glue. This substance was much used during the war in the making of aircraft. It has special advantages over other glue because it can withstand extremes of climate, but it is likely to produce dermatitis if it is allowed to dry on the skin. In consequence, in 1943 a notice was issued by His Majesty's Stationery Office about the danger of dermatitis from synthetic glue. I do not know that the notice has any statutory effect. At any rate, we were not referred to any statute about it. I expect that it was originally put up in government workshops where aircraft were made, but the notice has since been recognised, both by the manufacturers of the glue

and by outside employers who use it, as laying down the proper precautions which ought to be taken when synthetic glue is used. It affords, therefore, a safe basis on which the common law can build, because the courts will certainly have regard to any failure to take those precautions. The notice, so far as material, runs as follows:

"Dermatitis from glues (synthetic). Cautionary Notice. N.B. Glue must not be allowed to dry on the skin. Dermatitis is an inflammation of the skin starting with redness and irritation. Some of the ingredients of synthetic (chemical) glues and hardeners may cause dermatitis, but this can generally be avoided by taking the following precautions. Before starting work: (i) After washing, dry the hands and apply the special barrier preparation (skin protective) provided. Re-apply after each washing. At work: (ii) Roll the sleeves down and fasten them at the wrists; the arms are then protected. (iii) Never allow glue (especially if mixed with the hardener) to dry on the skin. Wipe it off at once with the damp swab provided. Wash using the special soap if the amount of glue on the skin is more than a trace."

In 1946 the workman went to the employers as a "trainee." He went into the radio cabinet shop for about six months, and then, for the remaining three years of his service with them, he was in the piano fitting shop where upright pianos were being fitted together. It was common knowledge in the works that there was a danger of skin disease from the use of the glue and that it was necessary to take precautions against it. The plaintiff himself knew of this danger and knew the precautions which should be taken. Indeed, in the radio shop where he first worked the government notice was put up, and he himself read it. In that shop barrier cream was provided. Women brought it from the store for the men to use, and there were two buckets of water to wash with. In the piano fitting shop, however, where the workman went after his first six months, the notice was not up, there was no barrier cream, and there was only one bucket of water. The barrier cream was kept in the factory store. The workman and the other men in the piano fitting shop could have got the cream from the store if they had wished, but in that shop none of them used it. A significant phrase was used by the foreman of the shop. When he was asked: "Was the barrier cream popular?" he said: "I do not think so. I was not a great believer in it myself." The foreman said that the one bucket of water in that shop got very dirty and he had to complain about it. He eventually got a second bucket, but the workmen used it for washing rags and so they reverted to one bucket for washing hands.

On those facts, the question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. To discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them, he must set in force a proper system by which they use the appliances and take the necessary precautions, and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become careless about taking precautions. He must, therefore, by his foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself.

The first point is in regard to the barrier cream. Did the employers fulfil their duty by keeping it in the store and leaving it for the workmen to fetch it from the store if they wished? No containers were provided for fetching it. If a workman did not have a small tin or jar of his own, he could get the cream from the store on a piece of greaseproof paper and then take it back to the

shop, and there apply it and so protect himself. None of them, however, did it in this shop. The foreman did not insist on it—as he said, he was not a great believer in it himself. In these circumstances, I cannot bring myself to believe that the employers fulfilled their duty to the workman. They should, at least, have done in the fitting shop the same as they did in the radio shop, namely, provide the barrier cream in the shop itself, and the foreman should have seen, as far as he could, that the workmen used it. The facts are rather like those in *Finch v. Telegraph Construction & Maintenance Co., Ltd.* (1), where workmen were left to ask for goggles if they wanted them, and DEVLIN, J., held that there was no proper system.

The second point is about the water. It was said that a bucket in the workshop was not sufficient, and that the employers should have provided running water in the shop itself. I do not think that the employers were guilty of any breach of the Factories Act, 1937, s. 42. That is one of the “welfare provisions” requiring that proper facilities shall be provided for washing, including soap and towels, and it is not one of the safety provisions. In this factory there was sufficient provision for ordinary washing purposes. There was a lavatory with wash-basins, soap and towels, where the workmen could wash. For ordinary welfare purposes the employers performed their duty. The only question with regard to the water is, therefore, whether the employers fulfilled their common law obligations. They provided a bucket in the workshop and the men were at liberty to change the water in the bucket by going down a few steps and getting hot water from a boiler outside. As it was very important that the men should wash off any glue from their hands before it got dry, I am not sure that the employers ought not to have provided running water actually in the shop, but, in view of the very close proximity of the boiler, I am not prepared to differ from the learned judge on the point.

I rest my judgment, therefore, on the barrier cream. It should have been provided in the shop itself, and a system should have been established whereby the men used it in accordance with the government notice. That not having been done, the employers were guilty of a breach of duty to their men, and it is a plain inference that that breach of duty was one of the causes of the dermatitis from which the workman suffered.

The remaining question is: Was the workman himself guilty of contributory negligence? The judge did not consider this question, because he thought that the employers had not been guilty of any breach of duty. I think that the workman was negligent. He knew that the glue was dangerous, and he knew what precautions ought to be taken, but he did not take them. He knew that he could get the barrier cream by going to the store, and yet he did not get it. The employers ought, no doubt, to have had it in the workshop, but I do not think that the workman can be acquitted of all responsibility on that account. The employers must take care of the men, but the men must also take care of themselves. The fact that all the men in the shop were negligent does not exempt any one of them from responsibility for his own negligence. The question then arises: In what proportion ought the workman and the employers to share responsibility? On the whole, I think that they should share it equally. The amount of damages which the judge has assessed should be borne by the parties equally.

COHEN, L.J.: I will ask ASQUITH, L.J., to deliver the next judgment.

ASQUITH, L.J.: I have come to the same conclusion as DENNING, L.J., has, and after similar hesitation. On balance, I think that, by a small margin, and subject to contributory negligence on his part, the workman has succeeded in discharging the burden on him of showing that his injury resulted from want of a safe working system on the part of the employers. The causes of my doubts were the following. (i) We start from a finding of fact that the workman had read the warning notice in the radio department which directed him,

inter alia, to use barrier cream as a prophylactic when handling synthetic glue. (ii) As he knew when he was in the radio shop that this glue was a dangerous material, it is difficult to see how, or why, when he handled exactly the same glue in a different department of the same factory, he should have supposed that it should have lost its dangerous character and that the precautions enjoined were no longer necessary. There is, again, the fact that there was no difficulty, as he well knew, in procuring the barrier cream from the store. When all due allowance has been made for these factors, however, the foreman's evidence that he did nothing on his part to enforce or encourage the use by the men under his charge of this barrier cream, in which he admits he had no particular faith, seems to me to point to want of a safe working system. When some precaution is omitted which a safe working system would enjoin, and injury ensues to a workman of the kind which might be expected to ensue owing to the omission of that precaution, then there is a presumption that the injury did in fact result from the omission. Therefore, it seems to me that the workman has proved his case, but I feel no doubt whatever, for the reasons given by DENNING, L.J., that he was guilty of contributory negligence, and I agree with the proportion suggested for the apportioning of the responsibility.

COHEN, L.J.: I am of the same opinion. Where an employer is making use of a dangerous process, it is not enough for him to have available somewhere in the factory the appliances necessary to minimise the danger. The system of working must be one in which the appliances are available at the place where they are needed, and the man in charge of the work should be responsible for seeing, so far as he can, that the workers make use of the appliances provided. It seems to me, from evidence given on behalf of the employers, that they recognised that the man in charge should be responsible for seeing that the precautions indicated in the government notice were carried out, and it is quite plain from the evidence of the man in charge that he did not discharge that duty. For these reasons I agree that the appeal should be allowed and the order made as proposed by DENNING, L.J.

Solicitors: *Shaen, Roscoe & Co.* (for the workman); *Goldingham, Wellington & Co.* (for the employers).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

POTTS' EXECUTORS *v.* INLAND REVENUE COMMISSIONERS.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord MacDermott), November 20, 21, December 14, 1950.]

Surtax—Settlement—Sums paid to settlor otherwise than as income—Body corporate connected with a settlement—Loans to settlor by body corporate—Payments made by company to third parties on behalf of settlor—Finance Act, 1938 (c. 46), s. 40 (3), s. 40 (5) (a) (i).

By the Finance Act, 1938, s. 40 (1), any capital sum paid, directly or indirectly, by trustees of a settlement to the settlor is to be treated as income of the settlor to the extent of the available income arising under the settlement. Section 40 further provides: "(3) For the purpose of this section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year . . . (5) . . . in this section—(a) the expression 'capital sum' means—(i) any sum paid by way of loan or repayment of a loan; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money's worth . . ."

On Mar. 31, 1939, P. made a settlement of a sum of money on his infant grandchildren, and on Apr. 25, 1939, the trustees of the settlement invested the money in the purchase from P. or his nominees of the whole of the issued share capital, save one share, of a company of which P. was governing director and which was admitted to be a "body corporate connected with the settlement" within the meaning of s. 40 (3). P. had had for many years prior to the settlement, and continued to have after the date of the settlement, an arrangement with the company whereby it paid various accounts on his behalf, such as certain charitable subscriptions, and tax, debiting his account in the company's books with the sums so paid, and crediting his account with director's fees and expenses due to him and payments which he made to the company in discharge of his indebtedness. In the tax years 1939-40 and 1940-41 the company made payments at P.'s request exceeding the available income of the settlement, and P.'s executors (P. having since died) were assessed to surtax in respect of the amounts so paid.

HELD (LORD MORTON OF HENRYTON *dissentiente*): on the true construction of s. 40 (5) (a) (i), the company did not make the payments in question "by way of loan" to P., and they did not, therefore, constitute a "capital sum" within s. 40 (3), and, although the words "directly or indirectly" were to be read into s. 40 (3), the words "paid to the settlor" were not thereby so enlarged as to include payment to some person other than the settlor for that person's own use and benefit.

Decision of the COURT OF APPEAL ([1949] 2 All E.R. 555), *reversed*.

Per LORD NORMAND: In a taxing Act designed to prevent tax evasion by affecting with liability to tax sums paid to a settlor otherwise than as income, it was obviously necessary to provide for the case when persons accountable to the settlor are interposed between the payer and the settlor for the purpose of disguising the transaction. That is a satisfactory explanation of the use of the words "directly or indirectly." There is, therefore, no reason for extending the meaning of "indirectly" so as to include payments to third parties which the settlor has an interest to make.

[FOR THE FINANCE ACT, 1938, s. 40, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 414.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Westminster (Duke)*, [1936] A.C. 1; 104 L.J.K.B. 383; 153 L.T. 223; *sub nom. Westminster (Duke) v. Inland Revenue Comrs.*, 19 Tax Cas. 490; Digest Supp.
- (2) *Parsons v. Equitable Investment Co., Ltd.*, [1916] 2 Ch. 527; 85 L.J.Ch. 761; 115 L.T. 194; 7 Digest 49, 256.
- (3) *Stott v. Shaw & Lee*, [1928] 2 K.B. 26; 97 L.J.K.B. 556; 139 L.T. 302; Digest Supp.
- (4) *Brooks & Co. v. Blackburn Benefit Society*, (1884), 9 App. Cas. 857; 54 L.J.Ch. 376; 52 L.T. 225; 7 Digest 487, 199.
- (5) *Partington v. A.-G.*, (1869), L.R. 4 H.L. 100; 38 L.J.Ex. 205; 21 L.T. 370; 18 Digest 35, 344.
- (6) *B. S. Lyle, Ltd. v. Chappell*, (1931), T.L.R. 562; *revsd. on other grounds*, [1932] 1 K.B. 691; Digest Supp.
- (7) *Cuthbert v. Robarts, Lubbock & Co.*, [1909] 2 Ch. 226; 78 L.J.Ch. 529; 100 L.T. 796; 3 Digest 261, 788.

APPEAL by the taxpayers from an order of the Court of Appeal dated July 26, 1949, reported [1949] 2 All E.R. 555, allowing an appeal by the Crown from an order of SINGLETON, J., dated July 26, 1948, whereby he discharged assessments to surtax for the financial years 1939-40 and 1940-41 which had been confirmed by the Special Commissioners. The facts appear in the opinion of LORD SIMONDS, and are summarised in the headnote.

Grant, K.C., Talbot, K.C., and D. C. Miller for the taxpayers.
Pennyquick, K.C., and R. P. Hills for the Crown.

The House took time for consideration.

Dec. 14. The following opinions were read.

LORD SIMONDS: My Lords, this appeal raises a question on the Finance Act, 1938, s. 40, a section which has not previously been considered in this House. Before I refer to its provisions, I will state the relevant facts.

The late G. W. Potts was, until April, 1939, the owner of substantially the whole of the share capital of G. W. Potts, Ltd., which consisted of fifty thousand shares of £1 each. He was also governing director of the company receiving each year £5,000 as remuneration, and £1,500 for expenses. He had for many years before 1939 a current account with the company in which he was credited with his remuneration and expenses and debited with payments made by the company at his request sometimes to third parties and sometimes to himself. In 1936 he formed the Carron Trust, Ltd., a trust company with a capital of £100 divided into one hundred shares of £1 each. He held all these shares by himself or his nominees, but was not a director of the company. On Mar. 31, 1939, he, as settlor, executed a settlement of which Carron Trust, Ltd., was trustee and paid to that company as trustee £150,000 on trust to be invested at the trustee's sole discretion and to be held (subject to certain powers therein mentioned) on trust for accumulation for the benefit of four named infant grandchildren of the settlor in the manner therein mentioned. On Apr. 25, 1939, the trustee company as trustee of the settlement bought from the settlor or his nominees 49,999 fully paid shares of £1 each in G. W. Potts, Ltd., at £3 each. It has been throughout admitted that this company was a "body corporate connected with the settlement" within the meaning of the Finance Act, 1938, s. 40 (3).

I have said that the settlor had a current account with this company. It appears that at the end of 1935, after being debited with various sums, including subscriptions to charities, payments of tax and weekly cash drawings, he was in credit in the sum of £2,612 4s. 7d. which was carried forward to 1936. At the end of 1936 he was similarly in credit in the sum of £1,377; at the end of 1937 the account was exactly square; at the end of 1938 he had a credit of £1,316, but at the end of 1939, largely owing to the payment by the company on his behalf of a large sum for surtax, he was in debit in the sum of £8,850. At the end of 1940 the account was again square, but during that year the company had paid very large sums on his behalf, including £28,000 for surtax, and he was largely in debit until on Dec. 23, 1940, he paid £32,570 to the company. On the same day he resigned his directorship of the company. He was at all material times a rich man and had ample liquid resources to pay all that he owed to the company. It has not been suggested that the transactions between himself and the company were in any way colourable or a device for the evasion of tax. The only other fact that I need mention is that the company, whose primary business was that of meat salesmen, had power under cl. 3 (I) of its memorandum of association to make advances as well to any director as to customers and others with or without security and on such terms as the company might approve and generally to act as bankers for customers and others, and under cl. 3 (L) to invest and deal with the moneys of the company not immediately required in or on such securities and in such manner as might from time to time be determined in the absolute discretion of the directors. I mention these powers because on them, and particularly the first of them, the Crown relied.

It was in these circumstances that, the settlor having then died, additional assessments to surtax were made on his executors in the sum of £50,107 for the year ending Apr. 5, 1940, and in the sum of £19,924 for that ending Apr. 5,

1941. These figures were subsequently adjusted and became respectively £55,383 and £5,426 and, after a further adjustment, £50,583 and £5,470. The assessments were made on the footing that these sums represented capital sums paid directly or indirectly to the settlor by the trustee of the settlement. It is time then to turn to the section which is said to have such a result. No question arises in regard to the *quantum* of the assessment, the only matter in dispute being whether the sums, with which the settlor was credited in the current account already mentioned, were capital sums on which the section operated. It will be necessary, therefore, to refer to a few provisions only of the section.

The Finance Act, 1938, s. 40, so far as relevant provides:

“(1) Any capital sum paid directly or indirectly in any relevant year of assessment by the trustees of a settlement to which this section applies to the settlor shall—(a) to the extent to which the amount of that sum falls within the amount of income available up to the end of that year, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year; . . . (3) for the purpose of this section, any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year. (5) . . . in this section—(a) the expression ‘capital sum’ means—(i) any sum paid by way of loan or repayment of a loan; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money’s worth; . . .”

It is, as I have already said, admitted that the company is a “body corporate connected with the settlement” and it follows that the validity of the assessment to which I have referred depends on the nature of the relevant transactions between the settlor and the company. There was, in the first place, some argument whether the words “directly or indirectly” which occur in sub-s. (1) are to be read into sub-s. (3). In my opinion, they clearly are, for the purpose and effect of that sub-section are merely to substitute payment by a body corporate connected with the settlement for payment by the trustees of the settlement. In other respects the measure of liability is intended to be the same.

The question, then, is whether the sums with which the settlor was debited in current account with the company were capital sums paid directly or indirectly by the company to him. This they would be if they were sums paid to him by way of loan or repayment of a loan, or were sums paid to him otherwise than as income which were not paid for full consideration in money or money’s worth. These are true alternatives, and I will consider the latter first. I cannot doubt, and the matter was not seriously contested by the Crown, that, the sums in question having been paid at the request of the settlor and on his promise express or implied to repay, there was full consideration given by the settlor for the payment. Some suggestion was made that, inasmuch as there was no provision for payment of interest, there was not full consideration, but that was an arrangement which was, no doubt, convenient to both parties. Though latterly the company was largely in credit, in the earlier years it had been the other way about and no interest was charged against the company. In my opinion, this contention fails, and I turn to the question whether these sums were paid by way of loan directly or indirectly by the company to the settlor. The Special Commissioners held that the sums in question were “sums paid by way of loan.” They thought that if the company was called on to justify the payments they would have to rely on the power to lend money contained in cl. 3 (I) of the memorandum of association and said:

“The payments by the company direct to (for example) the Inland Revenue

Commissioners for surtax are in substance merely a convenient method which avoided the necessity of the company paying to Mr. Potts and Mr. Potts then paying the Inland Revenue Commissioners."

There are, I think, sections in revenue Acts which justify a reference to the substance of a transaction, but there is danger in forgetting the words used by LORD TOMLIN in *Inland Revenue Comrs. v. Westminster (Duke)* (1) ([1936] A.C. 19) which are cited by SINGLETON, J., in this case. The question is not what the transactions between the settlor and the company in substance were, but whether they fell within the fair meaning of the section.

From the determination of the commissioners the taxpayers appealed by way of Case Stated to the High Court, and on July 26, 1948, SINGLETON, J., allowed their appeal, holding, in effect, that no capital sum within the meaning of the section was during the relevant years paid to the settlor. From his judgment the Crown appealed to the Court of Appeal who allowed the appeal and restored the decision of the commissioners. LORD GREENE, M.R., in whose judgment SOMERVELL and DENNING, L.JJ., concurred, took the view which I have already expressed as to importing into sub-s. (3) the words "directly or indirectly" and came to the conclusion ([1949] 2 All E.R. 561) that

"... the various payments made by the company ... ought fairly to be regarded as money paid directly or indirectly by way of loan to Mr. Potts within the meaning of the sub-section."

He was, I think, partly at least led to this conclusion by considering the position of a bank which by meeting a customer's cheques when he is overdrawn is deemed to have lent him money.

My Lords, I have come to a different conclusion. Reading the definition into the sub-section, I must be satisfied that according to the fair meaning of the words these sums were sums paid by way of loan to the settlor directly or indirectly by the company. I do not think it matters whether the words "directly or indirectly" qualify the payment or the receipt. I will assume they qualify both or either. The question is still whether the conditions of the composite phrase are fulfilled—were the sums paid to the settlor by way of loan? I do not doubt that in certain contexts money paid at A.'s request to B. may be properly described as "paid to A.": see, e.g., *Parsons v. Equitable Investment Co., Ltd.* (2), per LORD COZENS-HARDY, M.R., ([1916] 2 Ch. 530). The explanation of this is to be found in the judgment of SHEARMAN, J., in *Stott v. Shaw & Lee* (3) ([1928] 2 K.B. 31):

"... if the legal or business or commercial effect of the transaction can be taken to be the same as that described in the bill of sale, then the courts will hold the consideration to be truly stated."

But this is not the way in which a taxing statute is to be read. I am not, in the construction of such a statute, entitled to say that, because the legal or business result is the same whether, on the one hand, I borrow money from the company and with it make certain payments, or, on the other hand, the company at my request makes certain payments on my implied promise to repay, therefore it is immaterial what words are in the statute if that result is attained. Nor, again, is it relevant that, where a bank allows its customer to overdraw, the customer is to be regarded as having borrowed from the bank to the extent of the overdraft, a proposition in regard to which no doubt can be entertained; see *Brooks & Co. v. Blackburn Benefit Society* (4) (9 App. Cas. 868). The company was not a bank, and it would, in my opinion, be an abuse of language, or at least the merest colloquialism, to speak of the transaction between the company and the settlor as a banking transaction. The fact that the objects for which the company was established included that to which I have referred does not, in my opinion, affect the question. That question remains as I have stated it, and my answer is that according to the ordinary fair meaning of the

words the company did not pay any sums to the settlor by way of loan. It would in fact be as inapt to say that the company paid him sums by way of loans when he was in debit on the account as to say that he paid the company sums by way of loan when he was in credit. Some stress was laid on the distinction in the old forms of pleading between the plea for money lent to the defendant and the plea for money paid at the request of the defendant to a third party. I am not inclined to give much weight to this consideration, but it does indicate that there is at least a formal difference between the two transactions.

So far, my Lords, I have not specifically dealt with the word "indirectly." It is sufficient to say that it cannot so enlarge the meaning of the words "paid to the settlor" as to include payment to some other person than the settlor for his own use and benefit. I do not feel called on to determine positively what transactions it might be apt to cover. It may be that it is not apt to cover any that are not already covered by the normal meaning of the words "paid to the settlor." It was finally urged by learned counsel for the Crown that, if this appeal is allowed, an easy way of evading tax will be open to the taxpayer. This is an argument which is of no weight whatever. The question is: What is the fair meaning of words in a taxing Act? I have given my answer to it, and move that this appeal be allowed and the matter be remitted accordingly.

LORD NORMAND: My Lords, I shall not re-state the facts, nor repeat the provisions of the section on which the result of the appeal depends. The first and more difficult question is whether sums paid by the company to third parties by the settlor's request were within the meaning of the Act capital sums paid directly or indirectly to him by way of loan. These sums were either sums paid to the Inland Revenue in discharge of the settlor's tax obligations, or other sums of which subscriptions paid to charities were taken as typical. There were also sums which were paid to the settlor himself, but these were treated by the Special Commissioners as sums paid on account of the settlor's remuneration and expenses as the company's managing director. It is not suggested that the words "capital sums paid directly or indirectly to the settlor by way of a loan" have any special meaning imposed on them by the context. Each word must, if possible, be allowed its appropriate effect, yet it is the meaning of the whole expression, all the words being read together, that has to be found. The principles to be observed in applying the provisions of a taxing Act are stated by LORD CAIRNS in *Partington v. A.-G.* (5) (L.R. 4 H.L. 122):

"... as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The Crown submitted that the payments made by request were capital sums paid indirectly to the settlor as loans. I shall refer presently to the authorities by which the submission was supported. But first I shall consider the meaning of the relevant words apart from authority. In my view, they are apt to cover payments made as loans to third parties through whom the payment reaches the settlor himself, but they are not apt to cover payments made to third parties who are not accountable to the settlor and are entitled to retain the

sums as their own moneys. This is a taxing Act and its terms are not to be enlarged by reasoning that the same final result is achieved as by a loan made to the settlor followed by a payment made by him to the third party. The principle stated by LORD TOMLIN in the *Duke of Westminster's* case (1) is on this point conclusive. LORD TOMLIN said ([1936] A.C. 19):

" . . . it is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter' and that here the substance of the matter is that the annuitant was serving the duke for something equal to his former salary or wages, and that, therefore, while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the commissioners apparently acted) seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned, for the doctrine seems to involve substituting 'the incertain and crooked cord of discretion' for 'the golden and straight met wand of the law.' (4 Inst., 41)."

It would be inconsistent with this principle to accept the contention that the words should be extended to any payment made by the settlor's request to a third party which produces a pecuniary benefit to the settlor equivalent to the sum paid. It was said, however, that a payment made by the settlor's request to an agent or other person accountable to him is in law a payment made directly to the settlor and, therefore, that the word "indirectly" must have a wider significance than I have assigned to it. That is, with respect, to beg the question. In a taxing Act designed to prevent tax evasion by affecting with liability to tax sums paid to a settlor otherwise than as income, it was obviously necessary to provide for the case where persons accountable to the settlor are interposed between the payer and the settlor for the purpose of disguising the transaction. That is a satisfactory explanation of the use of the words "directly or indirectly." There is, therefore, no reason for extending the meaning of "indirectly" so as to include payments to third parties which the settlor has an interest to make whether in discharge of his legal liabilities or in furtherance of charities favoured by him. If that had been the intention, other words would have been added.

The Crown relied on *Parsons v. Equitable Investment Co., Ltd.* (2). In that case it was held that a sum of money borrowed on a bill of sale and paid by the grantor's request to a creditor or another person was properly described as a payment to the grantor. But the ground of this conclusion was not that a payment made to B. by A.'s direction is as matter of general law a payment to A., but that the requirement of the Bills of Sales Act (1878) Amendment Act, 1882, s. 8, that the bill of sale shall truly set forth the consideration, had been construed in accordance with the principle that

" . . . if the legal or business or commercial effect of the transaction can be taken to be the same as that described in the bill of sale, then the courts will hold the consideration to be truly stated,"

although "It is perfectly clear that, strictly understood, that statement was untrue": *Stott v. Shaw & Lee* (3), per SHEARMAN, J. ([1928] 2 K.B. 31, 30). In *B. S. Lyle, Ltd. v. Chappell* (6), another case relied on by the Crown, the rule of *Parsons v. Equitable Investment Co., Ltd.* (2) was applied in a moneylender's action to the statements in the moneylender's memorandum. To apply these cases in construing a taxing Act is again flatly inconsistent with the principle established by the *Duke of Westminster's* case (1). The court is not entitled to say that for the purposes of taxation the actual transaction is to be disregarded as "machinery" and that the substance or equivalent financial results are the relevant consideration. It may, indeed, be said that if these loose principles of

construction had been liberally applied, they would in many instances have been adequate to deal with tax evasion and there would have been less frequent cause for the intervention of Parliament.

A I, therefore, hold that the payments made by the settlor's request to third parties were not payments made directly or indirectly to the settlor. It is not necessary to consider whether they were payments made by way of loan, but since the question was argued I will state my opinion. There is a real distinction between a loan to A. to enable him to pay his creditors and a payment to A.'s creditors made for the purpose of discharging his debts. It is a distinction recognised and taken advantage of both by commercial men and by others. But there are exceptions, *e.g.*, in banking law payments to third parties are customers' loans if the account is overdrawn: *Brooks & Co. v. Blackburn Benefit Society* (4), *Cuthbert v. Robarts, Lubbock & Co.* (7). All the controversial payments in the present case appear as items in a current account described as a director's account. It is a fair inference that the payments, whether to the settlor himself or to third parties, were deemed by the company to be authorised by the power in the memorandum of association to make advances to directors and customers and generally to act as bankers for customers and others. Nevertheless, the account is not a banker's account with its customer. For example, the payments with which the settlor is credited are not loans to the company, as are the payments into the bank when the customer's account is not overdrawn; nor were any of the payments made for the purpose of granting credit required by the settlor, who had at all times liquid resources ready to pay all that he owed to the company. I, therefore, think that the payments in question were not payments by way of loan as that word is understood in common parlance and as it is used in s. 40.

D The Crown did not offer more than a perfunctory submission that the payments made to third parties were not paid for full consideration in money or money's worth. The consideration was, in my opinion, the services rendered by the managing director coupled with an implied obligation of repayment on demand. Further, there is no finding that the consideration was not full consideration, and I can find no ground for holding that full consideration was not given. Courts of law are not concerned with extrinsic circumstances, such as that the provisions of s. 40 as I have construed them are of little value because they may easily be evaded by those who have the will to evade them, or that persons who contract genuine loans or receive repayment of genuine loans without any purpose of evasion and without in fact evading any liability to tax are as likely to be taxed under s. 40 as persons who contrive elaborate schemes of pretended loans for the purpose of evasion. I would allow the appeal with costs.

E LORD OAKSEY: My Lords, I agree that this appeal should be allowed. The object of the Act, in my opinion, was to tax a settlor who obtained payment of capital sums from the trustees of his settlement or from companies connected with the settlement for which he had not given full consideration in money or money's worth; it cannot have been the object of the Act to tax him in respect of payments for which he had given full consideration. In these circumstances it appears to me that, if the words of the Act are fairly susceptible of a meaning which attains this object, they should be given that meaning rather than a meaning which goes beyond the object of the Act and leads to admitted injustice.

I The first question is whether the sums in question are capital sums within the meaning of s. 40 (5) (a). It was contended for the Crown that the sums paid by the company were sums paid by way of loan. In my opinion, in the particular circumstances of this case, the payments were not made by way of loan. They were made in accordance with the practice which had long existed by which the governing director of a company in which he had held all the

shares directed or requested the company to make payments on his behalf as a matter of ordinary convenience. The company had never carried on a business of bankers or moneylenders, and it is not, in my opinion, a fair use of language to describe payments made for the governing director in such circumstances as loans. According to the argument for the Crown, whenever the governing director's account became in debit there was a loan by the company to him, and whenever it was credited with any sum thereafter until the account balanced there were repayments of loans. A

The second question is whether, even if the payments were made by way of loan, they were paid directly or indirectly to the settlor. None of them was in fact paid to the settlor, and from some of them the settlor derived no financial benefit since some of them were contributions to charities. Having regard to the object of the statute I think the words "paid directly or indirectly to the settlor" should be held to mean paid into the settlor's hands or into the hands of someone accountable to him. B

For my own part, I should also be prepared to decide the case on the ground that the true construction of s. 40 (5) (i) is that it refers only to sums paid by way of loan which are not paid for full consideration in money or money's worth and that in the present case the accommodation afforded to the appellant was given for full consideration in money or money's worth. C

LORD MORTON OF HENRYTON: My Lords, the charging sub-section in s. 40 of the Finance Act, 1938, is sub-s. (1). It begins:

"Any capital sum paid directly or indirectly in any relevant year of assessment by the trustees of a settlement to which this section applies to the settlor shall . . ."

Then follow the words which give rise to the charge to tax. The ambit of the sub-section is enlarged by sub-s. (3) which provides:

"For the purpose of this section any capital sum paid to the settlor in any year of assessment by any body corporate connected with the settlement in that year shall be treated as having been paid by the trustees of the settlement in that year."

The effect of this latter sub-section is to insert in sub-s. (1) immediately after the words "to which this section applies" the words "or by any body corporate connected with the settlement in that year." It is admitted by the appellants that G. W. Potts, Ltd. (hereafter called "the company") is such a company. The expression "capital sum" is defined by sub-s. (5) (a) as follows: F

"The expression 'capital sum' means—(i) any sum paid by way of loan or repayment of a loan; and (ii) any other sum paid otherwise than as income, being a sum which is not paid for full consideration in money or money's worth . . ."

Then follow some words which are immaterial for the present purpose. I agree with the Court of Appeal in thinking that para. (ii) has no application in the present case, and the relevant words are "any sum paid by way of loan." The question for decision may, therefore, be expressed as follows, reading sub-s. (1), sub-s. (3) and sub-s. (5) (a) (i) together and applying them to the facts of the present case: Were the sums paid out by the company in the relevant years of assessment, at the request of the settlor and on his promise to repay, "sums paid by way of loan directly or indirectly to the settlor"? This question can be sub-divided into two questions: (a) Were these sums paid by way of loan? (b) If so, were they paid directly or indirectly to the settlor? H

For the purpose of considering the first of these two questions, it is, I think, important to note the circumstances in which the sums under consideration were paid out by the company. To quote the Case Stated:

"For many years Mr. Potts had had a current account with the company. In these accounts Mr. Potts was credited with his remuneration as governing director and expenses and various payments were made by the company at Mr. Potts' request, some payments being to third parties (e.g., the Inland Revenue Commissioners for tax and charities) and some being payments to himself (cash drawings)."

It is argued on behalf of the taxpayers that where there is a current account, with payments out and payments in from time to time, it would be wrong to treat every payment out as a "loan" within s. 40 (5) (a) (i) and every payment in as a repayment of a loan. That case can be considered if and when it arises, but it is not the case now before your Lordships. The relevant period is from Apr. 5, 1939, to Apr. 5, 1941, and the details appear in the "director's account" for the period from Jan. 18, 1939, to Dec. 31, 1940: see exhibit E to the Case Stated. On May 5, 1939, the company paid the settlor's surtax amounting to £12,613 15s. 7d. The settlor's account was overdrawn before this payment was made and from that time on his account was never in credit. Between May 5 and Dec. 31, 1939, a large number of payments were made by the company at the request of the settlor. I need not pause to analyse them in detail at the moment, but they included payments of the settlor's income tax sched. E, various sums of cash paid to the settlor himself and a number of payments to charities. During this period the settlor paid nothing into the account. At the end of the year the settlor was credited with his director's fees, £5,000, and director's expenses, £1,500, and this left his account in debit to the amount of £8,850 7s. 7d. In 1940 further payments were made by the company at the request of the settlor, including surtax, £28,000, and income tax, £779 12s. 6d. On Dec. 23, 1940, when the settlor resigned his position as governing director, he was credited with director's fees and expenses from Jan. 1 to Dec. 23, 1940. This credit reduced his debit balance to £32,570 1s. 3d., and on Dec. 23, 1940, the settlor gave the company a cheque for that amount to balance the account.

I have mentioned these facts to show that on every occasion on which a sum was paid out by the company during the relevant period, it was in the nature of an overdraft. At the end of the year the settlor's director's fees and expenses were credited to him, and this had the effect of reducing the overdraft, but no sum was ever paid in by the settlor during the relevant period until he gave the company the balancing cheque of £32,570 1s. 3d. on Dec. 23, 1940. Whether or not it is accurate to describe the company as carrying on the business of banking, there is no doubt that during the relevant period the company supplied money to the settlor as and when he requested the company to do so and debited him with each of these amounts. The only difference between the procedure adopted by the company and the procedure adopted by a bank granting an overdraft is that the company did not apparently require any security, and did not charge any interest on the sums debited to the settlor. This is not surprising, as the settlor was a rich man and all the shares in the company except two were held by nominees for the settlor.

For the moment, I shall only deal with the substantial sums amounting to over £40,000, which the company paid out, at the settlor's request, in discharge of his liabilities for income tax and surtax. My Lords, I think that the sums so paid out cannot accurately be described as anything other than loans to the settlor. To quote LORD BLACKBURN in *Brooks & Co. v. Blackburn Benefit Society* (4) (9 App. Cas. 864):

"But they [bankers] are under no obligation to honour cheques which exceed the amount of the balance, or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent; when they do so the legal effect is that they lend the surplus to the customer . . ."

For the sake of example I shall take the sum of £28,000 paid out in March, 1940, in discharge of the settlor's liability for surtax. That transaction can, I think, be accurately stated as follows: The settlor said: "Please pay my surtax; if you do pay it I promise to repay the sum on demand." When the money was paid to the Inland Revenue, it seems to me that it was lent to the settlor just as much as if the company had been a bank and had granted him an overdraft of that amount.

I now come to the second of the two questions already stated, *viz.*: Were the sums in question "paid directly or indirectly to the settlor"? In agreement with the Court of Appeal and the Special Commissioners, I think that they were so paid. It is argued on behalf of the taxpayers that no sum can be "paid to the settlor," even indirectly, unless it is either paid into his hands or reaches his hands through some agent who is accountable to him. I find myself unable to accept this argument. I think that a sum is paid to A.B., in the ordinary meaning of these words, if it is either paid into the hands of A.B. or into the hands of his duly authorised agent, and that the construction contended for by the taxpayers really gives no force to the words "directly or indirectly." I think that these words cover at least two types of payment—a payment direct to the settlor or his agent, and a payment, made at the request of the settlor, which confers a pecuniary advantage to the settlor equal to the sum paid, *e.g.*, payment of a debt presently due from the settlor such as the income tax and surtax in the present case.

It seems to me that this construction accords with the intention of s. 40 as expressed by the words used therein, and the contrary view gives rise to some strange results. Let me assume that two rich men, X. and Y., each make a settlement of the kind to which the section applies, for instance, a settlement of a sum of £50,000 under which the income is to be accumulated so that no surtax attaches to that income. Assume further that both X. and Y. have other substantial income which attracts surtax and that they desire this surtax to be paid by the trustees of the settlement. X. says to the trustees: "Pay my surtax and I promise to repay you." Y. says to the trustees: "I need £10,000 in order to pay my surtax, give me a cheque and I promise to repay you." If the appellants' contention is correct, the payment to X will not come within s. 40 and the payment to Y. will come within it. This seems a very strange and capricious result, and, incidentally, it reveals an extremely simple way of making the section wholly ineffective. On the other hand, if my view is correct, X. has received payment by way of loan indirectly and Y. has received payment by way of loan directly within the meaning of the section and they will both equally be charged with tax. This is, I venture to think, a result which the legislature intended to achieve, and, in my view, it has been achieved by the words used in the section.

I do not think it right to detain your Lordships by considering in detail the other payments such as subscriptions to charities. If the view which I have expressed commends itself to your Lordships, there is no dispute between the parties as to the figures in the assessments; if your Lordships are of a contrary opinion, the assessments cannot stand. I would dismiss the appeal.

LORD MACDERMOTT: My Lords, the question here is whether the aggregate of certain sums paid by G. W. Potts, Ltd. (hereinafter called "the company") for and on behalf of the late Mr. G. W. Potts constituted (after certain deductions which need not be specified) a "capital sum paid directly or indirectly . . . by the trustees of a settlement . . . to the settlor . . ." within the meaning of those words as used in the Finance Act, 1938, s. 40 (1).

It was agreed that the company was a "body corporate connected with the settlement" mentioned in the Case Stated for the purposes of sub-s. (3) of that section, and, accordingly, that the payments in question, if otherwise within sub-s. (1), were to be treated as having been paid by the trustees of the

said settlement of which Mr. Potts was the settlor. But it was in dispute whether the need to resort to sub-s. (3), in which the words "directly or indirectly" do not occur, had the effect of allowing those words to be ignored in applying sub-s. (1). I am satisfied that, on the true construction of the section, the expression "directly or indirectly" contained in sub-s. (1) forms a constant part of the enactment, whatever its effect may be, and I have, therefore, incorporated it in stating the question for decision. This leaves two matters for consideration: (i) Did the payments made by the company constitute a "capital sum" as defined by s. 40 (5) (a), and (ii) If so, was such capital sum paid to the settlor? It is only if the answer to both these queries is in the affirmative that the assessments under review can be upheld.

My Lords, I incline to the opinion that the sums paid by the company could not, in any event, be brought within sub-s. (5) (a) (ii). If they come within that sub-section at all it must, I think, be under para. (a) (i) and then only by virtue of that part thereof which reads "any sum paid by way of loan." Now, I entertain little doubt that in certain circumstances it may properly be said that, if A. out of his own moneys pays a sum to B. for and at the request of C., A. has paid the sum by way of loan, and by way of loan to C. in the sense, and only in the sense, that he has thereby created the relation of lender and borrower between himself and C. But this is not to say that all transactions of that kind are loans. They may be but incidents in some wider relationship, other than that of lender and borrower, and take, as it were, their colour from it. For example, a rent agent may have to pay rates and a solicitor may have to pay stamp duties for clients whose accounts are not in credit at the time of payment. But in the ordinary course of events I do not think it would occur to anyone, or be a correct use of language, to say that such disbursements were loans or made by way of loan. On the other hand, the kind of wider relationship to which I am referring may provide opportunity for transactions within it which are exceptional and beyond the normal scope of the relationship and which may properly be describable as loans and as nothing else. The true view must depend on the circumstances. In the present case no attempt has been made to explore the position with these considerations in mind. It may have been impossible to do so. But, whatever the reason, there is no distinction drawn between the relevant items in the accounts; big or little, fiscal or charitable, they are all treated alike. Accordingly, I think this first question can only be settled on an assumption of normality which, with debits ranging from "Dunhill—2s. 10d." to "surtax—£18,000" (*vide* exhibit E, director's account for 1940) seems to me to be assuming a good deal. For this reason and because, on the view I take of the rest of the case, it becomes unnecessary to do so, I do not propose to express any concluded opinion on this branch of the matter. I, therefore, proceed to the second question assuming, for the purpose, an affirmative answer to the first.

For the Crown it was submitted that whatever was paid to the order of the settlor was a payment to him within the meaning of sub-s. (1), and, in the alternative, that if a sum paid in that way was not paid directly to the settlor it was nevertheless paid indirectly to him. On the facts of this case I do not think there is room for this alternative argument. The relatively small amounts paid directly to Mr. Potts were well within his salary and may be left out of account. Of the other payments those that matter here were not made to Mr. Potts' agents or in some circuitous way designed to put the money under his control eventually. Had they been, the word "indirectly" might have had a part to play, for in that case the issue would be whether, as a matter of fact, payment had been made, one way or another, to the settlor. In short, as it appears to me, the words "directly or indirectly" bear only on the mechanics of payment in fact. But the issue under consideration has to be related to payments which moved *from* Mr. Potts and is really one of law and not of fact. It is whether a payment made by A. on behalf of C. to B. (which

B. is to retain as a gift or as in discharge of some obligation owed him by C.) is a payment by A. to C. within the meaning of sub-s. (1). As SIR RAYMOND EVERSHERD, M.R., observes, this question is largely one of first impression. Differing from him with great respect, I would answer it in the negative. A man who pays his creditor does not pay himself, and if his agent discharges the debt on his behalf the position in this respect surely remains the same. I think the natural meaning of the words "paid . . . to the settlor" signifies a payment that goes to the settlor, not one that goes away from him, and I see no good reason, either within s. 40 or without it, for substituting something else for the natural meaning. It was said for the Crown that it was no straining of language, where A. paid a sum to B. at C.'s request and for C.'s benefit, to say that A. had paid C. I cannot agree. The person paid is B. and no one else, and the consideration that the payment is advantageous to C. seems to me beside the point so far as concerns the construction of the material words. It was also urged that to hold against this last submission would be to make s. 40 so easy to circumvent that it would be useless for its purpose. That purpose, doubtless, was to prevent or discourage certain forms of tax evasion. But the section attempts this in a manner which may work great harm to innocent people, as by inflicting tax on the grossed-up amount of a loan so temporary that it might only be till the banks opened, or of a loan genuinely borrowed and as genuinely repaid to the settlor. Tax evasion often places the draftsman in great difficulty and it may not always be possible to avoid hurting the guiltless. But s. 40 seems capable of involving straightforward transactions to such a considerable extent that a decision which may encourage the substitution of something better need not be a matter for regret. I would hold, then, that no capital sum was paid to the settlor within the meaning of sub-s. (1), and for that reason I would allow the appeal and restore the order of SINGLETON, J.

Appeal allowed with costs.

Solicitors: *Allen & Overy* (for the taxpayers); *Solicitor of Inland Revenue.*

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law.*]

DARNELL v. MILLWOOD.

[COURT OF APPEAL (Sir Raymond Eversherd, M.R., Cohen and Singleton, L.JJ.), November 24, 1950.]

Rent Restriction—Alternative accommodation—"Suitable to the needs of the tenant and his family"—"Family"—Exclusion of housekeeper and her husband and child—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (3) (ii).

The statutory tenant of a dwelling-house was a widower, and a married woman acted as his housekeeper, occupying, with her husband and child, part of the house. In proceedings for possession the landlord offered as alternative accommodation for the tenant a part of the house which was of an extent sufficient to accommodate the tenant, but not also to accommodate the housekeeper and her family.

Held: the housekeeper and her husband and child were not members of the tenant's "family" within s. 3 (3) (ii) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and, therefore, in considering whether the alternative accommodation offered was suitable, the court could not take account of the needs of the housekeeper and her husband and child.

Standingford v. Probert ([1949] 2 All E.R. 861), *applied*.

[AS TO DISCRETION TO ORDER POSSESSION ON PROOF OF ALTERNATIVE ACCOMMODATION, see HALSBURY, Hailsham Edn., Vol. 20, p. 332, para. 398; and FOR CASES, see DIGEST, Vol. 31, pp. 582-584, Nos. 7311-7330 and Digest Supp., and 2nd Digest Supp.]

Case referred to:

(1) *Standingford v. Probert*, [1949] 2 All E.R. 861; [1950] 1 K.B. 377; 2nd Digest Supp.

APPEAL by the tenant from an order of possession made against him by His Honour JUDGE CROSTHWAITTE, sitting at the Liverpool County Court, dated July 25, 1950. The landlord offered alternative accommodation which the judge held to be suitable, and the tenant appealed on the ground that, though suitable for him personally, it was not suitable for the needs of his housekeeper and her husband and child who lived with him and should be counted as part of his "family" within the meaning of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (3).

Miss M. L. Williams for the tenant.

Gerson Newman for the landlord.

SIR RAYMOND EVERSHED, M.R.: This is an appeal on a short point arising under s. 3 (3) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The landlord brought proceedings in Liverpool County Court for possession of premises of which the tenant is, and was at the material date, admittedly the statutory tenant, and he sought to found the jurisdiction of the court on the offer of alternative accommodation consisting either of the ground floor of the same house, or, alternatively, of the first floor, subject to the condition that the requisite kitchen arrangements should first be installed. The judge thought that reasonable accommodation was offered, and he thought it reasonable to make the order which he did, which was for possession in three months' time.

The tenant is a widower aged sixty-eight years. He lost his wife in 1949, and, after a period during which his children looked after him, he arranged with a Mr. and Mrs. Starkey to come and live with him. They paid him 25s. a week, but Mrs. Starkey undertook the burden of doing the housework and generally looking after him and he paid all the household bills. That arrangement, financially speaking, was, perhaps, peculiar, but the substance of it was that Mrs. Starkey acted as housekeeper for the tenant, and in return got the benefit of accommodation in the premises.

The first point which arises is this. It is said that in the circumstances of this case Mr. and Mrs. Starkey and their child are to be regarded as members of the tenant's "family" within the meaning of s. 3 (3) (ii) of the Act of 1933. We have been referred to a number of cases, but I think it will be sufficient if I refer to *Standingford v. Probert* (1), a case arising under the same enactment, where COHEN, L.J., giving the leading judgment of this court, said that the question what was to be comprehended by the word "family" was, putting it briefly, to be answered by considering whether the individuals claiming to be within the scope of the term would be said so to be if the question were asked in ordinary conversation: Are they members of so-and-so's family? Applying that test, it seems to me that *prima facie* persons who are in a household as members of the householder's staff would not be within the phrase the householder's "family." It is true, as counsel for the tenant observed, that in some senses the word "family" might include or be synonymous with a "household," but the question is not whether the tenant and the Starkeys can be regarded as one family, but whether the Starkeys are members of the tenant's family. As regards Mrs. Starkey, her only qualification is that she lives in the same house as, and looks after, the tenant, and the qualification of the child and Mr. Starkey would have to be at one remove, because

they were respectively the issue and husband of Mrs. Starkey. Applying the test laid down by COHEN, L.J., and without deciding whether in some circumstances a person who is, or primarily is, a housekeeper may not qualify under the section, I am of opinion that the county court judge was right to hold that these persons were not members of the tenant's family, and that, therefore, he had not to consider under the sub-section what was suitable accommodation for them as distinct from the needs of the tenant.

There is the second point, whether, having regard to the circumstances and certainly not forgetting the unhappy fact that the tenant has been left late in life without his wife, it is reasonable to make an order on the footing that he does not require the Starkeys to live with him. That, I think, is a question of fact. The judge obviously considered that point, and he said that he did not think that the tenant needed anyone living with him. He was not, for example, physically crippled, and, therefore, he could manage by getting daily help. It has been said many times in this court that the question what is reasonable is eminently a question of fact for the county court judge, and, unless it can be shown that he has misdirected himself by omitting some point of substance or by taking account of something which should not properly have been considered, it is not for this court to disturb the judge's findings. On neither head has the tenant satisfied the obligation that must always fall on an appellant from a county court, particularly where so much depends on matters of fact, and I, therefore, think that this appeal must be dismissed.

COHEN, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Potter, Sandford & Cosgrove*, agents for *W. T. Husband & Son*, Liverpool (for the tenant); *Leslie Black*, Liverpool (for the landlord).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOTE.

PRATT v. RICHARDS AND OTHERS.

[KING'S BENCH DIVISION (Barry, J.), October 24, 25, December 1, 1950.]

Negligence—Building in course of construction—Liability of contractor and sub-contractor—Scaffolding erected by main contractor—Omission to provide guard-rail—Accident to workman employed by sub-contractor—Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948, No. 1145), regs. 5, 24, 31.

ACTION for damages, tried at Norwich Assizes, by a widow on her own behalf and as administratrix of her husband's estate under the Fatal Accidents Acts, 1846 to 1908, and the Law Reform (Miscellaneous Provisions) Act, 1934.

The deceased, Egerton Sidney Pratt, a tiler's labourer employed by the first defendant, died from injuries received by him owing to a fall from the platform of scaffolding, 15 feet 2 inches above the ground. He had been working on the sloping roof of a newly-built house and had descended to the edge of the roof with the intention of getting more material from the platform. He had placed one foot on the platform, which was three feet below the eaves, and was about to place the other when he lost his balance and fell. There was no guard-rail provided on the platform. The first defendant, J. N. Richards, was engaged on tiling the roof of the house in question which was being built by the second defendants, H. C. Greengrass & Sons, Ltd., who had entered into a sub-contract with the third defendants, the Marley Tile Co., Ltd., for the tiling. The third defendants in their turn had sub-contracted the work of laying the tiles, including the fixing of the battens and felts, which were supplied by the second

defendants, to the first defendant. The scaffolding had been erected by the second defendants. The first defendant did not put in a defence. By their defences the second and third defendants denied that they were guilty of any breach of common law or of any statutory duty, and both pleaded that the accident was caused or contributed to by the negligence of the deceased. The second defendant alleged, alternatively, that the accident was attributable to negligence or breach of duty on the part of the first or third defendants or both of them.

The Building (Safety, Health and Welfare) Regulations, 1948, which applied to the operations on the site, provide, by reg. 5, that suitable scaffolds shall be provided for all work that cannot be safely done on or from the ground, and, by reg. 24, that every side of a working platform or working place . . . "from which a person is liable to fall a distance of more than 6 feet 6 inches, shall be provided with a suitable guard-rail . . . to a height of at least 3 feet . . ." By reg. 31:

"Where work is done on the sloping surface of a roof and, taking into account the pitch, the nature of the surface, and the state of the weather, a person employed is likely to slip down or off the roof, then unless he has adequate handhold or foothold or is not liable to fall a distance of more than 6 feet 6 inches from the edge of the roof, suitable precautions shall be taken to prevent his so falling."

Cases referred to:

- (1) *Horton v. London Graving Dock Co., Ltd.*, [1950] 1 All E.R. 180; [1950] 1 K.B. 421.
- (2) *Heaven v. Pender*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- (3) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affmd.*, (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.

Elton for the plaintiff.

The first defendant was not represented.

F. Whitworth for the second defendants.

Stephen Chapman for the third defendants.

Cur. adv. vult.

Dec. 1. BARRY, J., read a judgment, in which he found as facts that the accident would not have occurred if a guard-rail had been provided and that the deceased was not guilty of contributory negligence, and continued: At common law the first defendant was under a duty to take reasonable care to provide proper plant, appliances and equipment for the use of his workmen. His failure to ensure that the platform of this scaffold was provided with a guard-rail, as was required by the regulations, constituted, in my opinion, a neglect of this duty, which is personal to the employer, and the first defendant cannot escape from liability for the breach by showing that the scaffolding was erected and maintained by someone other than himself. The second defendants, as the principal contractors, admittedly erected the scaffold, and it is plain from the evidence that the scaffold was designed at the time of its erection, and continued to be so designed, for the purpose of the completing of the four houses, including the tiling of their roofs, by sub-contractors and their workmen. Thus, *prima facie*, they were required to comply with reg. 24 for the benefit, not only of their own employees, but for that of all workmen engaged upon the construction of the houses.

Before the decision of the Court of Appeal in *Horton v. London Graving Dock Co., Ltd.* (1) it might have been possible for the second defendants to argue that the absence of a guard-rail was not an unusual danger from the point of view of the deceased workman, and that, in consequence, the plaintiff

could establish no breach of duty on their part to the deceased who was not in their employment but in the employment of their sub-contractors. I do not think that any such defence is now open to these defendants. They were the erectors and the occupiers of the scaffolding, and the relationship between them and the deceased workman was that of invitor and invitee. Moreover, as erectors and suppliers of the scaffolding which was to be used by sub-contractors and their workmen, it seems to me that they fall within the principle enunciated by SIR WILLIAM BRETT, M.R., in *Heaven v. Pender* (2), as modified and explained by the subsequent cases referred to by SINGLETON, L.J., in his judgment in *Horton v. London Graving Dock Co., Ltd* (1). In circumstances like those in the present case, the duties of the head contractor to persons employed by his sub-contractor are co-extensive with the duties owed by him to his own workmen. If the first defendant failed to take reasonable care to provide safe plant, appliances and equipment for the use of the deceased, it must follow that the second defendants failed to perform the similar duty which they owed to him. In consequence, I find that the second defendants are liable to the plaintiff at common law in addition to their liability to her under the Building (Safety, Health and Welfare) Regulations, 1948.

Under the contract between the third and second defendants, the third defendants had no part in the design or erection of the scaffolding, which remained throughout in the occupation and under the control of the second defendants. The third defendants were neither the suppliers nor the occupiers of the scaffolding. They cannot be brought within either of the well-known principles enunciated in *Heaven v. Pender* (2) or *Indermaur v. Dames* (3), and the claim against them fails.

Judgment for plaintiff against first and second defendants for £1,950. Judgment for third defendants against plaintiff. Third defendants' costs of the action to be paid by second defendants.

Solicitors: *Stephenson, Harwood & Tatham* (for the plaintiff); *Masons* (for the second defendants); *L. Bingham & Co.* (for the third defendants).

F.A.A.

BIGOS v. BOUSTED.

[KING'S BENCH DIVISION (Pritchard, J.), November 14, 17, 1950.]

Contract—Illegality—Frustration of contract by one party—Right of other party to relief—Agreement for Italian money to be made available in Italy, and to be paid for with English money in England—Share certificate deposited by defendant with plaintiff as security for payment—Right of defendant to recover share certificate.

In 1947 the defendant was anxious to send his wife and daughter abroad for the sake of the daughter's health. Owing to the restrictions on English currency which were then in force he was unable to obtain from the Treasury what he considered an adequate allowance to enable them to stay abroad sufficiently long for the visit to be of benefit to the daughter, and, on Aug. 25, 1947, he entered into an agreement with the plaintiff, in contravention of the Exchange Control Act, 1947, s. 1 (1), whereby the plaintiff agreed to make available £150 worth of Italian money for the wife and daughter in Italy within a week and the defendant promised to repay her with English money in England. As security for his promise, the defendant deposited with the plaintiff a share certificate for 140 shares in a company. On Aug. 28 the defendant's wife and daughter went to Italy, but the plaintiff failed to make any Italian money available for them, and on Oct. 13 they returned to England, sooner than they would have returned if they had had the money. The defendant then asked the plaintiff

to return to him his share certificate, but she refused to do so. In an action by the plaintiff to recover the sum of £150 from the defendant on the ground that she had made a loan to him of that sum, the defendant denied the loan, set out the true facts of the transaction, and counter-claimed for the return of the certificate. The plaintiff abandoned her claim at the commencement of the hearing of the action, but the defendant proceeded with his counterclaim and contended that, although the contract was an illegal one, as it was still executory he was allowed a *locus poenitentiae*, and, therefore, he was entitled to claim the return of the certificate.

HELD: the reason that the illegal transaction was not carried out was due, not to any repentance on the part of the defendant, but to the frustration of the contract by the plaintiff, and, therefore, ~~as~~ the agreement relating to the deposit of the share certificate was one which sprang from the main illegal agreement and was tainted with the same illegality as that which attached to that agreement, and as the parties were *in pari delicto* at the time of making the agreement, the defendant was not entitled to seek the aid of the court to recover the certificate.

Scott v. Brown, Doering, McNab & Co. ([1892] 2 Q.B. 724), *Alexander v. Rayson* ([1936] 1 K.B. 169), and *Berg v. Sadler & Moore* ([1937] 1 All E.R. 637), *applied*.

Taylor v. Bowers (1876) (1 Q.B.D. 291), *distinguished*.

[AS TO ILLEGAL CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 7, pp. 173-177, paras. 248-250; and FOR CASES, see DIGEST, Replacement Volume 12, pp. 310-317, Nos. 2390-2444.]

Cases referred to:

- (1) *Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 61 L.J.Q.B. 738; 67 L.T. 782; 57 J.P. 213; 12 Digest, Replacement, 267, 2060.
- (2) *Taylor v. Bowers*, (1876), 1 Q.B.D. 291; 46 L.J.Q.B. 39; 34 L.T. 938; 12 Digest, Replacement, 316, 2438.
- (3) *Hastelow v. Jackson*, (1828), 8 B. & C. 221; 2 Man. & Ry. K.B. 209; 6 L.J.O.S.K.B. 318; 108 E.R. 1026; 25 Digest 406, 95.
- (4) *Bone v. Ekless*, (1860), 5 H. & N. 925; 29 L.J.Ex. 438; 157 E.R. 1450; 12 Digest, Replacement, 317, 2443.
- (5) *Kearley v. Thomson*, (1890), 24 Q.B.D. 742; 59 L.J.Q.B. 288; 63 L.T. 150; 54 J.P. 804; 12 Digest, Replacement, 318, 2453.
- (6) *Collins v. Blantern*, (1767), 2 Wils. 341; 95 E.R. 847; 12 Digest, Replacement, 290, 2229.
- (7) *Hermann v. Charlesworth*, [1905] 2 K.B. 123; 74 L.J.K.B. 620; 93 L.T. 284; 12 Digest, Replacement, 317, 2444.
- (8) *Alexander v. Rayson*, [1936] 1 K.B. 169; 105 L.J.K.B. 148; 154 L.T. 205; Digest Supp.
- (9) *Berg v. Sadler & Moore*, [1937] 1 All E.R. 637; [1937] 2 K.B. 158; 106 L.J.K.B. 593; 156 L.T. 334; *affg.*, [1936] 2 All E.R. 456; Digest Supp.

ACTION for the recovery of the sum of £150 as money lent, and **COUNTER-CLAIM** by the defendant for the return of a share certificate belonging to him and held by the plaintiff.

In 1947 the defendant was advised by his doctor to send his daughter, aged thirteen, abroad for as long as possible before the winter to avoid her having a recurrence of pleurisy, from which she had suffered during the three previous winters. Owing to the restrictions on English currency which were then in force, the defendant was able to obtain from the Treasury an allowance of only £75 for his wife, who would have to accompany the daughter abroad, and £40 for

the daughter. On Aug. 25, 1947, the defendant, thinking that these sums would be insufficient to allow them to stay abroad as long as was necessary, entered into a verbal agreement with the plaintiff whereby the plaintiff agreed to make available in Rapallo, Italy, within a week, £150 worth of Italian money for the use of the defendant's wife and daughter, and the defendant agreed to pay this sum to the plaintiff in English money in England. Not having £150 in cash available at the time and not wishing to sell securities, he deposited with the plaintiff a share certificate for 140 shares in Victory Insurance Co., Ltd., as security for his promise to repay the £150. Both parties knew that the agreement was unlawful under the Exchange Control Act, 1947, s. 1 (1), and, to cover up the unlawful transaction and cloak it in the guise of a loan, the defendant signed a document, stating: "To Mrs. Bigos, 30 Hogarth Road, S.W.5. I, the undersigned, hereby declare and agree that I have deposited with you 140 ordinary shares . . . in the Victory Insurance Co., Ltd., to the intent that such shares shall constitute a continuing security to you for the payment of £150 owing by me to you for the period of one year from Aug. 25, 1947." The plaintiff signed a document, stating: "I, Mrs. Bigos, hold a certificate in the name of Richard Algernon Lyons Boustead for 140 shares in Victory Insurance Co., Ltd., numbers as noted." On Aug. 28, 1947, the defendant's wife and daughter went to Rapallo, but the plaintiff failed to provide any Italian money, and they returned to England on Oct. 13, 1947, much sooner than they would have done if the unlawful agreement between the plaintiff and the defendant had been carried out. The defendant then asked the plaintiff for the share certificate, but she refused to return it. On Sept. 19, 1949, the plaintiff issued a writ against the defendant, claiming the repayment of the sum of £150 which she alleged that she had lent to him. The special indorsement on the writ set out the terms of the document of Aug. 25, 1947, signed by the defendant. On Nov. 18, 1949, the defendant filed his defence and counterclaim. By his defence he denied that he had received a loan of £150 from the plaintiff and he set out in full the facts of the transaction between them in 1947. In his counterclaim he asked for the return of the certificate. On Mar. 15, 1950, the plaintiff joined issue on the defence, alleging that on Aug. 25, 1947, she had handed to the defendant 150 £1 notes and that the loan was to bear interest at five per cent., and she claimed to be entitled to retain the certificate. At the commencement of the hearing of the action counsel for the plaintiff informed the judge that he was unable to pursue his client's claim, and consented to judgment on the claim. He also offered to deliver up the certificate to the defendant, but without costs, on the counterclaim. The defendant refused that offer and the case proceeded on the counterclaim.

Henry Harris for the plaintiff.

Aarvold for the defendant.

Cur. adv. vult.

Nov. 17. **PRITCHARD, J.**, stated the facts and continued: This case raises questions of law which are important and not easy. I have come to the conclusion that the agreement relating to the deposit of the share certificate was one which sprang from and was the creature of the main illegal agreement and was tainted with the same illegality which attached to that agreement. Therefore, the question which I have to decide is: What does the law say to a person who seeks to recover property with which he has parted pursuant to an agreement which is tainted with illegality? The general rule was stated in 1892 by **LINDLEY, L.J.**, in *Scott v. Brown, Doering, McNab & Co.* (1) in these words ([1892] 2 Q.B. 728):

"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice

of the court, and if the person invoking the aid of the court is himself implicated in the illegality."

In such a case the person resisting the claim possesses the advantage over the person making it, the maxim being *in pari delicto potior est conditio defendentis*.

There appears to be an exception to this rule which applies to cases in which it can be said that the parties are not *in pari delicto*, but this is not such a case.

A It could not be said to be such a case because it is obvious that when they made the agreement the defendant and the plaintiff were *in pari delicto*, which means that they were equally guilty. Each was making an agreement for the purpose which each desired to achieve, and, although the conduct of the plaintiff thereafter was despicable in the extreme, I think the point of time to which one has to look when one is deciding whether two people are *in pari delicto* is the time at which they enter into the illegal agreement. I am satisfied in this case that at that time these parties were *in pari delicto*.

It is contended, however, on behalf of the defendant that there is another exception to the rule which does apply to this case, the alleged exception being that, where the contract is still executory, a party is allowed what is called a *locus poenitentiae*, and may recover money or property delivered to the other party, provided that he takes proceedings before the illegal purpose has been substantially performed. With regard to this alleged exception, my attention has been drawn to certain authorities which I must now discuss. Counsel for the defendant relied chiefly on *Taylor v. Bowers* (2). In that case the plaintiff, who was financially embarrassed, entered into an unlawful agreement with one Alcock which was designed to defeat the rights of the plaintiff's creditors. The plaintiff made over his stock in trade to Alcock, who gave fictitious bills of exchange in the plaintiff's favour. Possession of the goods was given to Alcock, but no bill of sale was executed by the plaintiff. The defendant was one of the plaintiff's creditors and knew all about the unlawful agreement. After Alcock had removed the goods from the plaintiff's premises two meetings of creditors were held, but no compromise was effected, and at a later date Alcock executed a bill of sale of the goods to the defendant for the alleged purpose of securing the plaintiff's debt to the defendant, but the plaintiff did not know about that matter. The plaintiff then demanded the return of the goods from the defendant and Alcock, and brought an action against the defendant who was detaining the goods. It was held by the Queen's Bench Division and by the Court of Appeal that, the fraudulent purpose not having been carried out, the plaintiff was not relying on the illegal transaction, but was entitled to repudiate it and recover his goods from Alcock, and it was also held that, the defendant having no better title than Alcock, the plaintiff was entitled to succeed in his action against the defendant. In the Queen's Bench Division, COCKBURN, C.J., delivering the judgment of the court, said (1 Q.B.D. 295):

"In the present case nothing has been done to carry out the fraudulent or illegal object beyond the delivery of the goods to Alcock and their removal to Stafford. We put aside the bill of sale to the defendant, as the plaintiff was not a party to it, nor did it form part of the original arrangement. The next fact is, that before anything was done, and before the sale by auction, the plaintiff repudiated the whole transaction, and demanded back his goods from Alcock and the defendant. Under these circumstances, we think that the plaintiff is entitled to recover back his property from the defendant. The action is not founded upon the illegal agreement, nor brought to enforce it, but, on the contrary, the plaintiff has repudiated the agreement, and his action is founded on that repudiation. Now it seems to us well established that where money has been paid, or goods delivered, under an unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the

goods may repudiate the transaction, and recover back his money or goods. In *Hastelow v. Jackson* (3), LITTLEDALE, J., says (8 B. & C. 226): 'If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards.' And in *Bone v. Ekless* (4), BRAMWELL, B., referring to *Hastelow v. Jackson* (3), says (29 L.J.Ex. 440): 'Clearly an authority to pay over money for an illegal purpose may be revoked before the money is paid over. In *Hastelow v. Jackson* (3) that proposition of law was laid down, although there the plaintiff had to prove, as part of his case, that he had entered into an illegal contract; he did not, however, seek to recover upon it . . . The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards.' "

In the decision of the Court of Appeal the passage which is relied on by counsel for the defendant is from the judgment of MELLISH, L.J., where he said (*ibid.*, 300):

"But the illegal transaction was not carried out; it wholly came to an end. To hold that the plaintiff is enabled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done."

Before I leave *Taylor v. Bowers* (2), I think it is important and instructive to look at a short passage from the judgment of JAMES, L.J., where he stated what it is, in these cases, into which the court ought to inquire. He said (*ibid.*, 297):

"The question is a question of demerit on the part of the plaintiff on this point, and we have not to inquire upon this rule, and, according to my view, we have no right to inquire into any question of merit or comparative merit on the part of the defendant."

I think that that is important in this case because, if I have to decide this case on the merit, or on the comparative merit, of the defendant and the plaintiff, I should not have the least hesitation in deciding it in favour of the defendant, because I think that the plaintiff's case and her conduct are devoid of all merit in any regard whatever, but, bearing in mind what JAMES, L.J., said, I think what I have to consider in this case is purely and simply the demerit of the defendant, without comparing his conduct with that of the plaintiff.

Taylor v. Bowers (2) being relied on by counsel for the defendant in the first place, he then drew my attention to *Kearley v. Thomson* (5), in which there are some observations which seem to throw some doubt on the views expressed by MELLISH, L.J., in the earlier case. In *Kearley v. Thomson* (5) the defendants were solicitors who were acting for a petitioning creditor in bankruptcy proceedings. They had incurred costs which were to be paid out of the estate, but which had not been paid because the estate lacked assets. The plaintiff, a friend of the bankrupt, offered to pay to the defendants the costs which were owing if they would undertake not to appear at the public examination of the bankrupt and not to oppose his discharge. The defendants, after obtaining the consent of their client, agreed to what the plaintiff suggested, and received the money. They did not appear at the public examination, but, before any application was made for the discharge of the bankrupt, the plaintiff brought an action to recover back his money from the defendants. It was held that

the plaintiff was not entitled to recover, the reason for the decision being that, as the defendants had refrained from appearing at a public examination, the illegal agreement to pervert the course of justice had been partly performed, and the partial performance of the agreement prevented the plaintiff from succeeding in his claim. The passage which is said to throw some doubt on the views of MELLISH, L.J., in *Taylor v. Bowers* (2) appears in the judgment of FRY, L.J., and it is an important passage because it recurs in numerous cases. In this passage FRY, L.J., said (24 Q.B.D. 745):

"As a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case the usual rule is *potior est conditio possidentis*. There is another general rule which may be thus stated, that where there is a voluntary payment of money it cannot be recovered back. It follows in the present case that the plaintiff who paid the £40 cannot recover it back without showing the contract upon which it was paid, and when he shows that he shows an illegal contract. The general rule applicable to such a case is laid down in the very elaborate judgment in *Collins v. Blantern* (6), where the Lord Chief Justice [WILMOT, C.J.] says (2 Wils. 350): 'Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back.' To that general rule there are undoubtedly several exceptions, or apparent exceptions."

FRY, L.J., then discussed two exceptions, which do not concern this case, and continued (*ibid.*, 746):

"There is suggested to us a third exception, which is relied on in the present case, and the authority for which is to be found in the judgment of the Court of Appeal in the case of *Taylor v. Bowers* (2). In that case MELLISH, L.J., in delivering judgment, says (1 Q.B.D. 300): 'If money is paid, or goods delivered for an illegal purpose, the person who has so paid the money or delivered the goods may recover them back before the illegal purpose is carried out.' It is remarkable that this proposition is, as I believe, to be found in no earlier case than *Taylor v. Bowers* (2), which occurred in 1867, and, notwithstanding the very high authority of the learned judge who expressed the law in the terms which I have read, I cannot help saying for myself that I think the extent of the application of that principle, and even the principle itself, may, at some time hereafter, require consideration, if not in this court, yet in a higher tribunal: and I am glad to find that in expressing that view I have the entire concurrence of the Lord Chief Justice [LORD COLERIDGE, C.J.]."

It should be noted that the decisions in *Taylor v. Bowers* (2) were in 1876, and not in 1867 as stated by FRY, L.J., in *Kearley v. Thomson* (5).

Kearley v. Thomson (5) appears to me to be easily distinguishable from *Taylor v. Bowers* (2) in that, whereas the reason for the decision in *Taylor v. Bowers* (2) was that nothing had been done in pursuance of the illegal agreement, in *Kearley v. Thomson* (5) the report makes it quite clear that the plaintiff failed because something had been done in pursuance of the illegal agreement, and, therefore, I do not regard *Kearley v. Thomson* (5) as in any way conflicting with the decision in *Taylor v. Bowers* (2), although, of course, the observations made by FRY, L.J., in *Kearley v. Thomson* (5) on the rule as laid down by MELLISH, L.J., in *Taylor v. Bowers* (2) deserve attention, and, as I pointed out, occur again in subsequent cases.

In 1905 the Court of Appeal considered this question again in *Hermann v. Charlesworth* (7), in connection with an illegal marriage brokerage contract.

The plaintiff in that case had promised to pay £250 to the defendant if and when he introduced her to a gentleman who should marry her. She also paid to the defendant £52 which was called "a client's fee." The defendant thereupon introduced her to several men, but no marriage took place, and eventually the plaintiff brought an action to recover the £52. The action was remitted to the county court where the county court judge gave judgment for the plaintiff on the ground that, although the contract was a marriage brokerage contract and, therefore, illegal, the parties were not *in pari delicto*, as the defendant, who was out for money, was more blameworthy than the plaintiff, who was out for a husband. The defendant appealed to the Divisional Court who took the view that the contract did not come within the mischief which the law attributes to marriage brokerage contracts and allowed the appeal. The plaintiff appealed to the Court of Appeal who took the view that the Divisional Court was wrong, and that the contract was an illegal contract. Therefore, it became necessary for them to discuss the question with which I am concerned in the present case, and they allowed the plaintiff's appeal, with the result that she recovered her £52. The reason which the Court of Appeal gave for their decision was that, the object of the contract being to bring about a marriage, it could not be performed in part, and, therefore, as nothing had been done in the performance of the contract, the plaintiff was entitled to recover the money back, although she had paid it under an illegal contract. The facts in that case were peculiar, but, on the whole, it appears to me that the reason for the decision seems to support *Taylor v. Bowers* (2) and to disregard the criticism of that case which was made by FRY, L.J., in *Kearley v. Thomson* (5).

➤ Lastly, *Alexander v. Rayson* (8) and *Berg v. Sadler and Moore* (9), two comparatively recent cases, were cited to me, and it was argued on behalf of the plaintiff that they seriously affect the authority of *Taylor v. Bowers* (2). In *Alexander v. Rayson* (8) the defendant, in 1929, rented a flat from the plaintiff at a rent of £1,200 a year, which was to include certain services. The plaintiff required the agreement for that letting to be in two documents. One document was the lease which contained a provision for certain services which were to be rendered by the lessor [the plaintiff], and the rent together with the benefit of the services was stated to be £450 a year. The other document, which provided for virtually the same services as those provided in the first document, stated that the consideration for those services should be £750 per year. The rent was paid quarterly, the defendant paying £300 in each quarter, *i.e.*, at the rate of £1,200 a year, until Mid-summer, 1934. The defendant refused to pay £300 in respect of the quarterly instalment falling due on Sept. 29, 1934, because, as she alleged, the plaintiff had failed to provide the services which he had contracted to provide. She tendered, however, one quarter's rent under the lease, *i.e.*, £112 10s., but the plaintiff claimed £300 under the two agreements. The plaintiff's purpose in having those two documents prepared was purely to deceive and to defraud the assessment committee who had to assess the rates of the premises. It was proved that that attempt failed because the assessment committee were not deceived, and, therefore, prevented themselves from being defrauded. In those circumstances, the Court of Appeal decided that the plaintiff could not maintain his action. The judgment of the Court of Appeal was prepared by ROMER, L.J., and read by SCOTT, L.J., and it contains a passage ([1936] 1 K.B. 190) which, it is said, seriously affects the authority of *Taylor v. Bowers* (2):

"Plaintiff's counsel further contended that inasmuch as the plaintiff had failed in his attempted fraud, and could therefore no longer use the documents for an illegal purpose, he was now entitled to sue upon them. The law, it was said, would allow to the plaintiff a *locus poenitentiae*. So, perhaps, it would have done, had the plaintiff repented before attempting to carry his fraud into effect: see *Taylor v. Bowers* (2). But, as it is, the

plaintiff's repentance came too late—namely, after he had been found out. Where the illegal purpose has been wholly or partially effected the law allows no *locus poenitentiae*: see SALMOND AND WINFIELD'S LAW OF CONTRACT, p. 152. It will not be any the readier to do so when the repentance, as in the present case, is merely due to the frustration by others of the plaintiff's fraudulent purpose."

A The "others" referred to were the assessment committee, who were not parties to the illegal agreement, but who found out the purpose of that agreement in time to save themselves from being defrauded.

In *Berg v. Sadler and Moore* (9) the plaintiff was a tobacconist who had been a member of the Tobacco Association but had been put on the "stop list" of that association for a breach of its rules, and, as a result, he could not obtain
B supplies of cigarettes from members of the association. The plaintiff arranged with a member of the association called Reece, that Reece should order in his own name, but really on behalf of the plaintiff, cigarettes from the defendants, Sadler & Moore, who were members of the association. Reece did so, and the plaintiff sent his representative, accompanied by a representative of Reece, to receive the cigarettes from the defendants. The plaintiff's representative
C paid for the cigarettes with the plaintiff's money, but the defendants, being suspicious about the transaction, refused to deliver the cigarettes or to return the money which the plaintiff's representative had paid to them. Thereupon, the plaintiff sued the defendants for the return of the money. The case was tried, in the first instance, by MACNAGHTEN, J., who held that the plaintiff was guilty of an attempt to obtain the cigarettes by false pretences and that
D the court would not assist him to recover his money. The plaintiff appealed, but the decision of MACNAGHTEN, J., was upheld by the Court of Appeal. The judgments in the Court of Appeal contain some strong expressions of opinion as to what the courts ought to do in these and similar circumstances. LORD WRIGHT, M.R., based his judgment on *Kearley v. Thomson* (5), which he discussed at some length. He then said ([1937] 1 All E.R. 642):

E "FRY, L.J. [in *Kearley v. Thomson* (5)] goes on . . . to distinguish . . . *Taylor v. Bowers* (2), where recovery was allowed, as I understand the decision, on the ground that the illegal purpose had been abandoned, and that the plaintiff had so repented that he was not debarred from recovering what he had paid."

F That passage shows the importance which LORD WRIGHT, M.R., attributed to the decision in *Taylor v. Bowers* (2), and to the allegation of repentance on behalf of the plaintiff in that case, although it was not actually mentioned in the case itself. LORD WRIGHT, M.R., then said (*ibid.*):

G "Some such argument was put forward in this case, but I should like to add to the expression of opinion of FRY, L.J., on that point the observations which are contained in a judgment of this court in *Alexander v. Rayson* (8) . . ."

LORD WRIGHT, M.R., then cited the passage which I have already read from *Alexander v. Rayson* (8). ROMER, J., gave a very short judgment in *Berg v. Sadler & Moore* (9), but it does contain a principle. He said (*ibid.*, 644):

H "I entirely agree, and, once the facts of this case are understood, it is abundantly plain that no court in this country would lift a finger to help the plaintiff to recover from the defendants the money which the plaintiff paid to them. The money was paid by the plaintiff to the defendants in the course, and for the purposes, of an attempt, on the part of the plaintiff, to defraud the defendants; the fact that, owing to the vigilance of the defendants, the attempt was frustrated is, in my opinion, wholly immaterial."

Finally, SCOTT, L.J., dealt with the matter, first, by setting out the passage from the original judgment of MACNAGHTEN, J., which was stated in very clear terms, and could leave no doubt as to what the learned judge meant. MACNAGHTEN, J., said ([1936] 2 All E.R. 461):

"I have no hesitation in saying that in this case Mr. Berg attempted, although the attempt failed, by deceit to induce a course of action on the part of the defendants, Messrs. Sadler & Moore, which would have been an action to their grave injury. If in fact they had supplied goods to Mr. Berg, he being on the 'Stop List', the consequences to them might have been consequences of a very serious character in their business. It seems to me that it is a plain case of . . . an attempt to obtain goods by false pretences, and it is nothing to the purpose to say that the fraudulent person who was attempting to commit that crime was in fact willing to pay to the persons he was attempting to defraud the full price of the goods. Now those being the facts as I find them to be, the question arises, can Mr. Berg under those circumstances, having paid this money with the intention of obtaining goods by this false pretence, now maintain an action in this court to recover the money? No case has been cited to me where the court has ever entertained any such action. If dishonest people pay money for a dishonest purpose, and then by good fortune the offence which they designed to commit is not committed, are they entitled in this court to come and ask for recovery of the money? In my opinion, they are not. It would be a bad example if this court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the court an order that the money should be repaid."

After quoting this passage, SCOTT, L.J., continued ([1937] 1 All E.R. 644):

"I entirely agree with that judgment, which I have adopted as my own. At the same time, I agree with what LORD WRIGHT, M.R., has said, that the facts of this case involve a slightly new application of the rule, but *ubi eadem ratio ibi jus*. The principle which forbids the assistance of the court to a plaintiff who asks it in order to effect a dishonest purpose extends, in my opinion, to the case of a request for the court's assistance in order to extricate himself from a pecuniary difficulty in which he has placed himself by an incomplete performance of a dishonest course of action."

I now have to consider how the authorities to which I have referred should be applied to the facts of the present case. I confess that there was a time when I thought it would be right to apply to the facts of this case the reasoning of the decision in *Taylor v. Bowers* (2), but, having considered all the authorities, I do not take that view. I think that what is to be extracted from the authorities may be stated as follows. I think that they show, first, that there is a distinction between what may, for convenience, be called the repentance cases, on the one hand, and the frustration cases, on the other hand. If a particular case may be held to fall within the category of repentance cases, I think the law is that the court will help a person who repents, provided his repentance comes before the illegal purpose has been substantially performed. If I were able, in this case, to take the view that the defendant had brought himself within that sphere of the authorities, it might well be that I would have been able to help him by saying that his repentance had come before the illegal purpose had been substantially performed, but I do not take that view. I think, however, that this case falls within the category of cases which I call the frustration cases, and that it is proper to regard it as in the same category as *Alexander v. Rayson* (8), and *Berg v. Sadler & Moore* (9), rather than as in the category of cases such as *Taylor v. Bowers* (2) and *Kearley v. Thomson* (5), and, to some extent, *Hermann v. Charlesworth* (7).

A In *Alexander v. Rayson* (8) the illegal contract was made between the plaintiff and the defendant. It was frustrated by third parties and, as there was no repentance by the plaintiff before the frustration by others of his fraudulent purpose, he was held disentitled to succeed. In *Berg v. Sadler & Moore* (9) the illegal contract was entered into between the plaintiff and a third party, and was frustrated by the defendants, and the plaintiff was held disentitled to succeed. In the present case the illegal contract was entered into between the plaintiff and the defendant. The defendant is in the position in which the plaintiff was in all the other cases which I have mentioned, and the performance of that illegal contract was frustrated by the other party to it, namely, the plaintiff. For that reason this is, I think, a frustration case and not a case of repentance.

B On the return of the defendant's wife and daughter from Italy the whole project fell to the ground. There was no repentance which caused the contract not to be carried out. The defendant desired that it should be carried out until the plaintiff failed to do so, and, when she failed, the plaintiff's wife and daughter had to return to England because, as the result of the plaintiff's failure, they could no longer afford to stay in Italy. By the plaintiff's failure the whole venture was frustrated, and, in those circumstances, I do not think that the reason for this illegal contract not having come to fruition was the repentance of the defendant. The reason was that the whole object of the contract was frustrated by the failure on the part of the plaintiff to provide the lira which she had contracted to provide in Italy. In those circumstances, I have come to the conclusion that the words of MACNAGHTEN, J., ([1936] 2 All E.R. 462) in *Berg v. Sadler & Moore* (9), which were cited with approval by D SCOTT, L.J., in the Court of Appeal, should be applied to this case:

E "If dishonest people pay money for a dishonest purpose, and then by good fortune the offence which they designed to commit is not committed, are they entitled in this court to come and ask for recovery of the money? In my opinion they are not. It would be a bad example if this court were to entertain an action by a man for money dishonestly paid for the purpose of committing an offence against the criminal law, and he were allowed to claim from the court an order that the money should be repaid."

F That is the view which I take in this case and, for those reasons, I have come to the conclusion that this is not a case where the defendant showed himself to be within the exception of which *Taylor v. Bowers* (2) is an example. In all the circumstances, I think that the defendant's counterclaim must fail, and, accordingly, there must be judgment for the defendant on the claim and his counterclaim must be dismissed.

Judgment for the defendant on the claim with costs. Counterclaim dismissed; no order as to costs.

Solicitors: *Montague & Co.* (for the plaintiff); *Philip Conway, Thomas & Co.* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

Re BRASSEY'S DEED TRUSTS. *COUTTS & CO. v. INLAND REVENUE COMMISSIONERS.*

[CHANCERY DIVISION (Romer, J.), November 29, December 13, 1950.]

Estate Duty—Passing—Property deemed to pass—Policy of assurance—Premiums paid by trustees of settlement—Death of assured—Cesser of payment premiums—Claim on “slice” of capital to produce premiums—Finance Act, 1894 (c. 30), s. 2 (1) (b), s. 7 (7).

By a deed of appointment and re-settlement, dated Aug. 8, 1935, made between R.B., the life tenant, H.B., the remainderman, and trustees, certain investments and cash were directed to be held by the trustees on trust (i) as regards the cash, to make certain payments and to purchase from R.B. at their surrender value certain policies of assurance on his life, and (ii) as regards the investments, to retain or sell the same and re-invest the proceeds and out of the income of the investments and re-investments (thereinafter called “the trust fund”) to pay (*inter alia*) the premiums and other moneys necessary for keeping on foot certain policies of assurance (including those purchased from R.B.) and to pay the balance of the said income to H.B. during his life. At all times after the date of the re-settlement the premiums in respect of the policies on the life of R.B. were paid by the trustees. On Nov. 14, 1946, R.B. died, and estate duty was claimed under the Finance Act, 1894, s. 2 (1) (b), in respect of the “slice” of the trust fund required to produce the income necessary to pay the premiums on the policies on the life of R.B.

HELD: the persons expectantly interested on the death of H.B. had an interest within the meaning of s. 2 (1) (b) during R.B.'s lifetime in the income (and a corresponding interest in the capital) of the trust fund in that they were entitled to insist that the trustees apply part of the income in payment of the premiums, and, therefore, on the cesser of that interest on R.B.'s death a claim for estate duty arose under s. 2 (1) (b) to the extent of the beneficial interests arising, *i.e.*, in respect of the capital value of the “slice” ascertained in accordance with s. 7 (7) of the Act of 1894.

[AS TO PROPERTY IN WHICH AN INTEREST WAS LIMITED TO CEASE ON THE DECEASED'S DEATH, see HALSBURY, Hailsham Edn., Vol. 13, p. 236, para. 226; and FOR CASES, see DIGEST, Vol. 21, pp. 9, 10, Nos. 34-42.]

Cases referred to:

- (1) *Westminster Bank, Ltd. v. A.-G.*, [1939] 2 All E.R. 72; [1939] Ch. 610; 108 L.J.Ch. 294; 160 L.T. 432; Digest Supp.
- (2) *A.-G. v. Barclays Bank, Ltd.*, [1943] 1 All E.R. 181; *affd.*, [1943] 2 All E.R. 123; [1943] K.B. 721; 112 L.J.K.B. 585; 169 L.T. 149; *reversd.* *Barclays Bank, Ltd. v. A.-G.*, [1944] 2 All E.R. 208; [1944] A.C. 372; 113 L.J.K.B. 465; 171 L.T. 366; 2nd Digest Supp.

ADJOURNED SUMMONS under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, to determine the question whether, and to what extent, estate duty became payable in connection with the death of Robert Bingham Brassey under the Finance Act, 1894, s. 2 (1) (b), in respect of the cesser of the duty of the trustees of a settlement to pay the premiums on certain policies of assurance on the life of the deceased which were subject to the said settlement. The facts appear in the judgment.

Talbot, K.C., and *R. Cozens-Hardy Horne* for the trustees.

Upjohn, K.C., and *J. H. Stamp* for the Crown.

Cur. adv. vult.

Dec. 13. **ROMER, J.**, read the following judgment. This summons raises the question whether estate duty became payable on the death of Robert Bingham Brassey (hereinafter called “Captain Brassey”) by reason of the

fact that certain trust income had to be, and was, applied in paying the premiums on some policies of assurance on Captain Brassey's life.

A By a disentailing deed, dated Aug. 6, 1935, and made between Captain
B Brassey, of the first part, his son, Hugo Brassey, of the second part, and certain
trustees, of the third part, the entailed interest of Hugo Brassey in the funds
then subject to the trusts of a re-settlement which had been executed on June 3,
1897, was barred, and such funds were limited on such trusts and subject to
such powers and provisions as Captain Brassey and Hugo Brassey should
jointly appoint, with a limitation over in default of and subject to any such
appointment. Under and by virtue of a deed of appointment dated Nov. 7,
1927, and made between Captain Brassey, of the one part, and Constance
Marion Brassey (hereinafter called "Mrs. Brassey"), of the other part, and
C a deed of appropriation dated Aug. 7, 1935, Mrs. Brassey, as the widow of
Captain Brassey, became entitled on his death to a jointure rentcharge of £3,000
(or, in the event of her re-marriage, £1,500) per annum payable during the
residue of her life and charged on the investments specified in sched. I to the
deed next mentioned. On Aug. 8, 1935, a deed of appointment and re-settle-
ment (hereinafter called "the 1935 re-settlement") was entered into by Captain
Brassey, of the first part, Hugo Brassey, of the second part, and Coutts & Co.
and Sir Henry Brassey, as trustees, of the third part. The effect of the 1935
re-settlement is sufficiently summarised as follows in the affidavit of Mr. Rowles
sworn in support of the summons, and I will read para. 2 and para. 3 thereof,
subject to certain slight omissions and alterations:

D " (2) (Clause 1) In exercise of a power conferred on hem by the disentailing
deed therein mentioned the above-mentioned Robert Bingham Brassey
(hereinafter called 'Captain Brassey') and Hugo Bulkeley Brassey (herein-
after called 'Hugo Brassey') irrevocably appointed that the investments
specified in the first and second parts of sched. I thereto (subject to the
jointure and portions therein mentioned) and the cash specified in the
third part of the said schedule should be held by the plaintiffs and the
E Right Honourable Henry Leonard Campbell Baron Brassey of Apethorpe
(then and therein described as Sir Henry Leonard Campbell Brassey,
baronet) as the then trustees thereof (hereinafter together called 'the
trustees') upon such trusts and subject to such powers and provisions
as Captain Brassey and Hugo Brassey should at any time or times there-
after by any deed or deeds revocable or irrevocable appoint and in default
F of and subject to any such appointment upon the trusts and subject to
the powers and provisions thereafter declared and contained concerning
the same that was to say: (i) The trustees should pay and apply the said
cash in manner following, namely: (a) The trustees should pay and pro-
vide for the commuted succession duties, stamp duties and costs therein
mentioned. (b) The trustees should pay £8,000 to Hugo Brassey for his
G own use and benefit. (c) The trustees should purchase from Captain
Brassey for the sum of £11,000 or such larger sum as should represent
the surrender value at the date of such purchase the policies on Captain
Brassey's life specified in the first and second parts of sched. III thereto.
(d) The trustees should apply £46,000 (or such other sum as might be
required for the purpose) in effecting or enabling Hugo Brassey to effect
H in the names of the trustees a single premium endowment policy on the
life of Hugo Brassey to produce the sum of £26,000 in ten years and
£60,000 in twenty-six years. (e) The trustees should apply the sum of
£6,000 in the purchase of a ten year annuity certain. (f) The trustees should
apply the sum of £115,000 (or such other sum as might be required for
the purpose) in effecting or enabling Captain Brassey to effect in the names
of the trustees a single premium policy on Captain Brassey's life to produce
the sum of £160,000 on the death of Captain Brassey. (g) The trustees

should hold any balance as capital monies under the 1935 re-settlement. (ii) The trustees should forthwith convert the policies specified in the second part of sched. III thereto into fully paid-up policies. (iii) (a) The trustees should stand possessed of the investments thereby appointed (hereinafter called 'the appointed investments') upon trust to permit the same to remain as actually invested so long as the trustees should think fit or might at any time or times sell the same or any part thereof and should invest the moneys produced thereby and the moneys which might be received by the trustees in respect of the policies specified in sched. III thereto and the policies to be effected in pursuance of sub-cl. (i) (d) and (f) of this clause and any other capital moneys which might be received by the trustees in respect of the funds thereby appointed in the names of the trustees in or upon any investments thereby authorised with power to vary or transpose any investments for or into others of any nature thereby authorised. (b) The trustees should out of the income of the appointed investments and any moneys received by them as aforesaid and the investments for the time being representing the same respectively (thereinafter called 'the trust fund') and the annuity specified in sub-cl. (i) (e) of this clause pay the premiums and other moneys necessary for keeping on foot the policies on the life of Hugo Brassey specified in sched. II thereto (thereinafter called 'Hugo Brassey's life policies') and the policies specified in the first part of sched. III thereto so far as regards Hugo Brassey pursuant to the covenant by him in that behalf thereinafter contained and should hold the balance of the same income upon protective trusts for the benefit of Hugo Brassey during his life. (c) After the death of Hugo Brassey the trustees should stand possessed of the capital and future income of the trust fund and the said annuity in trust for all or such one or more exclusively of the others or other of the children or remoter issue of Hugo Brassey such children or issue to take vested interests not later than twenty-one years from the death of Hugo Brassey at such age or time or respective ages if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement either after the death of Hugo Brassey or during his life with his consent in writing and maintenance and education at the discretion of the trustees or of any other person or persons as Hugo Brassey should by deed or deeds revocable or irrevocable appoint and in default of and subject to any such appointment (d) In trust for all or any the children or child of Hugo Brassey who being male should attain the age of twenty-one years or being female should attain that age or marry and if more than one in equal shares . . . (f) If there should be no child of Hugo Brassey who being male should attain the age of twenty-one years or being female should attain that age or marry then subject to the trusts powers and provisions thereinbefore declared and contained and to the powers by law vested in the trustees and to every or any exercise of such powers the trustees should stand possessed of the trust fund and the said annuity for such person or persons and for such purposes as Hugo Brassey should by will or codicil appoint. (iv) Hugo Brassey might by any deed or deeds revocable or irrevocable executed prior to and in contemplation of any marriage or by will or codicil appoint that the income of the whole or any part of the trust fund and the said annuity should from and after his death be paid to any wife who might survive him during her life or any less period in such manner and subject to such conditions and restrictions as Hugo Brassey might think fit. (v) The trustees might from time to time by mortgage or sale of the trust fund or any part thereof raise any moneys not exceeding in the whole the sum of £20,000 and pay

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or apply the same to or for the benefit of Hugo Brassey in such manner as the trustees should in their absolute discretion or with the sanction of the High Court of Justice think fit. (vi) In so far as the income derived from the investments appropriated in respect of the jointure therein mentioned should prove insufficient such jointure should stand charged on the corpus of such investments. (Clause 2) (a) The trustees should stand possessed of all moneys which might be received by them in respect of Hugo Brassey's life policies upon the trusts and subject to the provisions therein declared and contained in relation to the trust fund thereinbefore mentioned so far as the same were applicable and so as to form one fund therewith. (b) Hugo Brassey covenanted with the trustees that he would duly and punctually pay the premiums and other moneys (if any) necessary for keeping on foot Hugo Brassey's life policies and would forthwith deliver the receipt for every such payment to the trustees. (c) The trustees should not be chargeable or responsible for any omission or neglect to enforce any covenant thereinbefore contained in relation to any policy for the time being subject to the trusts thereof or to keep up or restore any such policy or effect any new policy pursuant to the provisions thereinbefore contained or for any such policy lapsing or becoming void by any means whatsoever. (3) The first and second parts of sched. I to the 1935 re-settlement contained particulars of the investments thereby settled (having a nominal value of over £100,000) and the third part of the said schedule specified the sum of £196,696 2s. 5d. cash. Schedule II contained details of two policies for £20,000 and £10,000 respectively on the life of Hugo Brassey at annual premiums of £305 16s. 8d. and £142 10s. 0d. respectively. The first part of sched. III contained details of policies on Captain Brassey's life for an aggregate sum of £40,000 at an aggregate yearly premium of £1,976 13s. 4d. and the second part of such schedule contained details of other policies on Captain Brassey's life which were to be converted into fully paid-up policies under cl. 1 (ii) of the 1935 re-settlement."

Captain Brassey died on Nov. 14, 1946. From the date of the 1935 re-settlement until the date of his death the annual premiums on the policies on Captain Brassey's life specified in the first part of sched. III to such re-settlement were paid by the trustees thereof out of the income of the trust fund and the balance of such income (subject since Captain Brassey's death to Mrs. Brassey's jointure) has been paid to Hugo Brassey. Hugo Brassey has been married twice, but has had no issue by either marriage, and has not exercised the power of appointment in favour of a surviving wife conferred on him by the 1935 re-settlement. In default of issue of Hugo Brassey who attain a vested interest under the 1935 re-settlement and of his exercising the testamentary power of appointment thereby conferred on him, the property comprised in such re-settlement will, as I understand it, devolve on three daughters of Captain Brassey as the residuary legatees under Captain Brassey's will.

Following on Captain Brassey's death, the Estate Duty Office claimed duty in respect of the slice of the trust funds required by the income thereof to pay the premiums on the policies of assurance specified in the first part of sched. III to the 1935 re-settlement. This is the claim which is now before me, and it is founded on the Finance Act, 1894, s. 2 (1) (b), which provides, so far as material, that property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest.

Counsel for the plaintiffs argued that, on the death of Captain Brassey, there was no cesser of anybody's interest by reason merely of the fact that no further premiums fell to be paid in respect of the policies in question, and that in the absence of any such cesser the provisions of s. 2 (1) (b) of the Act have no

application. So far as Hugo Brassey was concerned, they say that his interest in the trust fund remained as it was before, *viz.*, a protected life interest. So, also, the interest of the remaindermen continued to be what it had been prior to Captain Brassey's death, *viz.*, a right in reversion to the corpus of the fund. It was further contended that s. 2 (1) (b) is not concerned with interests in remainder, but is aimed at the cesser of interests in possession, and that this view receives support from the language of s. 7 (7), and that, so far as the remaindermen are concerned, they had no interest in possession prior to Captain Brassey's death, nor have they any such interest now.

It is, of course, quite true that the remaindermen neither had nor have any right to call on the trustees to transfer to them any part of the capital of the fund. That right was and is in suspense, and, if it constituted the only relevant interest of the remaindermen in the fund during Captain Brassey's lifetime, it could not be said that it ceased, either in whole or in part, on Captain Brassey's death. On analysis, however, I do not think it is accurate to say that that was the only right which the remaindermen possessed, for they were at all material times entitled as *cestuis que* trust to insist that the trustees should, during Captain Brassey's lifetime, apply a sufficient part of the income of the fund to payment of the premiums on the policies in question. In other words, they could compel the trustees temporarily to divert a proportion of the income away from the life tenant and apply it in the manner I have stated. This application of income would, of course, enure to their benefit in that it would result in an increase of the trust capital to which they would eventually succeed.

Accordingly, if the trustees, in disregard of their trust obligations, had paid the whole of the trust income to Hugo Brassey, there can be no doubt but that the court would, at the instance of the remaindermen, have intervened and compelled them to devote sufficient of the income to the maintenance of the policies. From this it follows, in my judgment, that the remaindermen had *pro tanto* an "interest" in the trust income and a corresponding "interest" in the property, *i.e.*, the trust fund, of which that income was the fruit. I am unable to avoid the conclusion that this was an interest in property within the purview of s. 2 (1) (b) or that that interest ceased on the death of Captain Brassey; and, in my view, the fact that the right was vested in the remaindermen in their capacity of reversioners is of no real materiality. It was contended on behalf of the plaintiffs that it is not permissible to split up the rights of the remaindermen and, by doing so, to identify some immediate interest and isolate it from their title to possession of the property, which was reversionary and nothing else. I cannot, however, accept this contention. The fact that the remaindermen's right to the possession and the enjoyment of the property was and is future does not and cannot alter the further fact that a right to insist on income being applied to premiums (like a right to enforce accumulation, as to which see *Westminster Bank, Ltd. v. A.-G.* (1), is a valuable ancillary right which confers an immediate interest in the property from which the income is derived.

Accordingly, I hold that the remainderman has an interest in the trust fund which ceased on Captain Brassey's death and that duty became then exigible if a benefit accrued or arose by the cesser of such interest. As to this, it seems to me that benefits accrued or arose in various ways. The policy moneys fell in, to the advantage both of the remaindermen and of Hugo. Hugo's income was no longer diminished by the payment of premiums, and Captain Brassey's widow became entitled to receive her jointure. It, therefore, appears to me that in this respect also the case falls within s. 2 (1) (b) of the Act, and that duty is payable on the footing prescribed by s. 7 (7), *viz.*, on the capital value of the slice of the trust funds which was required by the income thereof to pay the premiums on the policies in question, and, if this is so, it was conceded by counsel for the plaintiffs that, having regard to the decision of WROTTESLEY, J., in *A.-G. v. Barclays Bank, Ltd.* (2), he must accept in this

court that such slice has to be ascertained by comparing the gross income required to produce, after deduction of tax, the net amount of the premiums with the gross income of the trust funds.

Declaration accordingly. Costs of both parties to be taxed and paid out of the trust fund.

Solicitors: Norton, Rose, Greenwell & Co. (for the plaintiffs); Solicitor of Inland Revenue.

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

R. v. SIDMOUTH RENT TRIBUNAL. Ex parte SELLEK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.), December 7, 1950.]

Rent Control—Reduction of rent—House converted into flats—Flat first rated as separate hereditament at £80—No apportionment of assessment of dwelling-house—Jurisdiction of tribunal—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1).

In July, 1947, a house situated elsewhere than in London, the rateable value of which was £70, was converted into four self-contained flats one of which was let to the tenant at £200 a year. On Mar. 27, 1948, the flats were separately rated, the flat in question being assessed at £80, subsequently reduced to £64. No application was made to the county court under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, to apportion the rateable value of the house to determine that of the flat, but the tenant applied under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, to determine the reasonable rent for the flat, stating in his application that the rateable value was £64. This figure was not challenged by the landlord, and the rent tribunal reduced the rent. On an application by the landlord for an order of *certiorari* to bring up and quash the determination of the tribunal,

Held: in the absence of an apportionment by the county court under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, of the rateable value of the whole house, the only rateable value of the flat which could properly have been placed before the rent tribunal was that at which it was first assessed, viz., £80, and, as that assessment was in excess of the limits laid down by s. 3 (1) (c) of the Rent and Mortgage Interest Restrictions Act, 1939, the tribunal had no jurisdiction and *certiorari* must issue.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1094.]

Case referred to:

(1) *Langford Property Co., Ltd. v. Batten*, [1950] 2 All E.R. 1079.

Motion by the landlord, Eleanor Annie Sellek, for an order of *certiorari* to bring up and quash a determination of the Sidmouth Rent Tribunal whereby they reduced the rent of a flat. The flat was one of four created on the conversion of a house, the rateable value of which, on Apr. 1, 1939, was £70. No apportionment of that assessment had been made to the flat. For the tribunal it was contended that, as the rateable value of the whole house was within the limits laid down by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1) (c), the flat also must be within those limits, and, therefore, the tribunal had jurisdiction to make an order reducing the rent. The facts are stated in the judgment of LORD GODDARD, C.J.

N. R. King for the landlord.

J. P. Ashworth for the tribunal.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of *certiorari* to bring up and quash a determination of the Sidmouth Rent Tribunal by which they reduced the rent of a flat situate at Aldenham House, near Sidmouth. The flat had been let to the tenant, Brigadier Sidney Noel Rice, at a rent of £200 a year, and he applied to the rent tribunal for a determination what rent was reasonable for it, stating in his application that the rateable value of the flat was £64 a year. If that had been so, the tribunal would have had jurisdiction. The figure of £64 was not challenged by the landlord, it being the rateable value of the flat at the time when the notices were served bringing the case before the tribunal. If the rateable value at the relevant time had been more than £75 a year, the flat would have been outside the Rent and Mortgage Interest Restrictions Act, 1939, and the tribunal would have had no jurisdiction. They were led to believe, however, by both parties, in error, that the rateable value was £64. A

Aldenham House was formerly one house used as a boarding-house. In July, 1947, it was converted into four self-contained flats. When the house stood as one entity the rateable value was £70 a year. The flats were not separately rated until Mar. 27, 1948, and then the flat in question was rated as a separate hereditament at £100 gross and £80. At that figure it was outside the Act of 1939, and, therefore, not a flat that could be referred to the rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949. The fact that at a later date the rateable value was reduced to £64 is immaterial. B C D

Section 7 (2) of the Act of 1939 provides:

“In relation to any dwelling-house of which the rateable value on the appropriate day was not on that day separately assessed, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to such proportion of the rateable value on that day of the property in which the dwelling-house is comprised as may be apportioned to the dwelling-house by the county court in accordance with the provisions of s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.” E

By s. 7 (1) “the appropriate day” means, as regards London, Apr. 6, 1939, and, as regards the remainder of the country, Apr. 1, 1939. Section 7 (3) provides: F

“In relation to any dwelling-house first assessed after the appropriate day, any reference in the preceding provisions of this Act to the rateable value on the appropriate day shall be construed as a reference to the rateable value on the day on which the dwelling-house was first assessed.” G

This flat was first assessed on Mar. 27, 1948, but counsel for the tribunal has argued that the only thing to which one can have regard under s. 7 (2) is the rateable value at the appropriate day, and, therefore, as the flat is only part of the original house and the original house was assessed at £70, this part of the original house must necessarily be assessed at less than £70. In other words, he contends that, as the flat has been carved out of a house which, on Apr. 1, 1939, was assessed at £70, it follows that the rateable value of the flat must be considered, for our present purpose, as a proportion of that £70, and, therefore, within the Act of 1939. H

Where a tribunal has a property referred to it, its rateable value must be proved. If the only assessment of that property is £100 on the appropriate day or when it was first assessed, £100 is *prima facie* the rateable value of the property. If, however, the property is part of a house that has been rated,

then it must be proved that the rateable value of the whole has been apportioned by the county court judge. It is not enough to say that if the parties had gone to the county court judge, he must have assessed the property at less than £100 or £75, as the case may be. The words in s. 7 (2) of the Act of 1939

A "a reference to such proportion of the rateable value on that day [i.e., Apr. 1, 1939] . . . as may be apportioned to the dwelling-house by the county court"

are, I think, conclusive. The county court must do the apportionment. The word "may" is not used there in contradistinction to "must." It is used because the sub-section is dealing both with the present and the future. The

B county court may be asked to apportion at any time.

With regard to the contention of counsel for the tribunal that, as the rateable value of the whole house on Apr. 1, 1939, was only £70, it follows that the rateable value of this flat, which has been carved out of the house, must be less, I think it extremely doubtful—though it is not necessary for us positively to decide the point—in view of the recent decision of the House

C of Lords in *Langford Property Co., Ltd. v. Batten* (1), whether, if the county court judge had apportioned the rateable value, he must have found it to be less than £70. It is probable that if that point comes up directly for decision, it will be held that on an application for apportionment the county court judge can consider whether the conversion of a house into flats is not to create a number of new entities altogether, rather than that it is a mere matter of structural

D alteration or improvement. A new entity could, I think, be created though the four walls of the house remained the same. Therefore, I do not think we can speculate about what the county court judge might have found, still less what he would have been bound to find, if the present case had gone before him. I prefer to base my decision entirely on the fact that, as there had been no apportionment here, the only rateable value which could have been put before

E this tribunal was that at which this flat was first assessed, *viz.*, £100 gross and £80 rateable value. For these reasons, although there is no blame attaching to the tribunal, who were unintentionally misled, *certiorari* must issue.

HILBERY, J.: I agree. When the tenant made his application to the rent tribunal, he presented it in relation to the dwelling-house which he was occupying, which was a self-contained flat. At that time, in stating what was

F the rateable value, he should have put in the rateable value as on the "appropriate date." The argument of counsel for the tribunal, in effect, is that the tribunal had jurisdiction to make the apportionment which a county court judge has to make so as to ascertain a rateable value which would give them jurisdiction. That seems to me to be an impossible contention. Under

G s. 12 (3) of the Act of 1920 the county court judge is the tribunal which alone can make the apportionment. Among other matters he will, as my Lord has pointed out, have to consider whether, in the particular circumstances of the case, the entity in respect of which he is asked to make the apportionment is not a new entity altogether. I agree that *certiorari* should issue.

PARKER, J.: I would decide this case on the strict construction of

H s. 7 (2) of the Act of 1939, the question being: What do the words "may be apportioned" mean? Do they mean that it is a condition precedent that the rateable value shall be apportioned by the county court judge, or not? If one tests the question by assuming that Aldenham House, while a boarding-house, had a rateable value of, say £150 a year, it is conceded that it would be necessary that there should be first an apportionment by the county court. In other words, in that case the words "as may be apportioned" must be read "shall be apportioned by the county court." If that is the true construction of those

words in such a case, it must apply equally in the present case where the rateable value was only £70 a year. For those reasons I agree that *certiorari* should issue.

Order for certiorari granted. No order as to costs.

Solicitors: *Vivash Robinson & Co.*, agents for *Michelmores, Davies & Bellamy*, Sidmouth (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

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NOTE.

Re ANTIGEN LABORATORIES, LTD.

[CHANCERY DIVISION (Roxburgh, J.), November 13, 1950.]

Company—Oppression—Petition for order regulating conduct of company's affairs—Need to state nature of relief sought—Companies Act, 1948 (c. 38), s. 210 (1).

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PETITION by a shareholder for an order under s. 210 of the Companies Act, 1948, which provides:

"(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within s. 169 (3) of this Act, the Board of Trade, may make an application to the court by petition for an order under this section. (2) If on any such petition the court is of opinion—(a) that the company's affairs are being conducted as aforesaid; and (b) that to wind-up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up; the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

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The prayer of the petition asked: (i) that an order might be made for regulating the conduct of the company's affairs in future; (ii) or that such other order, whether directing investigation into the company's affairs or otherwise, might be made as in the premises should be just.

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Salt, K.C., and *E. L. Gardner* for the petitioner.

Raymond Walton for the company.

ROXBURGH, J.: From the prayer of the petition as presented, it is impossible to know what the petitioner wants. A petitioner seeking relief under s. 210 ought to state in the prayer of the petition in clear terms the general nature of the relief sought, whether it be by the appointment of a director or of some other kind. The prayer need not contain as much detail as the court would require on the drawing up of the order, or as much as is requisite in a draft minute. It must, however, contain enough to leave no doubt what the petitioner desires the court to do. The petitioner must take the responsibility of stating specifically what he wants. The specimen Form 5A in the Companies (Winding-up) Rules, 1949, points in that direction. I shall give leave to amend the petition as asked, and to apply to fix a day for the hearing of the petition.

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Solicitors: *Alexander Pollock* (for the petitioner); *Stannard, Bosanquet & Michaelson* (for the company).

R.D.H.O.

MILLS v. BRYCE.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), November 21, December 4, 1950.]

Rent Restriction—Death of tenant—Claim by daughter to remain in possession—Contractual tenancy—Premises let below standard rent—Increase of rent demanded by landlord and paid by tenant—No notice of increase served—Increase to a figure still below standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 3 (2), s. 12 (1) (g).

The standard rent of a dwelling-house to which the Rent Restrictions Acts applied, as determined by reference to a letting on July 3, 1939, was £58 10s. per annum exclusive of rates, which were payable by the tenant who was then in occupation. On July 6, 1942, the premises were let to B. at a monthly rent of £6 10s., *i.e.*, £78 per annum, the landlord undertaking to pay the rates which, at that time, amounted to £28 7s. On that date, the standard rent was, therefore, £86 17s., *i.e.*, £58 10s. (rent of original letting) plus £28 7s. (rates), and, therefore, the letting to B. was at a rent below the standard rent. On subsequent increases in the rates, the landlord demanded, and the tenant paid, the amount of the increases, and, on the occasion of a decrease, the landlord reduced his demand correspondingly. The rent demanded by the landlord, including the increases in the rates, did not at any time exceed £86 17s., and the landlord did not serve notices of increase in accordance with s. 3 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. On May 4, 1950, B. died. A notice to quit was served on him shortly before and expired shortly after his death. The defendant, his daughter, who had been residing with him for more than six months immediately preceding his death, claimed to be entitled to remain in possession by virtue of s. 12 (1) (g) of the Act of 1920, which protects a member of the tenant's family provided that the tenant was a statutory tenant at the date of his death.

HELD: an addition to the rent corresponding with an increase in rates which did not carry the rent above the standard rent did not require a notice of increase within s. 3 (2) of the Act of 1920; since no notice of increase had been served and since the increases, when demanded, were, in fact, paid, the tenancy remained contractual down to the date of the tenant's death; and, therefore, at the time of his death B. was not a statutory tenant and the defendant was not entitled to claim the protection of s. 12 (1) (g) of the Act of 1920.

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1950 Supplements; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplements.]

Cases referred to:

- (1) *Aston v. Smith*, [1924] 2 K.B. 143; 93 L.J.K.B. 733; 131 L.T. 565; 31 Digest 570, 7175.
- (2) *Baxter v. Eckersley*, [1950] 1 All E.R. 139; [1950] 1 K.B. 480.
- (3) *Winchester Court, Ltd. v. Miller*, [1944] 2 All E.R. 106; [1944] K.B. 734; 114 L.J.K.B. 152; 171 L.T. 150; 2nd Digest Supp.
- (4) *Asher v. Seaford Court Estates, Ltd.*, [1950] 1 All E.R. 1018; [1950] A.C. 508.
- (5) *Phillips v. Copping*, [1935] 1 K.B. 15; 104 L.J.K.B. 78; 152 L.T. 175; Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE TYLOR, K.C., made at Southampton County Court on July 4, 1950, whereby he refused to grant to the landlord possession of a flat subject to the Rent Restrictions Acts.

The flat in question was let in July, 1939, at an annual rent of £58 10s., exclusive of rates, and that letting determined its standard rent. In July, 1942, the flat was let to the tenant at an inclusive rent of £78. The rates at that date amounted to £28 7s., so that the landlord would have been entitled to let the flat at £86 17s. (*i.e.*, £58 10s. plus £28 7s.). On subsequent increases in the rates, the landlord demanded, and the tenant paid, the amount of the increases, and on the occasion of a decrease in the amount of the rates the landlord reduced his demand accordingly. At no time did the rent demanded and paid exceed £86 17s. The landlord did not serve any notices of increase. On the death of the tenant, in May, 1950, his daughter, the defendant, who had been residing with him for more than six months up to the date of his death, claimed the protection of s. 12 (1) (g) of the Act of 1920 as a member of the tenant's family. The learned county court judge took the view that notices of increases of rent were necessary to support the increases demanded by the landlord and paid by the tenant; that the landlord was estopped from denying that he had served the notices; and that the notices would have operated as notices to quit terminating the contractual tenancy, so that the tenant was a statutory tenant at the date of his death, and the defendant, accordingly, was entitled to remain in possession. On appeal by the landlord, it was contended on behalf of the defendant that the effect of s. 2 (3) of the Act of 1920, which permits an increase of rent in respect of a transfer to a landlord of any liability previously borne by the tenant, was exhausted when the inclusive rent was first fixed at £78 per annum, with the result that the landlord was thenceforward entitled to that inclusive rent and no more and could claim no addition thereto except by way of permitted increase under s. 2 (1) (b), and on service of the prescribed notice under s. 3 (2). The facts appear in the judgment of SOMERVELL, L.J.

Robert Hughes and Stansfeld for the landlord.
McCarraher for the defendant.

Cur. adv. vult.

Dec. 4. The following judgments were read.

SOMERVELL, L.J.: In this case the landlord seeks possession of a flat which is admittedly within the Rent Restrictions Acts. The defendant is a Miss Bryce, the daughter of a previous tenant, Major Bryce. The flat was let to Major Bryce on July 6, 1942. In February, 1949, Major Bryce went to hospital. He died on May 4, 1950. A notice to quit was served on him shortly before and expired shortly after his death. The defendant claims to retain possession as a tenant within s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The sole point before us is whether Major Bryce was a contractual or a statutory tenant at his death. If the former, on authorities which need not be referred to, the defendant cannot claim the protection of s. 12 (1) (g). If the latter, she can.

Section 2 of the Act of 1920 deals with permitted increases in rent. It provides *inter alia* that the rent may exceed the standard rent by an amount not exceeding any increase in the amount of rates payable by the landlord: s. 2 (1) (b). Section 3 (2) provides that these "permitted" increases shall not be recoverable unless a notice in writing is served in the form contained in sched. I to the Act, or substantially in that form. It has been decided in *Aston v. Smith* (1) that, if the rent is increased in accordance with this procedure, the tenant *ipso facto* becomes a statutory tenant. In *Baxter v. Eckersley* (2) a landlord demanded and obtained increases of rent to which he was entitled only if he served the statutory notices to which I have referred. No notices had been served. The tenant died, leaving a widow who claimed the protection of the Acts which she was entitled to do if her husband had become a statutory tenant. In the proceedings the landlord claimed, and obtained, an order for the increased amount of the rent for use and occupation. He sought, however,

to rely on the invalidity of his demands for the increased rent for the purpose of saying that the tenancy had remained a contractual tenancy. It was held that he could not in one and the same proceedings obtain two forms of relief based on inconsistent premises.

A I can state very shortly the nature of the issue here. Over the period of the tenancy increases of rent were demanded and paid, to cover the landlord's increased liability for rates. No notices were served. Counsel for the landlord submitted that notices were not necessary as the increases left the rent below the standard rent. Counsel for the defendant submits that notices were necessary and that *Baxter v. Eckersley* (2) applies. The learned judge so held, and, deciding the other points in the defendant's favour, made no order for possession.

B The flat in question in Southampton was let to a Mr. Gilbertson on July 3, 1939, at a rent of £58 10s., the tenant having to pay rates. This is the tenancy determining *prima facie*, at any rate, the standard rent. Later, the flat was let on the basis of the landlord bearing the rates. Section 2 (3) of the Act of 1920 provides *inter alia* that

C " . . . any increase of rent in respect of any transfer to a landlord of any burden or liability previously borne by the tenant where, as the result of such transfer, the terms on which any dwelling-house is held are on the whole not less favourable to the tenant than the previous terms, shall be deemed not to be an increase of rent for the purposes of this Act."

D In *Winchester Court, Ltd. v. Miller* (3), approved in the House of Lords in *Asher v. Seaford Court Estates, Ltd.* (4), it was held that the word "tenant" in the sub-section included a former tenant the demise to whom fixed the standard rent. As rates fluctuate it seems to me to follow that the application of s. 2 (3) to a case such as this results in a fluctuating standard rent. I will take a rent of £50, the tenant bearing the rates in the demise which settles the standard rent. The landlord assumes the burden of rates at a time when rates are £20. A subsequent letting of £70 will be on terms not less favourable to the tenant than the previous terms. If rates fall to £15 the rent must be reduced or the terms will be less favourable. If they rise to £25 a letting at £75 would be a letting at the standard rent. Mr. Gilbertson gave up his tenancy and on July 6, 1942, the landlord let to Major Bryce, the landlord undertaking to pay the rates. The rates were at that time £28 7s. The standard rent was, therefore, in my opinion, at that date £58 10s. plus £28 7s., that is £86 17s. The landlord let to Major Bryce at £6 10s. a month, that is for £78 per annum. That was below the standard rent. During the continuance of Major Bryce's tenancy, there were, I think, three increases and one decrease of rates. When the rates increased, the landlord claimed an increase of rent to cover the increase of rates, and when they were reduced he conceded a reduction. The position as found by the learned county court judge was that the landlord represented the increases as increases in respect of rates which she was entitled to make and Major Bryce submitted. The rents as so adjusted were always below the rent permitted by the application of the "transfer of burden" sub-section.

F The position when a landlord lets below the standard rent was considered in *Phillips v. Copping* (5). In that case on the expiration of a tenancy at a rent below the standard rent, the landlord served a notice increasing the rent to the standard rent and adding thereto permitted increases. It was held that he could do so. MAUGHAM, L.J., said ([1935] 1 K.B. 23):

" . . . there is nothing to show that the common law right of the landlord to terminate an existing tenancy and to fix the rent for the new tenancy at the standard rent is taken away."

It seems, therefore, clear that the landlord here could have served a notice to quit and offered a fresh tenancy at the standard rent, which was some £8 higher than the rent she charged. It also seems clear that the parties could

have agreed the increases which the landlord demanded. The learned county court judge found that Major Bryce never agreed to a modification of the tenancy agreement and he states the position as I have summarised it above. He draws the conclusion that this made necessary the service of statutory notices. I do not regard the case as an easy one, but I have come on both points to a different conclusion.

I agree that a lawyer familiar with the decision in *Phillips v. Copping* (5) would have put the matter more explicitly than did the landlord here. Taking the judge's findings, it was substantially accurate to say that the increases were increases which the landlord was entitled to make. If Major Bryce had insisted on the formality of a notice to quit, the landlord might have considered his rights and demanded more than he did, in fact, demand. I think the proper conclusion is that Major Bryce, by paying the rent, really did agree to a variation. In any event, I do not think that the statutory notices under s. 3 (2) of the Act of 1920 were required. The main scheme of the Act, as appears from s. 1, is to make irrecoverable any amount in excess of permitted increases over the standard rent. The opening words of s. 2 (1) dealing with permitted increases refer to the amount by which the rent may exceed the standard rent. The opening words of s. 3 (2): "Notwithstanding any agreement to the contrary . . ." indicate that the necessity for notices does not apply to increases below the standard rent which, as *Phillips v. Copping* (5) shows, the parties can agree. On the most technical view of the transaction, the utmost that could have been suggested was that the landlord obtained the increase by a misrepresentation which was plainly an innocent misrepresentation. He said: "I am entitled to demand this increase." He should have said: "By serving a notice to quit I can demand this increase if you wish to remain a tenant." By using the word "misrepresentation" I am not suggesting that it was such a misrepresentation as would have given the tenant any legal rights. That point does not arise. For these reasons I have come to the conclusion that the tenancy remained a contractual tenancy, and the appeal must be allowed.

JENKINS, L.J.: I agree. The crucial question in this case is whether Major Bryce's tenancy of the flat had become statutory or was still contractual at the date of his death. This question is not free from difficulty, but I think the right answer is that the tenancy was then still contractual.

The standard rent of the flat, as determined by reference to the letting to Mr. Gilbertson on July 3, 1939, was £58 10s. per annum exclusive of rates, which were payable by the tenant. It follows that on the letting to Major Bryce in 1942 it was open to the landlord to charge whatever "exclusive" rent she pleased not exceeding £58 10s. per annum, the tenant remaining liable for rates, or, at her option, to assume the liability for rates and make a corresponding addition to the rent charged as "inclusive of rates." In the latter alternative the addition to the rent, provided it did not exceed the contemporary amount of the rates for which liability was assumed by the landlord, would, under the "transfer of burden" provisions contained in s. 2 (3) of the Act of 1920, be deemed not to be an increase in rent for the purposes of the Rent Acts. Further, I think it was open to the landlord on the letting to Major Bryce to assume liability for rates and provide for periodical fluctuations in their amount by charging an "inclusive" rent not exceeding in total annual amount £58 10s. plus the amount of the rates from time to time payable by the landlord, as this arrangement would be on the whole not less favourable to the tenant than the previous terms, inasmuch as he would be out of pocket in "inclusive" rent no more than would have been payable under the terms of Mr. Gilbertson's tenancy in the form of "exclusive" rent plus rates, and the requirements of s. 2 (3) of the Act of 1920 would thus be automatically satisfied year by year whatever the rates might amount to. It does not, however, appear from the evidence that the agreement as to rent on the letting to Major

Bryce included any provision as to subsequent variations in the amount of the rates. The rent agreed seems to have been simply £6 10s. per month inclusive of rates, which were to be paid by the landlord. This, however, was well within s. 2 (3) of the Act of 1920, since £6 10s. per month equals £78 per annum and the rates then amounted to £28 7s., so that the rent less the amount attributable to rates was at the rate of only £49 13s. per annum, as compared with the £58 10s. rent plus liability for rates under the terms of the Gilbertson tenancy.

The difficulty arises as regards the subsequent increases in rent from time to time made to correspond with the subsequent increases in rates. After allowing for these increases the rent from time to time charged was always well within the yearly figure arrived at by adding to the "exclusive" standard rent of £58 10s. the amount of the rates from time to time payable by the landlord. It would, therefore, seem to follow, again applying s. 2 (3) of the Act of 1920, that there was here no increase in rent for the purposes of the Rent Acts. It is, however, argued on behalf of the defendant that the effect of s. 2 (3) was exhausted when the "inclusive" rent was first fixed at £6 10s. per month. Thenceforward, it is said, the landlord was entitled to that inclusive rent and no more, and could claim no addition on account of increased rates except by way of permitted increase under s. 2 (1) (b), and on service of the prescribed notice under s. 3 (2) which would have had the effect of converting the tenancy from a contractual to a statutory one. The fallacy in this argument, however, is that it treats the "inclusive" rent of £6 10s. per month as if it had been the standard rent, which it was not. The standard rent here in question was £58 10s. per annum exclusive, and the landlord could charge any rent she chose, not exceeding that amount plus the amount of the burden assumed by her in respect of rates. If, on the occasion of each of the increases in rent with which we are here concerned, there had been a change of tenant and a new agreement with such tenant for payment of the increased rent, I apprehend the agreement would have been perfectly lawful so far as the Rent Acts were concerned, for the amount charged, after allowing for the transfer of burden to the landlord in the shape of rates, would have been well within the standard rent, if the burden transferred is to be measured, as I think it should be (see *Asher v. Seaford Court Estates, Ltd.* (4)), by reference to the terms of the Gilbertson tenancy.

If the increases here made were open to any objection, it was not, I think, that the Acts precluded them from being made except as permitted increases in the standard rent and after service of the prescribed notice, because, if I am so far right, they were not increases in the standard rent at all. The objection (if any) was, as it seems to me, that the landlord, having agreed once and for all an "inclusive" rent of £6 10s. per month, had thereafter to pay the rates whatever they might amount to, and could not as a matter of contract demand any increase because the rates happened to go up. This purely contractual objection cannot, so far as I can see, avail the defendant. The increases, when demanded, were in fact paid. It may be this was done under a mistake as to the terms of the agreement. It may be that it was done because irrespective of the legal rights it was recognised as reasonable that the tenant should bear any increase in rates. One is tempted to think (especially in view of the decrease in rent allowed on one occasion when the rates were reduced) that the true agreement between the parties may have been that the tenant should bear any increase and take the benefit of any reduction in the rates. Of that, however, there is no evidence.

Whatever the true explanation of Major Bryce's acquiescence in those increases may have been, the fact, in my view, remains that the amount he paid never exceeded the amount which, so far as the Rent Acts were concerned, he could lawfully agree to pay—that is, the standard "exclusive" rent plus the amount

of the burden in the shape of rates transferred to the landlord. Looking at the substance of the matter, he was never out of pocket more than he would have been if he had paid the "exclusive" standard rent of £58 10s. and borne the rates himself. In fact, he was in pocket by comparison.

Accordingly, I agree that the tenancy remained contractual down to the date of Major Bryce's death, with the result that as the notice to quit had not then expired the defendant cannot claim the benefit of s. 12 (1) (g) of the Act of 1920 and that the appeal should, therefore, be allowed.

BIRKETT, L.J.: I have had the advantage of reading both the judgments which have been delivered, and as they cover so completely anything I would have wished to have said, and as I am in complete agreement with them, I do not desire to add anything more.

Appeal allowed with costs.

Solicitors: *White & Leonard*, agents for *Hallett, Martin & Lebern*, Southampton (for the landlord); *Carter & Barber*, agents for *Ewing, Hickman & Clark*, Southampton (for the defendant).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

DALEY v. DIGGERS, LTD. AND ANOTHER.

[KING'S BENCH DIVISION (Hilbery, J.), November 29, December 6, 1950.]

Legal Aid Costs—Assisted person—Right to costs when successful—Legal Aid and Advice Act, 1949 (c. 51), s. 1 (7) (b).

The writ in an action for damages for negligence was issued on Jan. 18, 1950, the plaintiff being at the time an ordinary, self-supporting litigant. On Oct. 11, 1950, he was granted a certificate entitling him to legal aid under the Legal Aid and Advice Act, 1949, and so became an "assisted person" under that Act. On Nov. 14 judgment was given for him for £500 against the first defendants, and the action was dismissed against the second defendants. The learned judge found that it was reasonable for the plaintiff to join the second defendants in the action and ordered the costs of the second defendants to be paid direct to them by the first defendants. The first defendants claimed that, as an assisted person was not personally liable for costs, the plaintiff should have no costs from and after the date when he became an assisted person, or, alternatively (having regard to the remuneration allowed to counsel and solicitors under sched. III, para. 1 (1) and para. 2 (1), to the Act), that he should have only eighty-five per cent. of his costs from that date.

HELD: (i) on the true construction of s. 1 (7) (b) of the Legal Aid and Advice Act, 1949, the court, in considering whether in the exercise of its discretion it should award costs to a successful party, should completely disregard the fact that that party was an "assisted person," and, therefore, the plaintiff would be awarded the costs of the action against the first defendants.

(ii) as the costs of the second defendants were ordered to be paid direct to them by the first defendants, the Legal Aid (General) Regulations, 1950, reg. 17 (1), which would require the court to hold an inquiry into the "assisted person's" means if an order for costs was made against the "assisted person," did not apply.

[FOR THE LEGAL AID AND ADVICE ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 532.]

Cases referred to:

- (1) *Harold v. Smith*, (1860), 5 H. & N. 381; 29 L.J.Ex. 141; 157 E.R. 1229; *sub nom. Harrold v. Smith*, 1 L.T. 556.

(2) *Gundry v. Sainsbury*, [1910] 1 K.B. 645; 79 L.J.K.B. 713; 102 L.T. 440; 42 Digest 126, 1207.

ACTION for damages for personal injuries.

The plaintiff was a servant of the first defendants, Diggers, Ltd., who were doing some work at the premises of the second defendants, the Co-operative Wholesale Society, Ltd., under a contract with the second defendants. During the course of his employment, the plaintiff met with an accident by falling through an asbestos roof at the premises of the second defendants, and he brought an action against the first defendants for breach of statutory duty and for negligence and against the second defendants for general breach of duty, for breach of the Building (Safety, Health and Welfare) Regulations, 1948, and for negligence in failing to warn him of the danger. The writ was issued on Jan. 18, 1950, and on Oct. 11, 1950, the plaintiff, who was until then an ordinary litigant, was granted a certificate entitling him to legal aid under the Legal Aid and Advice Act, 1949. The action was heard at Chelmsford Assizes on Nov. 13 and 14 when HILBERY, J., gave judgment for the plaintiff against the first defendants and dismissed the action against the second defendants. The learned judge reserved the question of costs for argument before him in London. The first defendants contended, *inter alia*, that the plaintiff should have no costs from the date when he became an assisted person. This report deals only with the judgment on costs.

W. M. F. Hudson for the plaintiff.

Boileau for the first defendants.

Berryman, K.C., and *Tudor Evans* for the second defendants.

Cur. adv. vult.

Dec. 6. HILBERY, J., read the following judgment. On Nov. 14 last, at the conclusion of the hearing of this case, I found in favour of the plaintiff as against the first defendants, and, having stated that, if I had been able to find for the plaintiff without attributing any blame and responsibility for the accident to him, I should have awarded him the sum of £2,000, I found that the plaintiff was himself three-quarters to blame and responsible for his accident, and, therefore, directed that my judgment would be in his favour for £500. The question then arose what order should be made as to costs, and I reserved that question for argument before me in London.

The writ in this action was issued on Jan. 18, 1950, and all the proceedings were conducted with the plaintiff carrying the ordinary responsibilities of a self-supporting plaintiff until Oct. 11, 1950. On that date the plaintiff was granted a certificate under the Legal Aid and Advice Act, 1949, entitling him, broadly speaking, to have his costs of solicitor and counsel and his disbursements paid for him out of the Legal Aid Fund. As I have said, the plaintiff succeeded in this action in establishing the liability of the first defendants to pay him damages to the extent of that fraction for which the first defendants were held liable, after a division of the responsibility for the plaintiff's accident between them and the plaintiff, and the question which is now to be decided is: "To what costs, if any, is the plaintiff entitled from and after the date when he became an assisted person under the Act?"

The unsuccessful defendants in this action have submitted that the plaintiff should either have no costs from and after the date when he became an assisted person under the Act, or, alternatively, that he should only have eighty-five per cent. of his costs from and after that date. There is no doubt about the principle on which, in the past, the courts of common law have awarded costs to a successful litigant. They have been awarded as being "as or in the character of an indemnity." In the words of BRAMWELL, B. (5 H. & N. 385) in *Harold v. Smith* (1):

"Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on

the party who pays them, nor given as a bonus to the party who receives them."

Those words were quoted with approval in the Court of Appeal by COZENS-HARDY, M.R., in *Gundry v. Sainsbury* (2), when the Master of the Rolls said of costs ([1910] 1 K.B. 649):

"They are not a complete indemnity, but they are only given in the character of an indemnity."

As an assisted person under the Legal Aid and Advice Act, 1949, the plaintiff has not been liable personally for costs, and, therefore, it is argued, he cannot be granted something in the character of an indemnity against a liability which he has not incurred. As a matter of principle, and apart from statute, this contention would seem to be well-founded. As an assisted person the plaintiff has not been under any personal liability for his costs incurred in establishing his claim against the first defendants, and, the court being apprised of that fact, he can have no claim to an award of costs, since such an award would issue on the basis of its being an indemnity to him against a liability which in fact has never been for him an existent liability.

It is necessary, therefore, to examine the Act to see what express provisions are made in it about costs and, if possible, to discover the intention of the Act with regard to costs where the assisted person succeeds in his claim and also where such a person fails. The first section which bears on the subject is s. 1 (7) (b), which is in the following terms:

"Save as expressly provided by this Part of this Act or by regulations made thereunder . . . (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which the discretion of any court or tribunal is normally exercised."

The fact, therefore, that the plaintiff is receiving the legal aid conferred by that part of the Act, is, in the first place, not to affect the liability of the other parties to the proceedings, *i.e.*, the liability of a defendant, or, in the second place, the principles on which the discretion of the court is exercised. Costs have always been in the discretion of the court and become a liability of a party to the suit only after the court in the exercise of its discretion has awarded them. The second part of the sub-section does, therefore, directly apply to the question of costs to be awarded, either to or against an assisted person. If the discretion to award them should normally be exercised in a particular case so as to make the defendant liable for them, then they become a liability of a party to the proceedings other than the assisted person and the first part of the sub-section comes into operation. Since the second part of the sub-section, after the disjunctive, expressly provides that the principles on which the discretion of the court is to be exercised, *i.e.*, the principles in matters of discretion, are not to be affected by the fact that a party is a legally assisted person, the intention of the section would seem to be that, when it comes to the exercise of the discretion over costs, the court should not allow itself to be affected by the fact that the plaintiff is an assisted person.

Thus construed, the section is in harmony with other provisions of the Act. For example, the Act seems to contemplate that the court in some cases will make orders for the payment of costs against an assisted plaintiff, and might make them for the full amount of the defendant's costs in the exercise of the court's discretion if it were left to act on the ordinary principles, unless the Act expressly provided otherwise. To limit the assisted plaintiff's liability for the successful defendant's costs to something below that which the court, exercising its discretion on ordinary principles, might order him to pay, the Act, therefore, expressly provides by s. 2 (2) (e) that:

" . . . his liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute."

The Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 17 (1), provides as follows:

"Where an order for costs is made against an assisted person, then, subject to the provisions of the next following paragraph of this regulation— (a) the determination of the amount of his liability for costs in accordance with s. 2 (2) (e) of the Act shall, save as is hereinafter provided, be made at the trial or hearing of the action, cause or matter and be final; (b) in determining the amount of the assisted person's liability, his dwelling-house and household furniture and the tools and implements of his trade shall be left out of account to the like extent as they are left out of account in the determination by the board of his disposable income and disposable capital; (c) in determining the amount of the assisted person's liability, any certificate, emergency certificate, notice or affidavit which may have been filed under the provisions of reg. 15 shall be evidence of the facts stated therein . . ."

At the same time the Act seems to contemplate that orders will be made for the payment of the full costs of an assisted person who succeeds, just as if he were an ordinary litigant, and s. 6 (5) and s. 6 (6) provide as follows:

"(5) Subject to this Part of this Act, a solicitor who has acted for a person receiving legal aid shall be paid for so acting out of the legal aid fund, and any fees paid to counsel for so acting shall also be paid out of that fund. (6) The sums payable under the last foregoing sub-section to a solicitor or counsel shall not exceed those allowed under sched. III to this Act."

Under sched. III, where the proceedings (other than certain matrimonial suits) are in the Supreme Court or the House of Lords, the sums payable out of the fund to counsel, under para. 1 (1), are only eighty-five per cent. of counsel's fees, and the sums payable to the solicitor, under para. 2 (1), are eighty-five per cent. of the solicitor's profit costs and the full amount of his disbursements. Section 6 (9) of the Act provides:

"Nothing in this section shall prejudice s. 1 (7) (b) of this Act, and in particular—(a) sub-s. (6) and sub-s. (7) of this section shall not affect the sums recoverable by virtue of an order for costs made in favour of a person who has received legal aid or of an agreement for costs so made which provides for taxation; and (b) for the purpose of any such order or agreement, the solicitor who acted for the person in whose favour it is made shall be treated as having paid any counsel's fees."

Section 6 (9), expressly referring, as it does, to s. 1 (7) (b) and to s. 6 (6) and s. 6 (7), is in terms saying that, although in litigation in the Supreme Court a solicitor for an assisted person will only have a right to eighty-five per cent. of his profit costs and his counsel will only have a right to eighty-five per cent. of his fees, none the less the court is to disregard this fact when exercising its discretion to award costs to a successful litigant who is an assisted person, and is to exercise that discretion on ordinary principles.

If the true construction of s. 1 (7) (b) were that the court should exercise its discretion on the ordinary common law principle when deciding whether or not to award costs to a successful assisted litigant, and, therefore, would award nothing because that assisted litigant had been under no liability for his own costs, there would have been no need for s. 6 (9). There would be no

question whether the plaintiff should be awarded more than eighty-five per cent., since a successful assisted litigant would not be awarded any costs at all. Furthermore, it is noticeable that by s. 2 (2):

“Where a person receives legal aid in connection with any proceedings . . . (d) any sums recovered by virtue of an order . . . for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund.”

Section 3 (7) provides:

“References in this section to the net liability of the legal aid fund on any person's account in relation to any proceedings refer to the aggregate amount of the sums paid or payable out of that fund on his account in respect of those proceedings to any solicitor or counsel and not recouped to that fund by sums which are recovered by virtue of an order or agreement for costs made in his favour with respect to those proceedings.”

The last part of this sub-section obviously envisages an award of costs to a successful litigant. That is not consistent with a construction of s. 1 (7) (b) which would result in the court denying an order for costs to a successful assisted litigant because he was an assisted person and had, therefore, been under no liability himself for costs.

These provisions in the Act to which I have called attention lend support to the construction which I have put on s. 1 (7) (b), namely, that, in considering whether in the exercise of its discretion the court should award costs to the successful assisted person, the court should altogether disregard the fact that the successful plaintiff is an assisted person under the Act. The alternative contention of the first defendants, *viz.*, that the costs to be awarded to the plaintiff as an assisted litigant should be limited to the eighty-five per cent. of the solicitor's profit costs and the eighty-five per cent. of the fees to counsel for which alone the legal aid fund has undertaken liability, is covered, in my opinion, by what I have already decided to be the proper construction of s. 1 (7) (b). I, therefore, enter judgment for the plaintiff against the first defendants for £500 and costs, and I enter judgment for the second defendants against the plaintiff.

As there was uncontradicted evidence before me that the first defendants suggested to the plaintiff that he should seek a remedy against the second defendants—in other words, that he should sue them—because the first defendants, it was said, were not financially strong at that time, I cannot say that it was not reasonable for the plaintiff to join the second defendants in this action, though it is true that, as against each of the defendants a completely different cause of action in tort was alleged and relied on. For many years past in such circumstances the court has ordered the costs of the successful defendant to be paid direct by the unsuccessful defendant instead of ordering those costs to be paid by the plaintiff and added to the amount of his damages recovered against the unsuccessful defendant. Since I am of opinion that the joinder in this case was reasonable, and since in those circumstances, according to the established present-day practice, the court makes the costs of the successful defendant the responsibility of the unsuccessful defendant and not of the plaintiff, I make that order in this case, that is to say, I order the costs of the second defendants to be paid direct to them by the first defendants. As I make the order for these costs against the first defendants and that order connotes that they are the party responsible for them, the Legal Aid (General) Regulations, 1950, reg. 17 (1), which would require me to hold an inquiry into the plaintiff's means if I were making an order for costs against him, does not apply. I am not making an order for costs against him but against the first defendants. This may seem artificial; it is. But so is, and always has been, the order for one defendant to pay another defendant's costs where two

defendants have been joined in the action and the plaintiff has succeeded against one and failed against the other.

Order accordingly.

Solicitors: *Turner, Martin & Symes*, Ipswich (for the plaintiff); *E. P. Rugg & Co.* (for the first defendants); *Fred Hollis* (for the second defendants).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

GREGORY v. FORD AND OTHERS.

[NOTTINGHAMSHIRE SUMMER ASSIZES (Byrne, J.), July 6, 1950.]

Master and Servant—Contract of service—Implied term—Performance of statutory duty—Servant not required to perform illegal act—Permitting vehicle to be used on road without policy of insurance in force—Accident caused by servant's negligence—Liability of employer for damages—Road Traffic Act, 1930 (c. 43), s. 35 (1).

On Oct. 11, 1948, owing to the negligence of the third defendant, a motor lorry, owned by the first and second defendants and driven by the third defendant, their servant, came into collision with a motor-cycle driven by the plaintiff, as a result of which the plaintiff suffered injury. In an action by the plaintiff against the defendants the plaintiff was awarded £4,075 damages and costs. The first and second defendants held a policy of insurance against third-party risks in respect of the lorry, but it was subject to certain conditions, one of which was not complied with at the time of the accident, with the result that the lorry was not then covered by the policy. In third party proceedings the first and second defendants claimed that they were entitled to an indemnity from the third defendant in respect of the damages and costs awarded to the plaintiff, and the third defendant claimed damages from the first and second defendants, alleging (a) a breach of their statutory duty to him under the Road Traffic Act, 1930, s. 35 (1), to keep the lorry insured against third-party risks and so provide him with an indemnity from the insurance company, and (b) breach of an implied term of his contract of service that the lorry should be so insured.

HELD: (i) s. 35 (1) did not cast on an employer any duty in relation to his servant to insure against third-party risks a vehicle driven by the servant, and, therefore, the first and second defendants were not liable to the third defendant for breach of statutory duty by reason of their failure to have the lorry covered against third-party risks at the time of the accident.

(ii) there was, however, an implied term in a contract of service that the servant should not be required to do an unlawful act; accordingly, it was an implied term in the third defendant's contract with the first and second defendants that they would comply with the provisions of s. 35 (1) of the Act of 1930; and he was entitled to recover against them the amount of the damages and costs which he was liable to pay to the plaintiff.

(iii) although the accident was caused by the negligence of the third defendant, the fact that the damages fell on the first and second defendants was due, not to the third defendant's negligence, but to a breach of their duty under s. 35 (1), and, therefore, their claim to be indemnified by the third defendant failed.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 35 (1), see HALSBURY'S STATUTES, Vol. 23, p. 636.]

Cases referred to:

- (1) *Tattersall v. Drysdale*, [1935] 2 K.B. 174; 104 L.J.K.B. 511; 153 L.T. 75; Digest Supp.

(2) *Monk v. Warbey*, [1935] 1 K.B. 75; 104 L.J.K.B. 153; 152 L.T. 194; Digest Supp.

(3) *Blows v. Chapman*, [1947] 2 All E.R. 576; 112 J.P. 8; 2nd Digest Supp.

THIRD-PARTY PROCEEDINGS in an action for damages for negligence.

The plaintiff was injured in a collision between his motor cycle and a lorry, which belonged to the first and second defendants and was being driven by the third defendant, a servant of the first and second defendants. BYRNE, J., found that the accident was caused by the negligence of the third defendant and awarded to the plaintiff £4,075 damages and costs against the defendants. The lorry was the subject of an insurance policy against third-party risks, but at the time of the accident it was not covered by the policy. The first and second defendants claimed an indemnity against the third defendant in respect of the damages and costs awarded to the plaintiff, as the accident was due to the third defendant's negligence. The third defendant contended that, in failing to have the motor lorry insured against third-party risks at the time of the accident, the first and second defendants were liable to him in damages (a) for breach of their statutory duty under the Road Traffic Act, 1930, s. 35 (1), and (b) for a breach of an implied term in their contract of service with him. The issue of negligence was determined by BYRNE, J., at Derby Assizes on June 14, 1950, when the learned judge gave judgment for the plaintiff. Some of the evidence in the third-party proceedings was given at Derby Assizes on June 15, and the proceedings were then adjourned to Nottingham Assizes. The facts appear in the judgment.

Vaughan, K.C., and *H. G. Talbot* for the plaintiff.

Elwes, K.C., and *J. G. S. Hobson* for the first and second defendants.

G. Terrell for the third defendant.

Cur. adv. vult.

July 6. BYRNE, J., read the following judgment. The third defendant, Thomas Francis Hill, claims damages from the first and second defendants for breach of statutory duty by them and for breach of an implied term of his contract of service with them. The first and second defendants, Thomas Ford and Harold Ford, claim that they are entitled to an indemnity from the third defendant in respect of damages and costs which have been awarded to the plaintiff, David Edward Gregory. These proceedings arise out of an accident which occurred on Oct. 11, 1948, when a lorry owned by the first and second defendants and driven by their servant, the third defendant, collided with a motor cycle driven by the plaintiff. That issue has been determined, I having found that the accident was caused by the negligence of the third defendant and having awarded the plaintiff £4,075 damages and costs against the defendants.

The following facts were established to my satisfaction in the third-party proceedings. (i) The first and second defendants used the lorry which was involved in the accident for the purpose of conveying milk produced by them to the premises of the Milk Marketing Board. (ii) When the accident occurred the first and second defendants were, by an agreement dated Dec. 2, 1942, made between them and the Milk Marketing Board, engaged in conveying milk for reward from Woolton Rectory Farm to the premises of the Milk Marketing Board, and they were also conveying to the Milk Marketing Board milk which they had produced. (iii) At the material time the lorry owned by the first and second defendants was the subject of an insurance policy subscribed by Trident Motor Policies. One of the general exceptions to that policy is that the underwriters shall not be liable for any accident, injury, loss, damage or liability, caused, sustained or incurred while the vehicle is being driven by any person who is not within the "persons or classes of persons entitled to drive" specified in the current certificate of insurance, or is being used otherwise than within the "limitations as to use" specified in that certificate. (iv) The certificate

of insurance specifies that the classes of persons entitled to drive are (a) the policy holder, and (b) any person in the employ of the policy holder. It further specifies that the limitations as to use are for purposes in connection with the policy holder's business and that the vehicle is not to be used for conveying goods for reward. (v) The third defendant was within the persons or classes of persons entitled to drive, but the vehicle was being used for conveying goods for reward and thus was outside the limitations as to use. It is conceded on behalf of the first and second defendants that at the time of the accident the lorry was not covered by the policy of insurance.

On behalf of the third defendant it is contended that there was a breach by the first and second defendants of the statutory duty imposed on them by the Road Traffic Act, 1930, s. 35 (1), to keep the lorry driven by him insured against third-party risks and that, as a result of that breach of statutory duty, he has lost the indemnity from the insurance company for damages for which he is liable as the result of his negligence. The Road Traffic Act, 1930, s. 35 (1), provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Part of this Act."

Section 35 (2) provides a penalty in the case of a person who acts in contravention of this sub-section. It is to be observed that the statute imposes no duty on the servant to insure and that the primary duty to insure is on the employer. It is clear, however, from s. 35 that, if a vehicle is used on a road in contravention of s. 35, both the driver and the owner are guilty of an offence, and lack of knowledge on the part of the driver of the terms of the insurance policy or of the fact that one was not in existence will, in the event of a prosecution, afford him no defence. Thus, the statute contemplated the servant as being one of the persons who could be injured by a breach of statutory duty by the employer in view of the fact that it imposed on him an equal duty.

It appears to me to be necessary to consider the object of the statute. In *Tattersall v. Drysdale* (1), GODDARD, J., said ([1935] 2 K.B. 181):

"[The Road Traffic Act, 1930,] was aimed at the protection of the public by providing that there should be a body of insurers behind every driver of a car."

With that observation I respectfully agree. *Monk v. Warbey* (2) is authority for the proposition that a person who is injured by the negligent driving of a motor car which is not the subject of insurance against third-party risks can sue the owner of the motor car for breach of statutory duty, but, so far as I am aware, there is no authority for the proposition that s. 35 (1) casts on the employer a statutory duty in relation to his servant, and, having regard to the object of the statute, I do not think that it does.

The third defendant further contends that it was an implied term of his employment that the first and second defendants should at all times keep the lorry insured against third-party risks. It seems to me that, when a person is employed to drive a lorry, there must be an implied term in the contract of service that the servant shall not be required to do an unlawful act. If that be so, it appears to me to follow that it is an implied term of the contract that the employer will comply with the provisions of the statute. There is no evidence before me that the third defendant knew that the policy of insurance did not cover the errand on which he was engaged at the time of the accident. In *Blows v. Chapman* (3), a Divisional Court considered whether a servant who had been convicted of an offence under s. 35 (1) of the Act of 1930, should be

disqualified, under s. 35 (2), from holding a licence, and SINGLETON, J., said ([1947] 2 All E.R. 577):

"It is not, I think, the duty of a workman to ask his employer each day: 'Is this vehicle insured?'"

In my view, there was an implied term in the contract of service that the employer would comply with the statute, from which it would follow that the servant would be indemnified by insurers for any damage caused by his negligence. I have, therefore, come to the conclusion that on this ground the third defendant is entitled to succeed. A

The first and second defendants claim an indemnity from the third defendant. A servant is, of course, liable at the suit of his master for damage which is the result of the servant's negligence, but in this case, although the third defendant was negligent, it is owing to the breach of statutory duty by the first and second defendants that the damages in respect of which they claim indemnity fall on them. For that reason, in my view, their claim fails. It follows that there will be a declaration that the third defendant is entitled to recover against the first and second defendants the amount of the plaintiff's damages and costs. B

Order accordingly. C

Solicitors: *Flint, Bishop & Barnett*, Derby (for the plaintiff); *Fraser, Brown, White & Pears*, Nottingham (for the first and second defendants); *Mee & Co.*, Retford (for the third defendant).

[Reported by MISS GWYNEDD LEWIS, *Barrister-at-Law.*]

D

PRESTON-JONES v. PRESTON-JONES.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), November 6, 7, December 14, 1950.]

Divorce—Adultery—Proof—Period of gestation—Three hundred and sixty days—Standard of proof—Facts within judicial knowledge. E

The husband was absent from the United Kingdom from Aug. 17, 1945, to Feb. 9, 1946. On Aug. 13, 1946, the wife gave birth to a normal child, and the husband brought a petition for dissolution of marriage on the ground of her adultery, the charge being based on the fact that a period of three hundred and sixty days elapsed between Aug. 17, 1945, and Aug. 13, 1946, from which, it was alleged, it followed that the child must have been conceived in adultery. F

HELD: (i) though a finding of adultery against a wife might have the effect of bastardising her child that did not mean that a degree of proof of adultery was required such as in a scientific inquiry would justify the conclusion that such and such an event was impossible. No higher proof was demanded than that the fact should be established beyond reasonable doubt, and in the present case all the court could demand was that it should be established beyond all reasonable doubt that a child born three hundred and sixty days after a particular coitus could not be the result of that coitus. G

Head v. Head (1823) (Turn. & R. 138), *applied.*

(ii) (LORD NORMAND *dubitante* and LORD MORTON OF HENRYTON *dissentiente*) the court was not entitled to assume judicial knowledge that a child born three hundred and sixty days after the last coitus between husband and wife was not the child of the husband; the court must have regard to the evidence; and (LORD OAKSEY *dissentiente*) on the evidence in the present case it was proved beyond reasonable doubt that the husband was not the father of the child, and he was entitled to a decree. H

Gaskill v. Gaskill ([1921] P. 425); *Wood v. Wood* ([1947] 2 All E.R. 95); and *Hadlum v. Hadlum* ([1948] 2 All E.R. 412), criticised.

M.-T. v. M.-T. & Official Solicitor ([1949] P. 331), approved by LORD MORTON OF HENRYTON.

[AS TO THE PERIOD OF GESTATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 663 n.; and FOR CASES, see DIGEST, Vol. 27, p. 298, Nos. 2753, 2754, and Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Russell v. Russell*, [1924] A.C. 687; 93 L.J.P. 97; 131 L.T. 482; Digest Supp.
- (2) *Head v. Head*, (1823), Turn. & R. 138; 37 E.R. 1049; 3 Digest 359, 11.
- (3) *Bosvile v. A.-G.*, (1887), 12 P.D. 177; 56 L.J.P. 97; 57 L.T. 88; 3 Digest 362, 42.
- (4) *Burnaby v. Baillie*, (1889), 42 Ch.D. 282; 58 L.J.Ch. 842; 61 L.T. 634; 3 Digest 367, 81.
- (5) *Gaskill v. Gaskill*, [1921] P. 425; 90 L.J.P. 339; 126 L.T. 115; 27 Digest 298, 2753.
- (6) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 2nd Digest Supp.
- (7) *Hadlum v. Hadlum*, [1948] 2 All E.R. 412; [1949] P. 147; [1949] L.J.R. 341; 2nd Digest Supp.
- (8) *M.-T. v. M.-T. & Official Solicitor*, [1949] P. 331; [1949] L.J.R. 378; 2nd Digest Supp.
- (9) *Williamson v. M'Clelland*, 1913 S.C. 678; 50 Sc. L.R. 469; 1 S.L.T. 289; 3 Digest 398, 328q.
- (10) *Gray v. Gray*, [1919] 1 Sc. L.T. 163;
- (11) *Banbury Peerage Case*, (1811), 1 Sim. & St. 153; 57 E.R. 62; 3 Digest 362, 35.
- (12) *Morris v. Davies*, (1837), 5 Cl. & Fin. 163; 7 E.R. 365; 3 Digest 359, 12.
- (13) *Ginesi v. Ginesi*, [1947] 2 All E.R. 438; 111 J.P. 521; *affd.*, [1948] 1 All E.R. 373; [1948] P. 179; [1948] L.J.R. 892; 112 J.P. 194; 2nd Digest Supp.
- (14) *Loveden v. Loveden*, (1810), 2 Hag. Con. 1; 161 E.R. 648; 27 Digest 296, 2730.
- (15) *Mordaunt v. Moncreiffe*, (1874), L.R. 2 Sc. & Div. 374; 43 L.J.P. & M. 49; 30 L.T. 649; 39 J.P. 4; 27 Digest 384, 3770.

APPEAL by the husband from an order of the Court of Appeal ordering the re-trial of his petition for dissolution of marriage on the ground of his wife's adultery and CROSS-APPEAL by the wife.

Sir Godfrey Russell Vick, K.C., *Mars-Jones* and *Scholfield* for the husband. *Middleton, K.C.*, and *H. V. Brandon* for the wife.

The House took time for consideration.

Dec. 14. The following opinions were read.

LORD SIMONDS: My Lords, your Lordships have to consider an appeal by the petitioner in a divorce suit whom I will call "the husband" and a cross-appeal by the respondent in that suit whom I will call "the wife." By his appeal the husband submits that an order of the Court of Appeal, so far as it directed that the cause should be re-heard, should be set aside and that in lieu thereof a decree for dissolution of his marriage with the wife should be made. The wife, by her cross-appeal, submits that the order of the Court of Appeal should be set aside and the judgment of Mr. Commissioner BLANCO WHITE, whereby the suit was dismissed, should be restored.

The husband was married to the wife on Apr. 14, 1941, at Brymbo in the county of Denbigh. Jean, a child of the marriage, was born on Apr. 15, 1942. On Aug. 13, 1946, a second child was born to the wife. The husband, alleging

that this child was not his child and founding on the circumstances of his birth a charge of adultery against the wife, on Nov. 8, 1946, presented a petition to the High Court for the dissolution of his marriage. He alleged that the child was conceived at some date between Aug. 29, 1945, and Feb. 13, 1946, and that during the whole of that time he was without, but the wife was within, the United Kingdom, and that the child must, therefore, have been conceived as the result of an act of adultery. The petition was first heard by His Honour Commissioner BURGIS, who dismissed it. The husband appealed to the Court of Appeal and that court allowed the appeal on the ground that the commissioner had largely decided the case on evidence given by the wife which under the rule in *Russell v. Russell* (1) was inadmissible, set aside the order of the learned commissioner and directed the petition to be re-heard before another judge. I do not think it necessary to make any further reference to this first hearing.

The petition was re-heard on Mar. 24, 1949, by Mr. Commissioner BLANCO WHITE. On the evidence adduced before him the commissioner expressed himself as satisfied beyond reasonable doubt that the husband was not in the United Kingdom between Aug. 17, 1945, and Feb. 9, 1946, and that the child born on Aug. 13, 1946, and weighing eight and a quarter pounds was, apparently, normal in every way and could not have been begotten as the result of intercourse on or after Feb. 9, 1946, the day on which the husband returned to the United Kingdom. The commissioner admitted in evidence certain letters written by the wife—to use his own words—“for what they were worth as evidence of conduct only, but not as evidence for any declarations in them bearing directly on the point whether the child born on Aug. 13, 1946, was legitimate or not.” It is clear that the commissioner was not influenced in favour of the husband by these letters, but came to the conclusions of fact which I have stated in spite, rather than because, of them. I do not propose to make any further reference to them except to say that they appear irrelevant to the issue which has now to be determined, and that, with great respect to the learned lords justices who thought otherwise, I can see nothing in their admission in the circumstances in which they were admitted which is fairly open to criticism. The question which then presented itself to the commissioner was whether the fact that at least three hundred and sixty days elapsed between the last possible intercourse between husband and wife and the birth of the child, together with the medical evidence, put it beyond reasonable doubt that the child was not the child of the husband. This question he answered in the negative. It is, I think, clear that he did not consider that he would be justified in finding that adultery had been committed merely on the ground of the lapse of time without medical evidence and he found the medical evidence that was adduced unsatisfactory.

The husband appealed from the order of the commissioner to the Court of Appeal, which, on July 22, 1949, set it aside and ordered that the cause be re-heard before a judge of the High Court if possible. From the order of the Court of Appeal this appeal and cross-appeal have been brought. BUCKNILL, L.J., with whom ASQUITH, L.J., agreed, expressed himself thus:

“The commissioner in his judgment said it appeared to be a pure question of law whether three hundred and sixty days is an impossible period without any satisfactory scientific evidence to that effect. I myself do not see the case in that light, but rather as a case where the court must balance the probabilities one against the other. On the one hand, there is a very great improbability, I will not put it any higher, of a woman, three hundred and sixty days after coitus, giving birth to a normal full-time child of eight and a quarter pounds without any difficult labour, and after a pregnancy which, according to the wife, was not unduly prolonged, but on the contrary was cut short. As against this high improbability one has the

fact that the wife has put forward the case of a visit by the husband to her in November, a case which the commissioner has not accepted. If the matter rested there I should be in favour of allowing this appeal."

- A BUCKNILL, L.J., however, found in the admission of the letters to which I have referred a sufficient reason for ordering a re-hearing instead of granting a decree. I have already indicated that, in my opinion, the admission of the letters and the course taken in regard to them did not in any way prejudice the wife, and I do not think that BUCKNILL, L.J., was justified in the course that he took. It would appear from the passage that I have cited from his judgment that, apart from this consideration, he would have thought fit to grant a decree, notwithstanding the criticism of the medical or scientific evidence which had led to the commissioner refusing to do so. DENNING, L.J., dissented. He took the view that the child was obviously conceived in November, 1945, and once it was proved that the husband had not been in England since August the irresistible inference was that it was conceived in adultery. He said:

- C "In the absence of any evidence on the matter I should have thought that according to the ordinary knowledge of mankind a three hundred and sixty day normal baby is impossible, and the courts should not assert that it is possible unless there is direct medical evidence to that effect. None was produced in this case, nor in any other case so far as I know."

- D It appears, then, that DENNING, L.J., did not rely on any medical evidence that was given in the case, but thought proper to assume judicial knowledge of the material facts. This is what is intended by his reference to the "ordinary knowledge of mankind."

- E It is plain, that these appeals raise a question of peculiar difficulty, which I may state in this way: "If a husband proves that his wife has given birth to a normal child three hundred and sixty days after he could have had intercourse with her and no proof of any adulterous intercourse by her is given, what, if any, further evidence is required that the child is not his child?"
- F Let me first get one difficulty out of the way. A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required. That does not mean, however, that a degree of proof is demanded such as in a scientific inquiry would justify the conclusion that such and such an event is impossible. In this context at least
- G no higher proof of a fact is demanded than that it is established beyond all reasonable doubt: see *Head v. Head* (2). To prove that a period of so many days between fruitful coition and the time of conception is in a scientific sense impossible is itself, I suppose, a scientific impossibility. The utmost that a court of law can demand is that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus. I would add that since writing this opinion I have had the advantage of reading that of my noble and learned friend, LORD MACDERMOTT, and concur in what he says on this matter.

- H The question, then, that I have posed resolves itself into two parts. First, is it permissible for the court to assume judicial knowledge that beyond all reasonable doubt a normal child born three hundred and sixty days after the last coitus between husband and wife is not the child of the husband? Secondly, if not, was there evidence in the present case which the learned commissioner should have accepted as justifying that conclusion? On the first question it has never, I think, been doubted that the court has judicial knowledge of the normal period of human gestation, though that period has from time to time been differently stated—e.g., two hundred and seventy to two hundred and seventy five days in *Bosville v. A.-G.* (3) (12 P.D. 183), two hundred and seventy three to two hundred and eighty days in *Burnaby v.*

Baillie (4) (42 Ch.D. 296). Two doubts, however, at once obtrude themselves. First, the word "normal" has been used, and the use of it suggests that there may be an abnormal period. Can the court altogether, and, if not altogether, within what limits, disregard the abnormal, and, fastening on the normal as that of which alone it has judicial knowledge, find as a fact that adultery has been committed if the period of gestation has been abnormal and no evidence to explain it has been adduced on one side or the other? Secondly, while the court has judicial knowledge of the normal period of gestation, *i.e.*, the period between conception (by which I mean the union of the male and female cells), and birth, can it ignore the fact which in recent cases has been brought to its notice that there may be that interval between coitus and conception to which I have already referred. In other words, even assuming that the court could without evidence refuse to hold that a normal child was born three hundred and sixty days after conception, could it without evidence refuse to entertain the possibility of a thirty, sixty or ninety day interval between coitus and conception? These doubts that I have raised are, of course, different aspects of the same problem.

I have great sympathy with the view expressed by DENNING, L.J. It would, I think, appear a fantastic suggestion to any ordinary man or woman that a normal child born three hundred and sixty days after the last intercourse of a man and a woman was the child of that man, and it is to me repugnant that a court of justice should be so little in accord with the common notions of mankind that it should require evidence to displace fantastic suggestions. As so often occurs in human affairs, however, the difficulty lies in drawing the line. I cannot disregard the fact that in *Gaskill v. Gaskill* (5), VISCOUNT BIRKENHEAD, L.C., held that in the then state of medical knowledge a period of three hundred and thirty one days could not be regarded as impossible; that in *Wood v. Wood* (6) LORD MERRIMAN, P., in the absence of any medical evidence came to the same conclusion in regard to a period of three hundred and forty-six days; and that in *Hadlum v. Hadlum* (7) a period of no less than three hundred and forty-nine days was not regarded as impossible. I must, I think, however reluctantly, come to the conclusion that an additional period of eleven days, making three hundred and sixty days in all, ought not to be regarded as making the vital difference so that the court can without any further evidence regard adulterous intercourse as proved beyond all reasonable doubt. I do not ignore that in *M.-T. v. M.-T. & Official Solicitor* (8), ORMEROD, J., held that a lapse of three hundred and forty days between coitus and the birth of a normal healthy baby was impossible, but he did so on the evidence of Sir Eardley Holland, a distinguished specialist in this branch of medicine, who said that he had never heard of an authentic case of an interval of twenty-one days between coitus and fertilisation such as had been suggested as a possibility in *Gaskill v. Gaskill* (5) before modern methods of examination were available, or even of an interval of fourteen days which had been referred to in *Hadlum v. Hadlum* (7).

I come, then, to the second branch of the question that I posed which concerns the evidence in this case. It is clearly a matter which may be of importance in other cases also. Your Lordships would, I think, regard it as undesirable that the burden should be imposed on litigants in this class of case of adducing evidence of the character which in *Gaskill v. Gaskill* (5), VISCOUNT BIRKENHEAD, L.C., thought it expedient for the Attorney-General to call for the assistance of the court. That may be unavoidable where medical evidence in regard to the period is called by the respondent; there is nothing to prevent a case becoming the battle-ground of experts. I am dealing, however, with such a case as that out of which this appeal arises, in which the substantial issue between the parties was whether the husband had, at what was considered the relevant times, any opportunity of intercourse with his wife and no question

of an abnormal period of gestation had been raised until the trial and then only by the commissioner himself.

A In this case the only medical evidence was that of William Glyn Evans whose qualifications were M.D., Edinburgh, and a Diploma of Public Health. He was, it seems, a general practitioner, but there was no evidence of his age or experience. He did not attend the mother in childbirth, but first saw her when he examined the baby on Oct. 12, 1946. He formed the view (which is not contested) that the child was a normal full-time child at birth, and, being told that he was born on Aug. 13, 1946, he expressed the opinion that the "probable date of conception was on or about Nov. 6, 1945." He added: "But allowing for an extension, say of twenty days—it has been known—it would bring it to the second or third week of October." There was some confusion what was the extension which he regarded as possible, but at a late stage in his evidence he made it clear. "What I mean," he said, "when I say twenty days is that you allow twenty days for the gestation. The usual gestation is two hundred and eighty days, but it has been known to go to three hundred days." He gave the latest day of conception as Nov. 6, and said it would be "very extraordinary" if the child was conceived after that date. At the end of his examination-in-chief the commissioner himself intervened and I think it asked to set out the material questions and answers. The commissioner asked:

"Q.—What you are saying is that after a woman becomes pregnant her periods might go on? A.—That is so occasionally. Once or twice it has been known they do have periods afterwards. Q.—Is it possible for the live spermatozoa to get tucked away in some crevice in the vagina or the mouth of the uterus? A.—Or in the tubes. But then you do not get a natural . . . Q.—Spermatozoa do live a very long time do not they? A.—Yes, as long as they are in the body, yes. Q.—Are there not any crevices in the vagina and the mouth of the womb where spermatozoa might lodge? A.—No, my Lord, because the secretions would destroy the spermatozoa after a time. They would live in the fallopian tube which is a tube going from the uterus to the ovary. They do sometimes live there and develop and you get a pregnancy in the tube, but in the vagina they would not live more than a few days at the most. Q.—I have heard Sir Bernard Spilisbury speak about a case where he found the corpse of a woman who had been drowned for three weeks with live spermatozoa in the vagina. You say that could not happen in a live woman? A.—I should think it could, but I should think it would be very unlikely that it would ever get into the uterus."

This matter was not pursued in cross-examination by counsel for the wife, but at the end of the re-examination the commissioner again intervened:

G "Q.—What is the maximum period in your view from the time of sexual intercourse to the time of the impregnation of the ovum? A.—I cannot give an opinion on that. I should think a few hours, but I have never studied that aspect."

H The question, as I see it, is whether the court ought to accept this evidence as adequate to justify a finding that beyond all reasonable doubt the child was not the child of the husband. I have no hesitation in answering this question in the affirmative. I do not say that the *onus probandi* shifts because the period is not a "normal" one, but I think that the onus is a light one and is easily discharged when the period diverges largely from the normal. Here the court had the advantage of hearing a medical practitioner whose training and everyday working practice must have made him familiar with the ordinary problems of gestation and birth. He had not studied the problem of the "maximum period from the time of sexual intercourse to the time of the impregnation of

the ovum," but it is sufficiently clear from his earlier answers that, while recognising the possibility of some interval between coitus and fertilisation, he regarded as impossible an interval which would defer the birth of a normal child to three hundred and sixty days after coitus. That he was, I think, entitled to say as a matter of competent medical opinion without having made a special study of the subject. In these circumstances the commissioner was not, I think, justified in disregarding his evidence. He was, as I have said, entitled as a matter of judicial knowledge to know that, just as there is a "normal" period of gestation, so there are "abnormal" cases. He was not entitled, however, to set his own view of possible or probable abnormality, whether derived from the decided cases or from other sources, against the evidence that he heard. If, indeed, it had been legitimate for him to do so, I do not understand how he could disregard the evidence given by Sir Eardley Holland in *M.-T. v. M.-T. & Official Solicitor* (8). In my opinion, therefore, the commissioner, having found the facts as I have already stated them, should have acted on the medical evidence that was given in the case and made a decree for divorce. I move that the appeal of the husband be allowed, the cross-appeal of the wife dismissed, and the cause be remitted to the High Court in order that the proper decree may be made.

LORD NORMAND: My Lords, this is an action of divorce on the ground of adultery. The husband is the petitioner. There has been already one re-trial and the Court of Appeal has by a majority ordered a second re-trial. Against this order the husband has appealed and the wife has cross-appealed. Both parties are anxious to avoid a second re-trial, the husband maintaining that on the evidence he is entitled to a decree *nisi* of dissolution of the marriage, and the wife maintaining that the judgment of the commissioner dismissing the action should be restored. DENNING, L.J., dissented in the Court of Appeal and was prepared to grant a decree *nisi*. The majority, BUCKNILL, L.J., and ASQUITH, L.J., would have been in favour of granting a decree, but found it difficult to do so because certain letters written by the wife, from which an inference unfavourable to her might be drawn, had been read to the commissioner without the wife's having had an opportunity of explaining them. The reason for that was that counsel were restrained from putting questions lest they should be thought to infringe the rule laid down in *Russell v. Russell* (1). BUCKNILL, L.J., and ASQUITH, L.J., were, I think, influenced in favour of ordering a new trial by the expectation that the rule would be abrogated by legislation before a new trial could take place. I respectfully agree with the Court of Appeal that it would be unjust to the wife to allow these letters to be used against her. If it is possible, however, without injustice to either party to arrive at a decision of the case on the other evidence, leaving the letters altogether out of account, that is the course which ought to be taken. For a second re-trial would be a hardship both for the husband and for the wife, and it might work injustice because the lapse of time since the events to be investigated might result in loss of evidence.

The salient facts are simple. On Aug. 13, 1946, the wife gave birth without prolonged or difficult labour to a normal full-term child weighing eight and a quarter pounds. The commissioner was satisfied beyond reasonable doubt that the husband was abroad from Aug. 17, 1945, till Feb. 9, 1946, and that the wife was throughout that period resident in this country. There is no evidence against the wife of any suspicious relations with any other man or of any looseness of conduct or that she was anything but a respectable and hard-working woman. The submission for the husband is that the child, born on Aug. 13, 1946, must have been conceived in adultery. His counsel relied on the child's weight and development at birth, the date of the birth three hundred and sixty days after the husband's departure from this country in August, 1945, and six months after his return, and the evidence of Dr. Evans

a general practitioner who examined the child on Oct. 12, 1946. He relied also on the way in which the defence had been conducted. The last matter may be conveniently dealt with at this stage. The wife at the trial adduced certain witnesses to speak to a visit paid to her by the husband in the late autumn of 1945. The dates given by the witnesses are vague, but there can be no doubt that the purpose in adducing them was to show that the husband and the wife were, or might have been, together at a date which would naturally account for the child's birth on Aug. 13, 1946. This evidence was disbelieved by the commissioner. It was said also that the case had been conducted by the wife on the footing that the only question was whether the wife and the husband might have been together in October or November, 1945. This is, however, a point on which the recollection of counsel to some extent differed and I would, therefore, disregard it.

In divorce proceedings it is for the petitioner to prove the case whether the action is defended or not, and though the putting forward of a false defence may destroy the respondent's credibility that in itself does not establish the truth of the petitioner's case. Apart from that objection of principle, it would in the circumstances of this case be unjust to the wife to infer or assume that the false defence is tantamount to an admission of guilt. If it is possible that a child may be born three hundred and sixty days after coitus and if that was what had, indeed, happened, the departure from the normal course of things is so extraordinary that the mother, conscious of innocence but believing herself the victim of a sport of nature, might, despairing of establishing the true defence, allow herself to palter with the truth, and might induce others closely connected with her to lend themselves to prevarication or worse. If it is proper to exclude the letters written by the wife and the way in which the case was conducted, there remains the evidence of the dates of birth and of the husband's absence and the evidence of Dr. Evans.

The possibility that a full-term child born on Aug. 13, 1946, could have been the fruit of a coitus which took place as late as Feb. 9, 1946, may be disregarded. I do not think that evidence is required to prove that that is not possible, but, if it is required, it is given by Dr. Evans who says that the latest date of conception of this child according to the date of its birth and its weight was Nov. 6, 1945. Accordingly, the only question is whether the child could be the result of a coitus which took place as early as Aug. 17, 1945, or three hundred and sixty days before birth. If the only period to be considered were the period of gestation, I have myself no doubt that ordinary men and women would unhesitatingly say that a three hundred and sixty days gestation is beyond the limits of what is possible, and a court of law could so decide without evidence. So far, at least, judicial knowledge may be allowed to reach. In this case Dr. Evans gave evidence in answer to a question put to him by the commissioner that the ultimate, by which he meant the earliest, date of conception was about Oct. 23, 1945. If evidence were required, there it is.

It appears from the cases cited by the commissioner and the Court of Appeal that the Divorce Court has in the present century entertained the question whether before impregnation there may not be a period during which the spermatozoa after insemination may maintain life in the female genital tract and after an indefinite lapse of time enter the uterus and impregnate the ovum.

This new aspect of the rule *pater est quem nuptiae demonstrant* has given rise to great difficulties, which have hitherto been solved by evidence in each particular case. The evidence in other cases, of course, cannot competently be used in this case, but it is unsatisfactory to find that in one case (*Hadlum v. Hadlum* (7)), three hundred and forty-nine days were found not to be too long, and that in another case (*M.-T. v. M.-T. & Official Solicitor* (8)), in the same year three hundred and forty days were found to be excessive. This was the result of the differing evidence of medical men in the two cases. When

doctors disagree the courts cannot claim such judicial knowledge about the viability of spermatozoa in the female body and the limit of time after which they would be unable to enter the uterus as would enable them to fix the precise time after coitus within which conception can take place and beyond which it cannot take place. In *Wood v. Wood* (6), LORD MERRIMAN, P., said ([1947] 2 All E.R. 96):

"It may be said to be impossible to know where to draw the line, yet it can plainly be seen that one case or another must be on the wrong side of any line that can possibly be drawn."

In *Williamson v. McClelland* (9), a filiation case, the Lord President (LORD DUNEDIN) said (1913 S.C. 680) that in such a case he thought himself entitled to consider the possible duration of gestation.

"in the light of what had been said by learned judges in other cases and of what one knows to be the opinion of experts as disclosed in medical books,"

and not to restrict himself to the evidence of the single medical witness in the case. I am satisfied that the Lord President would not have allowed himself this latitude in an action of divorce, for Scottish law has always allowed in filiation cases a latitude of probation which it has not allowed even in ordinary actions. His conclusion, however, is of interest in the present case for it deals with the issue of proof or disproof of paternity on general lines and agrees closely with the opinion of LORD MERRIMAN. The Lord President said (*ibid.*):

"It is absolutely clear that neither in law nor in medical science is it possible to fix an actual number of days as the extreme period of gestation. In certain systems of law the matter has been dealt with by statute, and a limit has been arbitrarily fixed, but in our system there is no such limit. That does not lead to the conclusion that a period might not be submitted to the consideration of the court of such length that the court would refuse to hold that the parentage had been proved. The court is left free to deal with each case as it occurs."

In another Scottish case, *Gray v. Gray* (10), LORD BLACKBURN thought that the onus should be on the defendant to prove that a gestation of three hundred and thirty-one days was possible. It will be observed that in these two cases it was the period of gestation that was being considered, and so far as I am aware the Scottish courts have not specifically had to consider whether there might be a period between coitus and conception nor how long such a period might be.

I have felt great doubt whether the House ought not to say that, though it is not possible to draw the line at an actual number of days, three hundred and sixty days is too long a period, unless evidence of medical knowledge is adduced by the wife to show the contrary. We have, however, the testimony of Dr. Evans, and it is, in my judgment, sufficient for the disposal of the case. I can deal with it briefly because it has already been analysed by LORD SIMONDS. The doctor said that the spermatozoa could not live in the vagina for more than a few days and still be able to enter the uterus. In answer to a further question he said that he was not able to say what was the maximum period which might elapse between coitus and impregnation because he had never studied that aspect. Because he gave this answer the commissioner treated his evidence as valueless and indicated that he would not be satisfied by anything short of the evidence of an "academic specialist." I think that the commissioner has misunderstood Dr. Evans. A medical man may not know what the maximum period may be and yet be able to say that according to existing medical knowledge and belief it cannot be more than a few days. That, I think, is the effect of Dr. Evans' testimony. In the Court of Appeal BUCKNILL, L.J., said:

"Surely the practical experience of a general medical practitioner is likely to give him a valuable working knowledge of what is normal in such cases, and if he has never known of a case where spermatozoa remain alive and fertile in the female for over two months before fertilising the ovum such an absence of experience has a definite practical value."

A This observation of the learned lord justice is, if anything, an understatement of the effect of the authorities. In *Gaskill v. Gaskill* (5) VISCOUNT BIRKENHEAD, L.C., stated the principle on which a judge should act in coming to a conclusion of fact on the possible duration of the period between coitus and birth. He had considered first the relevant authorities, and, in particular, the opinion of the judges in the *Banbury Peerage Case* (11), and the judgment of LORD LYNDHURST, L.C., in *Morris v. Davies* (12), from which he made extensive citations which it is needless to repeat. He summed up the result thus ([1921] P. 434):

"I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child."

C The existing state of medical science and belief is the standard which has been since applied. In *M.-T. v. M.-T. & Official Solicitor* (8), the evidence of the medical witness spoke of what happens "as a rule" and "normally" and of the absence of his knowledge of any case in which so long a period as twenty-one days had elapsed between coitus and impregnation. That evidence rightly, in my opinion, satisfied the learned judge who tried the case.

D In the present case the commissioner, if he had proceeded on the evidence and not on his own speculations of what may be possible, and if he had not misdirected himself that he should not be satisfied without the evidence of a scientist, could not reasonably have arrived at any other conclusion than that the child was not the child of the husband. There can be no suggestion that the wife's case has been prejudiced by excluding from consideration the letters written by her or the false defence put forward to her. There can, therefore, be no injustice to her on that score in granting a decree *nisi*. I am for allowing the appeal and granting to the husband the remedy for which he petitions.

LORD OAKSEY: My Lords, the wife has twice been successful in the courts of first instance and now for the first time she is by your Lordships' House to be found guilty of adultery and her child is, in effect, to be bastardised.

F She is a wife against whose marital conduct nothing has been said or suggested except that her child was born three hundred and sixty days after her husband had access to her. In such circumstances the law, as I understand it, has always been that the onus on the husband in a divorce petition for adultery is as heavy as the onus which rests on the prosecution in criminal cases. That onus is generally described as being a duty to prove guilt beyond reasonable

G doubt, but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded. The principle on which this rule of proof depends is that it is better that many criminals should be acquitted than that one innocent person should be convicted. The onus in such a case as the present, however, is founded, not solely on such considerations, but on the interest of the child and the

H interest of the State in matters of legitimacy since the decision involves not only the wife's chastity and status but in effect the legitimacy of her child: see *Russell v. Russell* (1).

This appeal not only involves the application of the rule of proof in such a case as the present. It also involves difficult questions as to the facts of which the court should take judicial notice. The cases to which reference has already been made have decided that the birth of a child many days after the normal period of gestation and up to as many as three hundred and forty-nine

days after access of the husband did not prove adultery. It is important, I think, to consider carefully what taking judicial notice of facts means. It cannot, in my opinion, mean assuming the truth of a fact in issue, for that would be to beg the question. Doubtless there are some facts almost universally accepted of which, if not denied and put in issue, the court can take judicial notice, but it is essential to be certain of the fact of which you assume the truth. As LORD SIMONDS has pointed out, to take judicial notice of the fact that the normal period of gestation is two hundred and seventy or two hundred and eighty days, apart from its own vagueness, affords little or no assistance when the question is what is the greatest abnormal period of gestation. In one sense the court takes judicial notice of the decisions in other cases, but it does not, unless bound by the decisions, assume their correctness. As to the evidence given and the facts found therein the court, no doubt, takes notice of the fact that the evidence was given and certain facts were found, but not in the strict sense of taking judicial notice or assuming that they are correct. In the present case it was the main question in issue whether the wife's child was the result of an abnormal period between coitus and birth, and the court could not, in my opinion, assume judicial knowledge of the length of that period nor is your Lordships' House bound by the decisions in the cases cited on the possible length of that period. On the other hand, it seems to me that great weight must be attached to the decision of VISCOUNT BIRKENHEAD, L.C., in *Gaskill v. Gaskill* (5), proceeding as it did on medical evidence specially called by the Attorney-General. DENNING, L.J., in the Court of Appeal, took judicial notice of other matters—which he described as the facts of nature—which appear to me to conflict with these decisions and of which I, at any rate, have no knowledge.

In my opinion, it is necessary, as VISCOUNT BIRKENHEAD, L.C., held, for a husband or the court in such a petition as the present to call medical evidence that the child could not, according to the medical opinion of the day, be the child of the husband. The question is, therefore, whether such evidence was called in this case. The evidence of Dr. Evans did not satisfy the commissioner and I must say does not satisfy me. Even in a criminal case, apart altogether from any question of legitimacy, if such evidence had been given in a case entirely dependent on medical considerations, I should not have allowed the case to go to the jury.

The question in this case and the question in the cases above referred to was whether there are abnormal cases in which birth may take place many days beyond the ordinary period of gestation either because spermatozoa can live after coitus and before conception or for other unspecified reasons. It is a question of medical science on which I imagine much must have been written and many opinions held by the most eminent medical authorities. Yet Dr. Evans does not refer to any authorities and when asked: "What is the maximum period, in your view, from the time of sexual intercourse to the time of the impregnation of the ovum?" he answered, "I cannot give an opinion on that, my Lord. I should think a few hours, but I have never studied that aspect, my Lord." Now that aspect was in this case, as it must have been in the other cases in which a period of three hundred and thirty-one days to three hundred and forty-nine days between coitus and birth was in question, the crucial aspect of the matter, and to hold that such evidence discharges the onus which rests on the prosecution in criminal cases or on any party who seeks to prove illegitimacy is, in my respectful opinion, to depart altogether from the practice in such cases. If a man wishes to divorce his wife and to stigmatise with bastardy her child born during their marriage it seems to me a small thing to require that he should call a medical witness who has an opinion on the main question at issue. Such cases as this do not arise every day and if there were any case of real hardship from the point of view of expense I

think the court should call expert evidence as VISCOUNT BIRKENHEAD, L.C., did, but in the present case, the husband having already failed at two hearings, I am in favour of allowing the cross-appeal and dismissing his petition.

LORD MORTON OF HENRYTON: My Lords, in my view, the commissioner ought to have granted to the appellant a decree *nisi* for the dissolution of his marriage on the ground of the adultery of the respondent with a man unknown.

- A The husband called evidence which satisfied the commissioner that the husband was not in this country between Aug. 17, 1945, and Feb. 9, 1946. He also called the midwife who attended the wife when she gave birth to a male child at 8.15 a.m. on Aug. 13, 1946. The commissioner clearly accepted the uncontradicted evidence of the midwife that the child was a full-time child weighing eight pounds, four ounces, that the child was a normal one and that there was no question of the child being "forced into the world." He was satisfied that the child could not have been the result of intercourse between the husband and the wife in February, 1946. There remained only two possibilities—that the child was the result of intercourse between the husband and the wife three hundred and sixty days before his birth, or that the wife committed adultery during her husband's absence from this country.
- B In addition to the evidence just mentioned, the husband called Dr. Evans, whose evidence has already been set out by LORD SIMONDS. Apart from formal questions as to her name and address, the wife was asked only one question by her counsel: "Have you ever committed adultery?" and she answered: "No, sir." Three witnesses were called on her behalf, her mother, her sister and a Mr. Mulhern, and they gave evidence to the effect that the husband was home on leave between August and Christmas, 1945. The commissioner did not believe the evidence of these three witnesses.
- C What was the burden of proof upon the husband, and did he discharge it by the evidence to which I have briefly referred? Section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, in the form which it now takes by reason of s. 4 of the Matrimonial Causes Act, 1937, provides, so far as material, that:
- D

- E "(1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties and also to inquire into any countercharge which is made against the petitioner. (2) If the court is satisfied on the evidence that—(i) the case for the petition has been proved . . . the court shall pronounce a decree of divorce . . ."
- F

- In *Ginesi v. Ginesi* (13) the Court of Appeal, after a survey of the authorities, held that a petitioner must prove adultery "beyond reasonable doubt." In my view, the burden of proof is certainly no heavier than this, and counsel for the husband did not contend that it was any lighter. Assuming that this burden lay on the husband, did he discharge it? The husband proved that the birth took place three hundred and sixty days after the end of his leave in August, 1945, and that the birth was a normal one. If one adds to this the evidence of Dr. Evans, I am of opinion that the husband amply discharged the burden of proof on him. I would add that the commissioner did not say that he believed the wife's statement that she had never committed adultery. He dismissed the petition because, as he said: "I am not satisfied beyond reasonable doubt that adultery has been committed." I think that he applied the right test, but that he ought to have been so satisfied.
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- H

Certain letters written by the wife were read to the commissioner and were considered by the Court of Appeal. BUCKNILL, L.J., said:

"They seem to me to be adverse to her credibility and tend to prove that her husband was not the father of her child."

I see no reason to differ from this observation, but I have entirely disregarded these letters in forming my conclusion in this case, as your Lordships have heard no argument as to whether they were or were not admissible in evidence. Counsel for the husband was content to submit that the case was proved without them.

So much for the case now before your Lordships' House, but I go further, in the hope that my views may meet with your Lordships' approval and may be of assistance in other cases. In my opinion, the court is entitled to take judicial notice of the fact that the normal period from fruitful coitus to birth does not exceed two hundred and eighty days. That is one of the ordinary facts of nature as to which no evidence is required. If a husband proves that a child has been born three hundred and sixty days after he last had an opportunity of intercourse with his wife and that the birth was a normal one, and if no expert evidence is called by either side, I am of opinion that the husband has proved his case beyond reasonable doubt. As to the possible period of time between coitus and conception, to which the commissioner attached so much importance, if evidence is given in any case hereafter that this period may be substantial, it will, of course, be duly taken into account by the judge before whom it is given. In the present case I cannot find that any evidence was given which should have raised any reasonable doubt in the mind of the commissioner, and if it had been legitimate for him to consider the latest medical evidence in any reported case, the evidence of Sir Eardley Holland, a past president of the Royal College of Obstetricians and Gynaecologists and consulting gynaecologist to the London Hospital, is to be found in *M.-T. v. M.-T. & Official Solicitor* (8) ([1949] P. 332). Sir Eardley said, *inter alia*, that the spermatozoa did not as a rule remain capable of effecting fertilisation for more than two or three days after being deposited in the female genital tract. Fertilisation normally took place at the time of insemination, that is, of coitus, and he had never heard of an authentic case of an interval of fourteen days between coitus and fertilisation which had been referred to in the evidence given in *Hadlum v. Hadlum*, Sir Eardley's evidence certainly gives no support to the theory that an interval of three hundred and sixty days between coitus and birth is even a remote possibility.

The burden of proving adultery is, of course, on the petitioner, but there must surely come a time when a husband is entitled to say: "Having regard to the ordinary course of nature and to the interval between intercourse and birth, there is no reasonable doubt that my wife has committed adultery. It is for her to raise a reasonable doubt, if she can, by calling expert evidence." I am glad to note that this view coincides with the view expressed by LORD BLACKBURN in the Scottish case of *Gray v. Gray* (10). It may be said: "If three hundred and sixty days is enough, why not three hundred and fifty, three hundred and forty, three hundred and thirty, or three hundred and twenty days, or less?" For my part, I think that in the absence of any expert evidence on either side, an interval of three hundred and twenty days should be enough to satisfy the court. I select that particular interval because I think that forty days beyond the upper limit of the normal period puts the matter beyond reasonable doubt, if the birth is proved to be a normal one and no further evidence is offered on either side. Evidence of loose conduct on the part of the wife might well lead a court to regard a shorter interval, coupled with such evidence, as proving adultery beyond reasonable doubt.

There are, however, cases in which a longer interval than three hundred and twenty days has been held insufficient to prove adultery. In *Gaskill v. Gaskill* (5) the interval was three hundred and thirty-one days. VISCOUNT BIRKENHEAD, L.C., who tried the case sitting as a judge of first instance, said, in regard to the wife ([1921] P. 434):

"I can only find her guilty if I come to the conclusion that it is impossible,

having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child. The expert evidence renders it manifest that there is no such impossibility. In these circumstances I accept the evidence of the respondent, and find that she has not committed adultery, and accordingly I dismiss the petition."

A In *Gaskill v. Gaskill* (5) the birth was far from being a normal one, but I think that VISCOUNT BIRKENHEAD, L.C., placed too heavy a burden of proof on the husband. It is not the law to-day, in my view, and with all respect to VISCOUNT BIRKENHEAD, L.C., I do not think it was the law in 1921, that a husband is bound to prove that he cannot possibly be the father of the child, and I do not think that *Morris v. Davies* (12), cited by VISCOUNT BIRKENHEAD, L.C., established the strict rule which he laid down. In *Wood v. Wood* (6) the interval between cohabitation and birth was three hundred and forty-six days and in *Hadlum v. Hadlum* (7) it was three hundred and forty-nine days. In each of these cases the court refused the husband a decree, and I gather that in each case the court took the view that the husband must prove that he could not possibly have been the father of the child. In *M.-T. v. M.-T. & Official Solicitor* (8), ORMEROD, J., had to try an issue as to the paternity of a child born three hundred and forty days after the husband had gone overseas. C Medical evidence was given which satisfied the judge that the husband could not have been the father of the child. The judge said nothing as to the burden of proof, and I think that his decision was beyond criticism.

D I have already stated my view as to the position when no expert evidence is given on either side. When such evidence is given it must, of course, be weighed with care to ascertain whether the husband has proved his case beyond reasonable doubt. I think that the cases of *Gaskill v. Gaskill* (5), *Wood v. Wood* (6), and *Hadlum v. Hadlum* (7), put an unwarranted and increasing burden on a husband who seeks to prove his wife's adultery. If these decisions were right, a husband would have to incur the expense of calling expert medical evidence in every case in which a child was born to his wife ten months or more after he last had intercourse with her. And even if he did call such evidence, absolute impossibility is a matter which is almost, if not quite, incapable of proof. I agree with the motion proposed from the Woolsack. E

LORD MACDERMOTT: My Lords, I do not find anything to further the husband's appeal either in the letters written by the wife or in the manner in which her case was conducted at the re-trial. Excluding these matters and F excluding also, as one must on the undisputed findings of the commissioner, any possibility of the husband having had access to his wife between Aug. 17, 1945, and Feb. 9, 1946, or of the child being conceived on or after the latter date, the evidence relevant to the appeal and cross-appeal is confined to— (a) that establishing the fact that the wife was delivered of a normal full-term child, without unusual difficulty, on Aug. 13, 1946, or three hundred and sixty G days after the last relevant opportunity of intercourse with her husband; (b) the medical testimony adduced by the husband; and (c) the wife's denial of adultery.

H The duty of the court on hearing a petition for divorce is, in so far as material, to pronounce a decree if "satisfied on the evidence" that the case for the petition has been proved, and to dismiss the petition if not so satisfied: see s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 4 of the Matrimonial Causes Act, 1937. The standard of proof to be observed by the court in exercising this jurisdiction was the subject of controversy in the present case. For the husband it was accepted that the adultery alleged had to be proved beyond reasonable doubt. For the wife, on the other hand, it was submitted that, as the result of a finding of adultery would, in effect, be to bastardise the child, the petitioner, in order to succeed, would have to go further and show that it was impossible for him to be the father. This, in

my opinion, is putting the onus too high. Though VISCOUNT BIRKENHEAD, L.C., in *Gaskill v. Gaskill* (5) said ([1921] P. 434):

“ I can only find her guilty if I come to the conclusion that it is impossible, having regard to the present state of medical knowledge and belief, that the petitioner can be the father of the child,”

I do not think he intended to set up the proposition advanced here on behalf of the wife. VISCOUNT BIRKENHEAD, L.C., had previously indicated his unqualified acceptance of the views expressed by LORD LYNDBURST, L.C., in *Morris v. Davies* (12), and I do not find in that case or in the *Banbury Peerage Case* (11), also referred to by VISCOUNT BIRKENHEAD, L.C., warrant for the contention put forward by the wife. The evidence must, no doubt, be clear and satisfactory, beyond a mere balance of probabilities, and conclusive in the sense that it will satisfy what SIR WILLIAM SCOTT described in *Loveden v. Loveden* (14), as “ the guarded discretion of a reasonable and just man,” but these desiderata appear to me entirely consistent with the acceptance of proof beyond reasonable doubt as the standard required. Such, in my opinion, is the standard required by the statute. If a judge is satisfied beyond reasonable doubt as to the commission of the matrimonial offence relied upon by a petitioner as ground for divorce, he must surely be “ satisfied ” within the meaning of the enactment, and no less so in cases of adultery where the circumstances are such as to involve the paternity of a child.

On the other hand, I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word “ satisfied ” is capable of connoting something less than proof beyond reasonable doubt. The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the court might be “ satisfied,” in respect of a ground for dissolution, with something less than proof beyond reasonable doubt. I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this House in *Mordaunt v. Moncreiffe* (15), that the two jurisdictions are other than distinct. The true reason, as it seems to me, why both accept the same general standard—proof beyond reasonable doubt—lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned.

The next question is whether the commissioner should have been satisfied, on the material to which I have referred, that the wife had committed adultery. I agree that he should. To get to the real issue it will be convenient to refer first to several connected matters in order to get them out of the way. The commissioner applied the correct standard of proof and kept it before him throughout. He also kept in mind that the wife had denied on oath that she had committed adultery, but he does not say that he accepted her denial, and I think it is clear from his judgment that the doubts which led him to dismiss the petition arose on the husband's case, and that, had it been fortified with the expert testimony which the commissioner found lacking, he would not have regarded the denial as sufficient to prevail against it. Further, it is plain that the commissioner was satisfied that the period of actual gestation was normal. This, and what was for him the real point of difficulty, are indicated clearly in the passage in his judgment where he says:

“ I have no reasonable doubt that the ovum from which that child was produced was impregnated somewhere about the normal period before that child was born. The doubt in my mind is as to the period which is

the longest period that is practicable between the time of coitus and the time of impregnation of the ovum, and that is a scientific question."

A Had Dr. Evans, the husband's medical witness, sworn that he had made a scientific study of that particular question and that the period between a fruitful coition and the resulting conception must, at longest, be a matter of weeks and not of months, then, as I understand his judgment, the commissioner would have been relieved of his doubt and would have given a decree, for the interval running from Aug. 17, 1945, to the date of conception was one of between two and three months on any reckoning. Dr. Evans, however, did not speak in those terms and it is obvious that the commissioner did not regard his testimony of value on the point that was troubling him. As he says in his judgment:

B "I do not know how long spermatozoa will remain alive in the tucks and crannies of the female genital tract. I have got no medical evidence on the subject."

C Counsel for the husband challenged the ruling of the commissioner on two main grounds. First, he said that the evidence of Dr. Evans (who admittedly is a competent general practitioner and a credible witness) proved enough to preclude any reasonable doubt on the point on which the husband's case founded. And, secondly, he submitted that what he contended was the impossibility of a normal child being born three hundred and sixty days after coition was a fact of which judicial notice ought to be taken. After a careful
D consideration of Dr. Evans' testimony I am satisfied that the first of these contentions is sound. Dr. Evans gave the probable date of conception as on or about Nov. 6, 1945, and was not asked anything by counsel, either in his examination-in-chief or on cross-examination, as to an interval between connection and fertilisation. His answers on that subject were made to questions asked by the commissioner. This part of the evidence I need not repeat. It
E has already been set out in the opinion just delivered by LORD SIMONDS. I entirely agree with what he has said regarding the substance and effect of this testimony, and, in particular, its adequacy, in the circumstances of this case, as proof beyond reasonable doubt that the husband was not the father of the child. I would only add two observations. One is that I find nothing in the authorities to suggest that, in the present state of knowledge on this
F particular matter, the final and convincing word must necessarily be that of "an academic specialist"—the term used by the commissioner—to the exclusion of medical evidence based on practical experience and the learning and literature of the profession on the subject. The other is that Dr. Evans' last answer—that in which he replied with a diffident: "I should think a few hours", when asked as to the maximum interval between intercourse and impregnation—
G has to be read with his earlier answers; and from those I take it to have been his definite opinion that spermatozoa would not live long in the genital tract on account of its secretions, and that if they survived for as much as three weeks they would be very unlikely ever to get into the uterus. The result, in my opinion, must be that, even if one were to discard the witness's "few hours" as hesitant, the maximum period that could be substituted, therefore,
H would, at most, be one of weeks and not months.

As this conclusion is enough to dispose of the appeal and cross-appeal I do not propose to deal at length with the second and, as it seems to me, more difficult submission advanced on behalf of the husband. Apart from the medical evidence altogether, was his case proved beyond reasonable doubt by the normal delivery of a normal child three hundred and sixty days after the relevant coition? There is no doubt that judicial notice will be taken of the fact that, in the ordinary course of nature, delivery occurs in or about nine months after

fruitful intercourse. And it is, I think, no less clear that judicial notice will also be taken of the fact that the normal period is not always followed in nature and that the actual period may on occasion be considerably less or considerably more, but the law of this country has not fixed limits of deviation from the normal period in the sense that more than a certain period or less than a certain period is to be deemed impossible, or impossible until the contrary is proved. The question which then arises—I refer from now on only to periods longer than the normal—is whether the court, without instruction on the matter, may ever regard an abnormally long period as impossible and, if so, at what point of time this may be done. I do not think it open to doubt that a time must come when, with the period far in excess of the normal, the court may properly regard its length as proving the wife's adultery beyond reasonable doubt, and decree accordingly. As has so often been pointed out, the difficulty is to know where to draw the line. The reported cases naturally tend to creep up on each other and there is little sound guidance to be gleaned from authority. If a line has to be drawn I think it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else, and it need hardly be added that before acting on the length of the period due regard must be paid to any other relevant evidence. I do not, however, find it possible to go further and lay down any hard and fast rule capable of general application. In my opinion, there is nothing in the testimony here, or in the facts of which judicial notice may be taken, to justify fixing a specific period and holding that, in the absence of evidence to the contrary, anything more would, but anything less would not, prove adultery beyond reasonable doubt. If, in the light of a full and exhaustive inquiry, the line could be thus fixed, it might well be that the period of three hundred and sixty days would come near or even cross it. However that may be, I am not prepared to decide this case merely on the fact that a period of that duration has been established. I prefer to relate my conclusion to the evidence as a whole and, for the reasons already given, I think it should have satisfied the learned commissioner beyond reasonable doubt. I would, therefore, allow the appeal and dismiss the cross-appeal.

Appeal allowed. Cross-appeal dismissed. No order as to costs.

Solicitors: *Edward Mackie & Co.*, Ealing (for the husband); *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the wife).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

HARROWBY (EARL) v. SNELSON AND ANOTHER.

[STAFFORDSHIRE AUTUMN ASSIZES (Cassels, J.), November 25, December 1, 1950.]

Intestacy—Intestate tenant—Notice to quit—Issue before grant of letters of administration—No service on President of Probate Division—Service on persons in occupation—Notice addressed to tenant's "executors . . . and to all others whom it may concern"—Grant of letters of administration before date of operation of notice to quit.

On Mar. 25, 1948, a farm and premises were let orally to one F.S. on a yearly tenancy. On Dec. 1, 1948, F.S. died intestate, and on Jan. 5, 1949, the landlord, by his agent, served a notice to quit on Mar. 25, 1950, on the defendants who resided on the premises, one of them being the widow of F.S. The notice to quit was addressed to "the executors of the late F.S. and to all others whom it may concern," and referred to the farm as being "now in the occupation" of the defendants. No notice was served on the President of the Probate, Divorce and Admiralty Division of the High Court in whom, under s. 9 of the Administration of Estates

Act, 1925, the estate of F.S. had vested at the time of the service of the notice on the defendants. On Mar. 5, 1949, a grant of letters of administration was made to the defendants who continued in occupation and managed the property.

HELD: (i) since the President was not in possession and had no responsibility for the rent the notice to quit could be validly served on the defendants notwithstanding that the legal estate had vested in the President.

Rees d. Mears v. Perrot (1830) (4 C. & P. 230), *applied*.

(ii) since the farm was in the occupation of the defendants and under their management after the tenant's death, the form of address of the notice to quit did not render it invalid.

(iii) if the defendants were not trespassers, they could only manage the farm as agents for the President, and, therefore, the notice was effective since a notice to the agent was a notice to the principal.

(iv) since the notice was still operative on Mar. 5, 1949, when the defendants were granted administration the notice was valid on that ground also, and, therefore, the landlord was entitled to possession.

[AS TO POWERS OF ADMINISTRATION BEFORE GRANT, see HALSBURY, Hailsham Edn., Vol. 14, pp. 175-177, paras. 276-281; and FOR CASES, see DIGEST, Vol. 23, pp. 65-70, Nos. 484-535.]

Cases referred to:

(1) *Rees d. Mears v. Perrot*, (1830), 4 C. & P. 230; 172 E.R. 683; 31 Digest 453, 5998.

(2) *Sweeny v. Sweeny*, (1876), I.R. 10 C.L. 375; 31 Digest 453, *q*.

(3) *Tanham v. Nicholson*, (1872), L.R. 5 H.L. 561; 31 Digest 454, 6013.

(4) *Smith v. Mather*, [1948] 1 All E.R. 704; [1948] 2 K.B. 212; [1948] L.J.R. 1209; 2nd Digest Supp.

(5) *Fred Long & Sons, Ltd. v. Burgess*, [1949] 2 All E.R. 484; [1950] 1 K.B. 115; 2nd Digest Supp.

ACTION FOR POSSESSION.

After the death intestate of one Fred Snelson, the tenant of an agricultural property, notice to quit was served by the landlord on the defendants, who were in occupation of the property. The notice was not addressed to the defendants by name, but to "the executors of the late F. Snelson and to all others whom it may concern." At the time of the service of the notice, the legal estate vested in the President of the Probate, Divorce and Admiralty Division, but no notice to quit was served on him or on the Treasury Solicitor. Before the date when the notice served on the defendants began to operate, the defendants, who had remained in occupation, were granted letters of administration of the tenant's estate. It was contended for the defendants that, the legal estate being vested in the President until the grant of administration, the notice should have been served on him, and, for that reason and because of its form of address, that the notice served on the defendants was bad in law and did not have the effect of terminating the tenancy. The facts appear in the judgment.

R. E. Megarry and D. P. Draycott for the landlord.

Myntett for the defendants, administratrices of the deceased tenant.

Cur. adv. vult.

Dec. 1. CASSELS, J., read the following judgment. The landlord, the owner of the house, buildings, lands, premises, and all other the hereditaments thereto belonging known as New Buildings Farm, Gayton, Staffordshire, seeks to recover possession from the defendants, the administratrices of the deceased tenant. A notice, dated Jan. 5, 1949, was sent to the farm addressed:

"To the executors of the late F. Snelson and to all others whom it may concern."

The defendants contend that the notice was bad in law, was not served on the probate judge, and was ineffective to determine the tenancy.

The facts of the case are not in dispute. On Mar. 25, 1948, the farm and premises were let orally to one Fred Snelson, farmer, who continued yearly the tenancy of this and another farm which he had occupied for about ten years. On Dec. 1, 1948, he died intestate. On Jan. 5, 1949, notice to quit, signed by T. W. Knowles, as agent for the landlord, the Earl of Harrowby, was, by registered letter, addressed to "the executors of the late F. Snelson and to all others whom it may concern," and reads as follows:

"I do hereby as agent to, and for and on behalf of your landlord, the Right Honourable John Herbert Dudley, Earl of Harrowby, give you notice to quit and deliver up possession of the house, buildings, lands, premises, and all other the hereditaments thereto belonging known as New Buildings Farm, situate at Gayton, in the county of Stafford, now in your occupation, on Mar. 25, 1950, or at the expiration of the current term of your tenancy. This notice is given by reason of the fact that the tenant, with whom the contract of tenancy was made, has died within three months of the service of this notice."

On Mar. 5, 1949, grant of administration was made to the defendants, the first defendant being the widow of the deceased, who both resided in the house and controlled the farm. No notice was sent to the President of the Probate, Divorce and Admiralty Division of the High Court or to the Treasury Solicitor. After the death of F. Snelson his widow failed to obtain the consent of the landlord to her continuing the tenancy, but she and her co-defendant remained in occupation and still do so.

The sole question is whether or not the notice to quit is effective to enable the landlord to gain possession. By s. 9 of the Administration of Estates Act, 1925:

"Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof, shall vest in the probate judge in the same manner and to the same extent as formerly in the case of personal estate it vested in the ordinary."

This law goes back many centuries, and the only new thing about it is that the "probate judge," which, by s. 55 (1) (xv) of the Act of 1925, means the President of the Probate, Divorce and Admiralty Division of the High Court, is substituted for the ordinary or bishop. It is submitted on behalf of the landlord that the notice to quit, actually served in the present case, is not vitiated either by the omission to serve it on the President or by the manner in which it was addressed. It is submitted on behalf of the defendants that this notice to quit is absolutely bad and does not have the effect of determining the tenancy, that the interest of the deceased was vested from his death in the President of the Probate, Divorce and Admiralty Division until the grant of administration, and that the notice should have been served on the President or his agent or servant.

The attention of the court has been called to several authorities. In *Rees d. Mears v. Perrot* (1) the tenant from year to year died and a regular notice to quit was served on the widow who remained in possession. LITTLEDALE, J., at the Hereford Assizes held that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant, and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix.

Rees d. Mears v. Perrot (1) received consideration in *Sweeny v. Sweeny* (2), where the headnote reads as follows:

"A tenant from year to year died intestate, and, no administration being taken out, his widow continued in possession and paid the rent;

the landlord served a notice to quit on her, and, on its expiration, he, with her assent, entered into an agreement with a new tenant for a letting of the premises, in pursuance of which the new tenant entered and paid rent; subsequently a son of the deceased tenant took out administration to him, and brought an ejectment as administrator to recover possession: *Held* (FITZGERALD, B., *dissenting*), that the service of the notice to quit on the widow, the person in possession, was sufficient, in the absence of a legal personal representative of the deceased tenant, to determine the tenancy which had been in him, and was effectual for such determination even as against the legal personal representative subsequently raised; and that, therefore, the plaintiff was not entitled to recover possession."

DOWSE, B., said (I.R. 10 C.L. 379):

"Since the decision of *Rees v. Perrot* (1), it has been accepted as settled law that, on the death of a tenant from year to year, the landlord is not bound to raise a personal representative to the deceased tenant as a condition precedent to the determination of the tenancy by a notice to quit: he can, in the absence of a personal representative, treat the party in possession as the tenant to all intents and purposes. The reason given for this by some is that any person holding the possession or assuming the ownership of the land may be treated as assignee of the tenant's interest . . . It may be urged with greater force that *Rees v. Perrot* (1) and the cases following it have been decided upon the law of estoppel, and that the defendant being in possession and acting as tenant in the absence of a personal representative will not be allowed, while he holds the land, to defeat the landlord in applying to that land one of the legal incidents of a yearly tenancy, *viz.*, the right to determine it by a notice to quit."

Later the learned baron said (*ibid.*, 382):

"Why in the case of a tenancy from year to year should the death of the tenant, which determines an ordinary tenancy at will, prevent the landlord from resorting to his legal rights and serving his notice to quit? Why should he be placed in a worse position by the death of the tenant than he would have been in if the tenant had lived? What the landlord has to deal with is the estate—that is, the yearly tenancy itself. When the tenant is dead the landlord should be entitled to treat the person he finds in possession as the representative of the estate, and deal with him and it accordingly. This I think is the real principle by which *Rees v. Perrot* (1) is to be supported. It is much more satisfactory to support that decision in this way than by raising presumptions of an assignment, or by a strained application of the law of estoppel. *Rees v. Perrot* (1) so understood becomes an authority here."

PALLES, C.B., in a concurring judgment said (*ibid.*, 394):

"In my opinion, we should be doing violence to the intention of the parties to a contract for a tenancy from year to year by holding that the tenancy cannot be determined except during the existence of a legal tenant; and if I am right in this, I can see no person upon whom it is more reasonable to hold that the notice should be served than the person who is in possession of the lands the subject of the tenancy."

It is to be observed that in the case I am now deciding the landlord, through his agent, on July 4, 1949, informed the defendants that he had let the farm as from Mar. 25, 1950, to another farmer and asked who would be acting on their behalf in the matter of outgoing valuations.

It seems from *Tanham v. Nicholson* (3) that a notice is well served if it is delivered to an agent with implied authority to receive documents of such a description, and it was contended here that the defendants should be treated

either as the agents of the President of the Probate, Divorce and Admiralty Division or as executors *de son tort* because they were exercising control over the property of the deceased tenant. It is further contended by the landlord that, although his notice to quit was dated Jan. 5, 1949, when the defendants were granted administration, there were still twenty days to run before Mar. 25, 1949, when the notice would begin to operate for its full and proper length, namely, one year.

Was the notice served on the right persons? The Agricultural Holdings Act, 1948, s. 92 (3), provides for the service of any notice under the Act on the agent, and the landlord contends that this was a service on the person in control of the property. This notice was addressed: "to the executors of the late F. Snelson." The landlord says that an administrator is comprehended in the word "executors": see SIR WILLIAM HOLDSWORTH'S "HISTORY OF ENGLISH LAW," 4th ed., vol. III, p. 566; and, further, that the phrase "to all whom it may concern" are saving words, and, if the notice did reach somebody whom it did concern, then it was correctly addressed.

The defendants rely on *Smith v. Mather* (4) where the contractual tenant of a house within the Rent Restrictions Acts died intestate. Her son and daughter were living with her at her death. No letters of administration having been taken out, the estate vested, in accordance with s. 9 of the Act of 1925, in the President of the Probate, Divorce and Admiralty Division, on whom the landlords proceeded to serve notice duly terminating the contractual tenancy, thereafter bringing proceedings for possession against the deceased tenant's children. It was held in that case that the due notice served on the President was valid and was the proper procedure in such circumstances for giving effect to the landlord's right to determine: see the judgment of SOMERVELL, L.J. ([1948] 1 All E.R. 706).

The defendants also rely on *Fred Long & Sons, Ltd. v. Burgess* (5), another case in which notice to quit was given to the President of the Probate Division. That case raised the question of relation back. There the contractual tenant died and her sons continued to live in the house. The landlords served a notice to quit on the President and started an action for possession against the sons. When the case reached the county court the sons' solicitors asked for and were granted an adjournment in order that one of the sons might take out letters of administration. The grant was obtained, and at the adjourned hearing the county court judge held that, by reason of the doctrine of relation back, the deceased's tenancy from the date of her death vested in the administrator who was entitled to hold over as statutory tenant. The Court of Appeal reversed the decision and held that the doctrine of relation back did not apply. There again, it is to be observed, a notice to quit was given to the President of the Probate Division. BUCKNILL, L.J., said ([1949] 2 All E.R. 487):

"I think that on principle and historically the vesting of the estate in the President of the Probate, Divorce and Admiralty Division is a positive act with some legal substance. Normally the court, formerly composed of the probate judge, appoints a person or persons to deal with the property of the intestate through a grant of administration, but I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him. If the President's position is such as I have indicated, I think he must have the legal capacity to receive a valid notice to quit, and such notice, after the proper lapse of time, has full legal effect. If no grant of administration has been made, there is no person other than the President to whom the notice to quit can validly be given. At any date subsequent to the death of the intestate a grant of administration may be made. There is no time limit in this matter. If a grant made years after the death is to make invalid the notice to quit

validly given to the President, confusion and uncertainty will prevail and injustice may be done to those who have acted on the assumption that the notice to quit given to the President had full legal effect."

The defendants place great stress on the sentence: "If no grant of administration has been made, there is no person other than the President to whom notice to quit can validly be given."

A The last two cases deal with instances where notice to quit *has* been given to the President. In the present case I have to deal with the situation where notice to quit *has not* been given to the President. I think the circumstances here are different. The landlord has had his farm and premises occupied by persons who were either executors *de son tort* in that they were managing the farm, or they were trespassers. I have not to deal with merits, only with rights. B The President is not in possession. He has no responsibility for the rent. The estate of the deceased is merely vested in him. The landlord is not deprived of all rights over the property merely because his tenant has died intestate. The landlord still remains landlord. By way of illustration, with great respect, I repeat the observations of BUCKNILL, L.J.: "There is no time limit in this matter." Does that mean that if a tenant, living alone, seriously ill, attended C by relative or friend, dies intestate, that relative or friend can take possession of the house immediately on the death; and the landlord cannot succeed in an action for ejectment against the relative or friend because he did not give notice to the President? I do not think so. This may be an extreme illustration, but in these days of housing shortage it is not unthinkable.

D It is said that this notice is bad because it is not addressed to the tenant. I am unable to agree. It was addressed to the executors and "to all others whom it may concern," and referred to the farm "now in your occupation." The defendants were concerned, and the farm was in their occupation and under their management. They had no rights. Death had determined the tenancy of the husband of the first defendant. The defendants, in November, E 1949, acted on the notice to quit, for, following the custom of the landlord's estate, they paid the last two quarters' rent in advance instead of in arrear.

There are two further grounds on which this notice to quit may be held to be valid. The estate of the deceased under the tenancy, for what it was worth, was vested in the President and the defendants were occupying and managing it. If they were not trespassers, they could only manage the farm as agents F for the President, and a notice to the agent is a notice to the principal. The second is that the notice to quit was still operative on Mar. 5, 1949, when the defendants were granted administration.

It may sound harsh that the widow of a farmer on his death should be ejected from the farm. In the present case the widow has remained in possession for nearly two years since the death. The reason why this notice was given so soon after the death was that the landlord, holding the view that the widow G would not make a satisfactory tenant of this holding from the agricultural point of view, had regard to (i) the Agricultural Holdings Act, 1948, s. 24 (1), which restricts the operation of notices to quit and gives the tenant the right to serve a counter-notice, and (ii) to s. 24 (2) (g) which excepts from the restrictions of sub-s. (1) the case where

H "the tenant with whom the contract of tenancy was made had died within three months before the date of the giving of the notice to quit, and it is stated in the notice that it is given by reason of the matter aforesaid."

Hence the concluding words of the notice in this case:

"This notice is given by reason of the fact that the tenant with whom

the contract of tenancy was made, has died within three months of the service of this notice."

I hold that the landlord is entitled to an order for possession.

Judgment for the landlord with costs.

Solicitors: *Haslewood, Hare & Co.*, agents for *H. Wallace-Copland*, Stafford (for the landlord); *Hand, Morgan & Co.*, Stafford (for the defendants).

[Reported by MISS GWYNEDD LEWIS, *Barrister-at-Law.*]

Re SMITH'S SETTLEMENT TRUSTS. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA, LTD. AND OTHERS v. INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Danckwerts, J.), December 12, 13, 1950.]

Estate Duty—Exemption—Government securities—Beneficial ownership of persons neither domiciled nor ordinarily resident in United Kingdom—Life tenant under settlement domiciled and ordinarily resident in United Kingdom—Remaindermen domiciled and ordinarily resident outside United Kingdom—Exemption on death of life tenant—Finance (No. 2) Act, 1915 (c. 89), s. 47—Finance (No. 2) Act, 1931 (c. 49), s. 22 (1).

The Finance (No. 2) Act, 1915, s. 47, and the Finance (No. 2) Act, 1931, s. 22 (1), provide that securities may be issued by the Treasury with a condition that neither the capital nor the income shall be liable to any taxation, present or future, so long as the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom.

Certain funds, the subject of three *inter vivos* settlements, included holdings of four per cent. funding loan, 1960-90, and 3½ per cent. war loan, 1952 or after. The funding loan had been issued with a condition of exemption under s. 47 of the Act of 1915. The war loan had been issued, with a condition of exemption under s. 47 of the Act of 1915, as five per cent. war loan, 1929-47, which was subsequently converted into 3½ per cent. war loan, 1952 or after. The life tenant died domiciled and ordinarily resident in the United Kingdom, and the trust funds passed on her death to persons some of whom were domiciled and ordinarily resident in Australia. Estate duty was claimed on the funds, including the four per cent. funding loan and the 3½ per cent. war loan.

HELD: at the time when the claim for estate duty arose, *i.e.*, immediately following the death of the life tenant, the beneficial ownership in the funds had passed to the persons next entitled under the settlements, and, therefore, in so far as those persons were neither domiciled nor ordinarily resident in the United Kingdom, the funding loan and the war loan were exempt from estate duty under s. 47 of the Act of 1915 and s. 22 (1) of the Act of 1931.

Re Augusta Magan ([1922] 2 I.R. 208), *applied*.

[AS TO SECURITIES FREE OF TAXATION, see HALSBURY, Hailsham Edn., Vol. 13, p. 261, para. 260.]

Cases referred to:

- (1) *Hughes v. Bank of New Zealand*, [1936] 3 All E.R. 975; 106 L.J.K.B. 309; 156 L.T. 153; *affd.*, [1938] 1 All E.R. 778; [1938] A.C. 366; 107 L.J.K.B. 306; 158 L.T. 463; 21 Tax Cas. 472; Digest Supp.

(2) *Re Augusta Magan*, [1922] 2 I.R. 208.

(3) *Sudeley (Lord) v. A.-G.*, [1897] A.C. 11; 66 L.J.Q.B. 21; 75 L.T. 398; 61 J.P. 420; 21 Digest 122, 917.

(4) *Corbett v. Inland Revenue Comrs.*, [1937] 4 All E.R. 700; [1938] 1 K.B. 567; 107 L.J.K.B. 276; 158 L.T. 98; 21 Tax Cas. 449; Digest Supp.

(5) *Re Demarest's Settlement Trusts*, [1940] Ch. 661; 109 L.J.Ch. 136; 163 L.T. 122; 2nd Digest Supp.

A

ADJOURNED SUMMONS under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, to determine *inter alia* whether certain holdings of funding loan and war loan devolving under settlements in connection with the death of the life tenant (who was domiciled and ordinarily resident in the United Kingdom) on persons some of whom were domiciled and ordinarily resident outside the United Kingdom were liable to estate duty, having regard to the Finance (No. 2) Act, 1915, s. 47, and the Finance (No. 2) Act, 1931, s. 22 (1). The relevant facts appear in the judgment.

B

Milner Holland, K.C., and *J. A. Wolfe* for the plaintiffs, the trustees of the settlements and the will and codicil.

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Upjohn, K.C., and *J. H. Stamp* for the Crown.

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DANCKWERTS, J.: The question which I have to decide arises in regard to property subject to the trusts of three settlements dated respectively July 30, 1907, June 19, 1913, and Feb. 25, 1914, and the matter is also affected by the trusts of the will and the second codicil of Robert Barr Smith, who was the settlor in the settlements, and who died on Nov. 20, 1915. I need not go into the provisions of the settlements in any detail, because the question can be very simply expressed by a reference to an event which happened, *viz.*, the death of a Mrs. Braund on Oct. 17, 1946. Certain portions of the funds included in those settlements, of which the plaintiffs are the trustees, passed on Mrs. Braund's death, she being the life tenant under the trusts, to persons some of whom are alleged to be resident in Australia. Mrs. Braund, the life tenant, on the other hand, died domiciled and resident in the United Kingdom.

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The question which I have to consider is limited to certain securities forming part of the investments included in those settlements, being 3½ per cent. war loan, 1952, which is a conversion of five per cent. war loan, 1929-47, and four per cent. funding loan, 1960-90, and the question is whether, in the events which have happened, those securities are free from liability to estate duty on the occasion of Mrs. Braund's death. The matter arises under the Finance (No. 2) Act, 1915, and the Finance (No. 2) Act, 1931, there being similar provisions in each case in substance, though the wording is slightly different. Section 47 of the Act of 1915 provides:

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"The Treasury may, if they think fit, during the continuance of the present war and a period of twelve months thereafter, issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition shall be exempt accordingly."

The Act of 1931 provides, by s. 22:

"(1) Any securities issued by the Treasury under any Act may be issued with the condition that—(a) so long as the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest thereon shall be exempt from income tax; and (b) so long as the securities are in the beneficial ownership of persons who are

neither domiciled nor ordinarily resident in the United Kingdom, neither the capital thereof nor the interest thereon shall be liable to any taxation present or future."

It appears that the Act of 1931 is the one which may be material in respect of the securities which were converted into the 3½ per cent. war loan, 1952. It is claimed by the plaintiffs that, in so far as, on Mrs. Braund's death, these securities passed from the deceased tenant for life, who was a resident in this country, to persons beneficially entitled who are not resident in the United Kingdom, those exemptions from tax apply.

Before I pass on I should deal with the prospectus relating to the issue of the securities in question. There are three prospectuses in question, but the provision is more or less the same in each case, so that I do not think I need read each of them. Taking the issue of five per cent. war loan, 1929-47, there is a paragraph in the prospectus in the following terms:

"Stocks and bonds of these loans and the dividends payable from time to time in respect thereof, will be exempt from all British taxation, present or future, if it is shown in the manner directed by the Treasury that they are in the beneficial ownership of a person who is neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland. Further, the dividends payable from time to time in respect of stock and bonds of these loans will be exempt from British income tax, present or future, if it is shown in the manner directed by the Treasury that the stock or bonds are in the beneficial ownership of a person who is not ordinarily resident in the United Kingdom of Great Britain and Ireland, without regard to the question of domicile. Where a bond belongs to a holder entitled to exemption under these provisions the relative coupons will be paid without deduction for income tax or other taxes, if accompanied by a declaration of ownership in such form as may be required by the Treasury."

One observes that in the prospectus, for the words "so long as" the Treasury have substituted the words "if it is shown." Whether that makes any real difference I do not know. I think it is the terms of the statute which may be more accurately expressed as regards income tax, because there one is referring to a continuing period rather than to a particular event. At any rate, it is clear that s. 22 of the Act of 1931 is an exempting provision and that to secure exemption the persons claiming it must show that they are within the terms of the provision.

The view taken officially by the Inland Revenue Commissioners is stated in GREEN'S DEATH DUTIES, 2nd ed., p. 632:

"Exemption, *so long as* the property is in a particular ownership, is more appropriate to income tax than to death duties, which relate to a change of ownership. The official view is that regard must be had, on the death of an absolute owner or a life tenant, only to *his* domicile, etc., and not to the domicile, etc., of the living beneficiaries."

That, it appears, is a convenient way of dealing with the matter, because it is easy to ascertain the domicile and residence of the deceased person—the commissioners are concerned with that for other purposes—and it is also contended that that obviously is correct having regard to the intention of the statute, which, it is said, is to induce persons not resident in the United Kingdom to invest their money in these particular securities for the benefit of this country. I am entitled, it appears, to consider the intention of the statute, and in that connection I am referred to *Hughes v. Bank of New Zealand* (1) ([1936] 3 All E.R. 984), *per* LORD WRIGHT, M.R., but the difficulty is to be sure what really was the intention in certain respects of the legislature in passing these provisions.

A Claims for estate duty, of course, arise on the death of the life tenant—at that moment and not before—and it is said on behalf of the plaintiffs that that is the cause, and the result of estate duty being leviable must follow the cause. On the other hand, it is said on the part of the Inland Revenue Commissioners that the events are simultaneous, the death, the passing, and the liability to duty, and that they all occur at the moment of time when the life tenant dies. One thing occurs to me to be fairly clear, and that is that it is not until the life tenant is dead that there can be any passing or any charge to duty. It is not the life of the life tenant, but the life tenant's death which attracts the duty in question, and so long as the life tenant is still alive, even though he or she be *in extremis*, no claim for duty can be made. It is only when the person in question has expired that the property passes and the liability to estate duty then arises.

B It seems to me that, though from one point of view one may regard those events as occurring simultaneously, in fact, from a common-sense point of view one must treat them as being in some sort of sequence. It seems to me that, on any view, the ownership of the life tenant cannot be the test, because, as I have said, when the event occurs the life tenant has gone. The question is: C What happens then? It was suggested by counsel for the Crown that there might be no person beneficially owning the property at the moment when death duties arose because of the simultaneous occurrence of death, passing, and liability to duty. I do not think that that is really the correct way to look at the matter. It seems to me that the death is the cause, as counsel for the plaintiffs suggested, and then that cause gives rise to a passing and a liability for duty, and, therefore, though conceivably there is a simultaneous occurrence D from one point of view, there is some slight, almost imperceptible, period of time before the liability to estate duty arises.

E In that view I receive some support from a decision of PALLES, C.B., in an Irish case, *Re Augusta Magan* (2). The question in that case was not on the same section as that in the present case. It arose on the Finance Act, 1894, s. 12 (2), which dealt with duty on settled property, and was whether the property was to be considered as settled at the moment of a life tenant's death. The position was that theoretically she might have children during her life and that on her failure to have issue she became absolutely entitled to the property concerned. Therefore, it was correct to say that during her lifetime the property was settled, but after her death, when the question had been decided whether F she could have children or not, the property was unsettled, and the question then was whether, for the purpose of the estate duty arising on the passing on her death, the property was settled or not. PALLES, C.B., said ([1922] 2 I.R. 210):

G “Now, as long as Miss Magan was alive, notwithstanding her age, and the fact that she had never been married, the law contemplated the possibility of her having issue. Her issue, had there been such, would have taken under the will of her mother, Mrs. Elizabeth Georgiana Magan, and therefore during the life of Miss Augusta Magan, and up to the moment of her death, the property in my view was ‘settled’ within the meaning of the Finance Act. But at the moment of her death the possibility of there being issue ceased. At and from that moment no person could take under H the mother's will save Miss Magan herself; and therefore I hold that, upon and from the moment of her death, the property ceased to answer the description of being ‘settled.’ Thus arises a question of some nicety: was the property ‘settled’ when it passed from Miss Magan at the moment of her death? I am of opinion that it was not. The two events—death and the passing of property—took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed,

and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognised principle of our law."

Then he refers to cases which are collected in VINER'S ABRIDGMENT OF LAW AND EQUITY, 2nd ed., vol. 14, pp. 447, 448. Now, it seems to me that that is, at any rate, the sensible view, if I may say so with respect, and one which I ought to apply in the present case.

There are, however, said to be certain difficulties produced by such a view which must compel me to consider that the intention of the statute is defeated unless I give effect to the view, put forward on behalf of the Crown, that the tenant for life's interest in the property is the one which has to be considered. It is said that unless estate duty is cleared from the estate of the tenant for life the intention of the section must necessarily be defeated. The sections refer to the capital as well as to the interest not being taxable under the Act. As is said in GREEN'S DEATH DUTIES, it is much easier to apply these provisions to income tax than it is to apply them to estate duty. Indeed, I think it was said at one stage that estate duty was the only tax on capital which could have been in the consideration of the legislature when the section was passed. That, of course, is not quite accurate, because at the date when each of these sections were passed there was another death duty—legacy duty—which would be very material with regard to capital or securities of this kind. Further, though so far there had not been at that date any tax of the kind, the sections refer to taxation both present and future, and it was always a possibility that there might be a capital levy of some kind imposed by the legislature to which the sections could refer.

It is said by counsel for the Crown that estate duty is a tax in respect of which the nature of the person succeeding is irrelevant and that, therefore, the beneficial interests are not material because the event which attracts the duty is the passing of property from one person to another. Obviously that is true, but in this case that argument does not carry very great weight because, first, there is the case of legacy duty in which the relationship of the deceased to the person to succeed is material, and, secondly, we are dealing here with two sections which in their terms are concerned with beneficial ownership. Therefore, whatever may be the general nature of estate duty, the court and the Inland Revenue are here compelled to consider the beneficial interest of the persons concerned.

The further argument which was put forward was one based on the difficulties which arise in the case of a testator who is absolutely entitled and who disposes of his property by will, unlike this case, where the settlor had disposed of his property *inter vivos*, so that on the tenant for life's death in the present case there was no difficulty about probate or administration of an estate and the property simply passed from one beneficiary to another set of beneficiaries. It is pointed out that, where property is disposed of by will, if these investments fell into the residuary estate and were not disposed of specifically, there is no person who could claim a beneficial interest in the property in question. It has been held, of course, for certain purposes, in such cases as *Sudeley (Lord) v. A.-G.* (3) and *Corbett v. Inland Revenue Comrs.* (4) ([1937] 4 All E.R. 704), that while the residuary estate is being administered the persons who will eventually, if the estate is solvent, obtain the property cannot claim that any particular asset of the estate is theirs or that the income of any particular asset is theirs. Therefore, it is said, on the death of the testator, at the moment when the charge to estate duty accrues, there is no person who could claim the benefit of these sections, because there is no person who is beneficial owner of the securities in question. Those difficulties require consideration, and there is no doubt that an awkward situation may arise in the case of a residuary estate which includes securities of this kind when the residue is given to non-residents.

It may be that when that question has to be considered by the courts, the courts will have regard to the substance of the matter and will not think for this purpose that it is necessary to adhere to the strict rule which is laid down in such cases as *Sudeley v. A.-G.* (3).

A In the case of a specific gift it is also said that there are difficulties, because even specifically bequeathed property is liable to be taken in an application for payment of debts and the beneficiary has no absolute right to the specifically bequeathed property at the date of the testator's death, and, further, that an assent is necessary, though in the case of an assent to a specific legacy the rule is, I think, that the assent dates back to the moment of death. The difficulties are not so great in the case of a specific legacy because the position is that the beneficiary to whom the property is specifically bequeathed has the real ownership in the asset in question, subject to the risk that it may be required—and, therefore, may be taken from him—for the purpose of paying the creditors of the estate, but that, again, is a case which I have not to consider here. It was argued very strongly that these difficulties do show that the legislature must have had in mind the particular case of an absolute owner of the securities, who would be hindered in procuring the advantages of the sections for the persons who succeed him on his death. It seems to me that C that is not at all conclusive. The fact that there are difficulties with regard to other cases does not necessarily dispose of the matter if I conceive that the case which I have to consider fits the words of the section. Further, one knows that in a matter which is complicated, as this case is, providing for exemption from taxation, even though the nature of such duty as estate duty is well known, the intention of the legislature is not always successfully carried out. D However that may be, it seems to me that in the present case the passing of the securities in question to beneficiaries who are resident outside the United Kingdom does fall within the terms of the exempting sections, and, therefore, there is a relief from duty in these cases and the claim of the plaintiffs succeeds.

E I should mention that I was referred also to *Re Demarest's Settlement Trusts* (5). That case appears to be the only decision on the sections in question, but it was not of much assistance to me in deciding the present case. There had been a gift made within three years before the date of the testator's death, which, therefore, was normally subject to estate duty on the death of the deceased. The question was whether the donee, being resident in the United Kingdom, could claim the benefit of the exemptions merely because the donor was a person who was resident or domiciled outside the United Kingdom. It F seems to me plain that the answer must have been the one which the court gave—that he was not exempted because both before and after the death of the deceased the securities in question were owned by a person who was resident in the United Kingdom. That seems to me to be a very clear case, and all that can be said that is useful for the purpose of the present case is that it does show that the sections may be concerned with persons other than the original G investor and that estate duty is a relevant matter. In *Demarest's* case (5) it did not matter whether one regarded the owner before the moment of the deceased's death or immediately after the deceased's death, because it was the same person in each case, and, therefore, the difficulties which I have to consider did not arise.

Order accordingly. Crown to pay costs as between party and party.

Solicitors: *Freshfields* (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

STAGG v. BRICKETT.

[COURT OF APPEAL (Somervell, Denning and Birkett, L.JJ.), November 15, 16, December 4, 1950.]

Rent Restriction—Standard rent—House first let furnished—Purchase of furniture by tenant during occupation—Subsequent letting unfurnished—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (as amended by Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), sched. 1).

In December, 1940, the landlord let to one C. a dwelling-house furnished at a rent of 25s. a week. In February, 1941, C. bought the furniture in the house for £50, £40 being paid at once and it being agreed that the balance should be paid by weekly instalments of 5s. Shortly afterwards the rent was reduced to 20s. a week because C. could not afford to pay 25s. as well as the weekly instalment for the furniture. After a few weeks C. left the premises, and in June, 1941, the landlord let the house unfurnished to the present tenant at a rent of £3 10s. a week. On an application by the tenant to fix the standard rent,

HELD: (i) to ascertain whether a contractual letting was furnished or unfurnished the position must ordinarily be decided as at the time when the tenancy begins.

Jozwiak v. Hierowski ([1948] 2 All E.R. 9) and *Bowness v. O'Dwyer* ([1948] 2 All E.R. 181), *applied*.

(ii) if, on applying that test, it is found that the house was let furnished at the beginning of the tenancy, it will thereafter retain the status of a furnished tenancy throughout the tenancy notwithstanding subsequent variations in the quantity or value of the furniture or the amount of the rent, but fundamental alterations regarding these matters will change the character of the letting and so entitle the tenant to the protection of the Rent Restrictions Acts.

Observation of ASQUITH, L.J., in Welch v. Nagy ([1949] 2 All E.R. 868), *discussed*.

(iii) in the circumstances of the present case, including the brevity of C.'s occupation and the fact that when he left the premises he had not finished paying for the furniture, the purchase of the landlord's furniture by C. could not be regarded as so fundamental as to change the furnished letting into an unfurnished letting, and, accordingly, the letting to the present tenant was the first letting and £3 10s. a week was the standard rent.

Brown v. Robins ([1943] 1 All E.R. 548) and *Seabrook v. Mervyn* ([1947] 1 All E.R. 295), *distinguished*.

[AS TO STANDARD RENT, see HALSBURY, Hailsham Edn., Vol. 20, p. 312, para. 369; and FOR CASES, see DIGEST, Vol. 31, pp. 564-566, Nos. 7117-7132, and Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Signy v. Abbey National Building Society*, [1944] 1 All E.R. 448; [1944] K.B. 449; 113 L.J.K.B. 486; 170 L.T. 238; 2nd Digest Supp.
- (2) *Insall v. Nottingham Corpn.*, [1948] 2 All E.R. 232; [1949] 1 K.B. 261; [1949] L.J.R. 156; 2nd Digest Supp.
- (3) *Jozwiak v. Hierowski*, [1948] 2 All E.R. 9; [1948] L.J.R. 1643; 2nd Digest Supp.
- (4) *Bowness v. O'Dwyer*, [1948] 2 All E.R. 181; [1948] 2 K.B. 219; [1948] L.J.R. 1774; 2nd Digest Supp.
- (5) *Welch v. Nagy*, [1949] 2 All E.R. 868; [1950] 1 K.B. 455; 2nd Digest Supp.

- (6) *Brown v. Robins*, [1943] 1 All E.R. 548; 168 L.T. 340; 2nd Digest Supp.
 (7) *Seabrook v. Mervyn*, [1947] 1 All E.R. 295; 2nd Digest Supp.
 (8) *Artillery Mansions, Ltd. v. Macartney*, [1948] 2 All E.R. 875; [1949] 1 K.B. 164; [1949] L.J.R. 405; *affg.*, [1947] 1 All E.R. 686; [1947] K.B. 594; 2nd Digest Supp.
 (9) *Prout v. Hunter*, [1924] 2 K.B. 736; 93 L.J.K.B. 993; 132 L.T. 193; 31 Digest 557, 7040.
 A (10) *Macmillan & Co., Ltd. v. Rees*, [1946] 1 All E.R. 675; 175 L.T. 86; 2nd Digest Supp.
 (11) *Roberts v. Jones*, [1946] 2 All E.R. 678; [1947] K.B. 221; [1947] L.J.R. 606; 176 L.T. 33; 2nd Digest Supp.
 (12) *Davies v. Warwick*, [1943] 1 All E.R. 309; [1943] K.B. 329; 112 L.J.K.B. 245; 169 L.T. 130; 2nd Digest Supp.
 B (13) *Chamberlain v. Farr*, [1942] 2 All E.R. 567; 112 L.J.K.B. 206; 2nd Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE LEON, made at Wandsworth County Court on June 29, 1950, whereby he fixed the standard rent of a house at 147, Kew Road, Richmond, at 25s. per week. The facts are set out in the judgment of SOMERVELL, L.J.

R. E. Megarry for the landlord.

L. A. Blundell for the tenant.

Cur. adv. vult.

Dec. 4. The following judgments were read.

D SOMERVELL, L.J.: In these proceedings the tenant applied to the registrar of Wandsworth County Court to fix the standard rent of 147, Kew Road, Richmond, under s. 11 of the Rent and Mortgage Interest Restrictions Act, 1923. She became a tenant of the premises unfurnished in June, 1941, at a weekly rent of £3 10s., which she has since paid. Her present claim is that the standard rent of 25s., on the basis that the premises were "first let" at that sum within the definition in s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.

E The registrar's findings of fact were not disputed. The landlord bought the premises in October, 1940, for £900. In December, 1940, they were let by him to a Mr. Cockram for 25s. a week. This was found to be a furnished letting at its inception. It was decided in *Signy v. Abbey National Building Society* (1) that the rent for such a letting is not to be taken either gross or after apportionment as the standard rent for the purpose of the definition. After Cockram had gone into possession he agreed to buy the furniture comprised in the original letting. This agreement was concluded in February, 1941. The price was £50, £40 was paid down and the balance was to be discharged by payments of 5s. a week. The application proceeded on the basis that the rent remained unchanged for a week, at any rate. It was then reduced to 20s. because Cockram found that he could not afford to pay 25s. per week in addition to the 5s. a week for the furniture. Cockram was the mace-bearer of the borough of Richmond, and as such had living accommodation at the Town Hall. That accommodation was destroyed, as was also his furniture, by enemy action. G The landlord was a councillor of the Richmond Council. There is, at any rate, indication of a charitable motive in the landlord's willingness to take 20s. instead of 25s., as stated above. The same motive may have entered into the original offer. If, however, there was an unfurnished letting within the definition, this is immaterial: *Insall v. Nottingham Corpn.* (2).

H The relevant provisions are, first, the definition in s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which reads as follows:

"The expression 'standard rent' means the rent at which the dwelling-

house was let on Aug. 3, 1914*, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after Aug. 3*, the rent at which it was first let."

The proviso I do not think assists. The question whether a letting is a furnished letting is governed by s. 3 (2) (b) of the Rent and Mortgage Interest Restrictions Act, 1939, which is applicable here, and s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. Section 3 (2) reads:

"The principal Acts shall not, by virtue of this section, apply— . . . (b) save as is expressly provided in the said Acts, as amended by virtue of this section, to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture."

Section 10 (1) of the Act of 1923 is as follows:

"For the purposes of proviso (i) to sub-s. (2) of s. 12 of the [Act of 1920] (which relates to the exclusion of dwelling-houses from the principal Act in certain circumstances), a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of the furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

Counsel for the tenant submitted that there was an unfurnished letting at 25s. a week when the furniture was bought. If so, it is not disputed that that was the first letting which would determine the standard rent. Counsel for the landlord submitted that the whole of the letting to Cockram is to be disregarded as being a furnished letting. On this basis it is not disputed that the first unfurnished letting was to the tenant at £3 10s., which would be the standard rent. Both sides rely on decisions of this court, and one of the questions is whether those decisions can be reconciled. The registrar decided in favour of the landlord. On appeal to the county court judge, that decision was reversed and the landlord appeals to this court.

Counsel for the landlord relied first on *Jozwiak v. Hierowski* (3). In that case, which was one of a weekly tenancy, the rent paid and the furniture supplied varied. Both increased over the period of the tenancy, but there was no evidence to relate the one increase to the other. ASQUITH, L.J., reading the judgment of the court, said ([1948] 2 All E.R. 10):

"It is not clear whether progressive rises in the rent were provided for when first the contract of tenancy was entered into or whether from time to time the *quantum* of rent was revised by agreement to keep pace with the tenant's increased capacity to pay and also with the accession of new increments of furniture placed at his disposal."

There was, as may well be the case here, a charitable motive, which as the court said, "did not make for precision." The court held on these facts that (*ibid.*)

" . . . the relevant date on which to compare the part of the rent attributable to the use of furniture with the whole rent is the time when the original contract of tenancy is made."

The claim was one for possession, and not for determination of the standard rent. The result, however, is that, if the original letting was furnished, a tenant could not obtain the protection of the Acts by showing that the amount of the

* By the combined effect of the Rent and Mortgage Interest Restrictions Act, 1939, s. 9 (4) and sched. I, and the Defence (Commencement of Enactments) Order, 1939 (S.R. & O., 1939, No. 1135), Sept. 1, 1939, was substituted for Aug. 3, 1914, in respect of dwelling-houses, such as that in the present case, to which the pre-1939 Rent Acts did not apply.

rent attributable to furniture had ceased to be substantial at the date when proceedings were taken owing to increase of rent, as in that case, or owing to diminution of furniture. The principle as there laid down was expressly approved as a decision binding on this court in *Bouness v. O'Dwyer* (4). That case raised other points which might have been made the basis of the decision, but, in a considered judgment, the principle as stated in the sentence I have cited was, as I have said, approved and applied.

A The present case differs from *Jozwiak v. Hierowski* (3) in that here it is not a question of more or less furniture. The tenant purchased all the furniture. Such a case was considered in *Welch v. Nagy* (5) by ASQUITH, L.J., in the course of his judgment. In that case the tenant had taken a lease of certain furnished premises for a year. Towards the end of the year he bought the furniture. There was no evidence as to any negotiations as to any variation of the existing tenancy, apart from the change in the position brought about by the purchase. ASQUITH, L.J., said ([1949] 2 All E.R. 871):

B “In my view, if during the currency of a single lease, which is originally a lease of a substantially furnished house, the tenant buys all the furniture, the effect is not, while that lease is still on foot, to convert the tenancy into an unfurnished one for the purpose of the Rent Restrictions Acts.”

C I agree with the submission of counsel for the tenant that on the facts of that case a conclusion on that point was not necessary for the decision, and it is, at any rate, not clear whether the other members of the court based themselves on it. In my opinion, however, if *Jozwiak v. Hierowski* (3) is binding on us, what ASQUITH, L.J., said follows. The question as between a furnished and unfurnished letting is whether a substantial portion of the rent is attributable to furniture. If an inquiry fell to be made at the date when proceedings were brought, as *Jozwiak v. Hierowski* (3) decided it did not, a decision that a substantial portion of the rent was not attributable to furniture would make it an unfurnished letting, that is, in the same category as if no furniture at all had been let. It may well be that the tenant in a case such as *Welch v. Nagy* (5) would not think it worth while to seek to re-open the question of rent for the remaining period of his tenancy. In such an event it would be quite illogical to treat the figure arrived at on a furnished basis as the standard rent. On this point I have come to a conclusion different from that at which the county court judge arrived. I do not think the fact that we are concerned with a weekly tenancy makes any difference. Such a tenancy, unless terminated by notice or surrender, continues as a tenancy. The decision in *Jozwiak v. Hierowski* (3) was based on this principle.

F If these decisions are binding on us, it seems to me clear that the landlord must succeed. Counsel for the tenant submitted that they are inconsistent with *Brown v. Robins* (6) and *Seabrook v. Mervyn* (7). These were not cited in the cases to which I have already referred. I will deal with *Seabrook v. Mervyn* (7) first. The letting there was originally a furnished letting. The landlord decided to remove the furniture and served a notice to quit so as to enable her to do so. It was held to be unnecessary to decide whether this was a valid notice. After that there were negotiations, some oral, some in writing. The tenant expressed a wish to stay on, bringing in her own furniture. There was evidence of oral discussion about rent, the landlord saying in her evidence it was to be the same. The court held that what had taken place amounted to a variation of the tenancy agreement in that the furniture was no longer to be included therein and the letting must be treated as unfurnished and the tenant was protected. In *Brown v. Robins* (6) there were again negotiations and letters. A quantity of furniture covered by the agreement which had been signed was excluded. The court may, I think, have proceeded on the basis that it must be treated as excluded *ab initio*, in which case the decision would not help the present tenant.

It is unfortunate that *Seabrook v. Mervyn* (7) was not cited in *Jozwiak v. Hierowski* (3), but I do not think they are irreconcilable. The combined effect seems to me to be this. If there is an original furnished or unfurnished letting, variations in the furniture supplied, or in the rent, do not, in themselves, alter the character of the letting which is, *prima facie*, determined for the period of the tenancy at the time when the original contract of tenancy was made. If, on the other hand, there is evidence of a variation consequent on the change in the furniture position, the question of the rent, having regard to that change, being included in the negotiations, then regard is had to the position as at that date. If in *Seabrook v. Mervyn* (7) the landlord had agreed to a reduction of the rent because no furniture was being supplied, it would have been very artificial not to regard it as an unfurnished letting. It was said that the principle in *Jozwiak v. Hierowski* (3) might lead to difficulties if the tenancy was a long time ago. The rule, admittedly, was a rule of convenience, and, with respect, it seems to me to justify that description. In any case, I regard it as binding on this court. Applying the law as so laid down to the facts of this case, it seems to me that neither the purchase of the furniture, in itself, nor anything that took place during the short remainder of Cockram's tenancy, precludes the application of the principle in *Jozwiak v. Hierowski* (3). The actual purchase was, it seems, in the same category as that in *Welch v. Nagy* (5) to which ASQUITH, L.J., referred. The subsequent lowering of the rent to 20s. was consequent, not on the change in the furniture position, but on the tenant's inability to pay.

I will refer to one or two other points which were mentioned in the course of the argument to show that I have not overlooked them. The registrar considered whether the fact that this was a weekly tenancy made any difference. He decided that it did not, because the original tenancy was not determined by notice or surrender. I agree with this finding, nor was it, I think, challenged. The submission of counsel for the tenant was that the purchase of the furniture *ipso facto* made the letting an unfurnished one for the purpose of applying the definition. Counsel for the landlord relied on *Artillery Mansions, Ltd. v. Macartney* (8). That case dealt with what portion of the rent was attributable to services, which are covered, as is furniture, by s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923. There had been an assignment, and the question was whether the "value . . . to the tenant" within that section was to be determined by reference to the position of the original tenant or to that of the assignee. The court held that it was the value to the original tenant. *Jozwiak v. Hierowski* (3) was not referred to, but the decision seems to me to be in line with the principle there laid down.

There was a question at one stage of the argument whether counsel for the landlord had conceded that after the purchase of the furniture Cockram became entitled to the protection of the Rent Restrictions Acts. On this basis counsel for the tenant argued, as it seemed to me, with force, that, if there was a protected tenant, there must be a standard rent. A concession by counsel could not affect the construction of the Acts. Counsel for the landlord, after some discussion, submitted that, if his argument as to standard rent succeeded, this did not necessarily imply that Cockram might not have been protected from eviction if he had held over after his tenancy had been determined. That issue can be dealt with if it ever arises. I find it difficult to see how, on the basis of the submission of counsel for the tenant, Cockram could have claimed to be a protected tenant.

Counsel for the tenant referred to *Prout v. Hunter* (9). There a flat had been let to the defendant unfurnished and sub-let by her furnished. The landlord served notice to quit on the defendant, who claimed the protection of the Acts. The defendant, as pointed out by SARGANT, J., had never been an occupying tenant. It was held that the flat must be considered with reference to its actual

occupation at the time when proceedings were brought as being a dwelling-house let furnished, and, therefore, outside the protection of the Rent Restrictions Acts. There is a statement in the judgment of BANKES, L.J., which was relied on, that the material time to consider the status of the house is when the landlord seeks to obtain possession. That case is clearly distinguishable on its facts, but it is worth noting that in *Bouness v. O'Dwyer* (4) the court clearly had in mind that "the general rule under the Acts" points to the date when the landlord seeks to enforce his rights as the date when the status is to be determined.

In my opinion, therefore, on the authorities, the house was "first let" within the definition of standard rent when it was let to the present tenant. The standard rent is, therefore, £3 10s., and the appeal must be allowed.

- B DENNING, L.J.:** The question for decision is: What is the standard rent of the house? Is it the 25s. at which it was let to Mr. Cockram? Or the £3 10s. at which it was let to Mrs. Stagg, the present tenant? This was a house which was first let after Sept. 1, 1939. It comes, therefore, within the provisions of the Landlord and Tenant (Rent Control) Act, 1949. Under that Act either landlord or tenant can ask the rent tribunal to determine what is a reasonable rent for the tenant to pay for the house. Neither side has yet asked the tribunal to determine that question, because there is a prior question, which is before us to-day, namely: What is the standard rent, £3 10s. or 25s.? The tribunal can lower a standard rent, but not raise it. If £3 10s. is the standard rent and is too much, the tribunal can reduce it to a reasonable rent, and that will be the standard rent, but if 25s. a week is the standard rent and is too little, then the tribunal cannot raise it to a reasonable amount. If 25s. is the standard rent, the tenant is entitled to keep the house at that figure, no matter that it is an unreasonably low rent, and she is also entitled to recover some £200 from the landlord. So it is very vital to determine what is the standard rent.

- The standard rent is the rent at which the house was "first let." In one sense, of course, 25s. was the rent at which this house was first let, but it has long been settled that it is not every first letting which fixes the standard rent. It must be a letting which is material for the purpose. Thus, a furnished letting is not material: *Signy v. Abbey National Building Society* (1); nor is a business letting: *Macmillan & Co., Ltd. v. Rees* (10); nor is the letting of a cottage which is subject to the Housing (Rural Workers) Acts, 1926-1942: *Roberts v. Jones* (11). Those lettings must be ignored in determining the standard rent. On the other hand, there are many exceptional lettings which do fix the standard rent. Thus, a letting made thirty years ago may fix the standard rent: *Davies v. Warwick* (12); and so may a letting at an uneconomic rent; *Chamberlain v. Farr* (13); or one at a preferential rent: *Insall v. Nottingham Corpn.* (2).

- G** The difficulty in the present case is that the letting started off as a furnished letting, but, in the course of it, the tenant bought the furniture. What is the position then? The cases are difficult to reconcile, but I think they come to this. To see whether a contractual letting is furnished or unfurnished for the purposes of the Rent Acts, the position must ordinarily be tested as at the time when the tenancy commenced. That is the time as at which the court must decide whether the amount of rent fairly attributable to the use of the furniture forms a substantial portion of the whole rent. If, on applying that test, it is found that the house is let furnished at the beginning of the tenancy, it will thereafter retain the status of a furnished house throughout the tenancy, notwithstanding subsequent fluctuations in the quantity or value of the furniture or of the amount of the rent: *Jozwiak v. Hierowski* (3); and, conversely, if it is found to be let unfurnished at the commencement, it will ordinarily retain thereafter the status of an unfurnished house, notwithstanding subsequent

fluctuations: *Bowness v. O'Dwyer* (4); cf. *Artillery Mansions, Ltd. v. Macartney* (8).

The rule that it is necessary to look at the commencement of the tenancy is not, however, an absolute rule, because changes may occur which are not mere fluctuations, but are so fundamental as to reverse the character of the letting. For instance, if there is a furnished letting, and, after it has started, the landlord removes the whole, or substantially the whole, of his furniture and the tenant brings in his own, it may well take on the character of an unfurnished letting so as to entitle the tenant to the protection of the Acts: *Brown v. Robins* (6) and *Seabrook v. Mervyn* (7). Applying the principle of those cases, I should think that, if the tenant buys all the furniture in the house from the landlord the letting may very well thereafter take on the character of an unfurnished letting, and the tenant will be protected by the Acts. I know that ASQUITH, L.J., in an *obiter dictum* in *Welch v. Nagy* (5), spoke as if it could not change its character in that way, but I cannot go all the way with him there. Suppose, for instance, in this case that the letting had continued for some years after Cockram bought the furniture, he paying 25s. a week all the time, I should have thought it plain that he would have become protected by the Rent Acts. Once he bought the furniture, he could have removed it the next day, or re-sold it, or exchanged it for other furniture, or destroyed it, without the landlord being able to say him nay, and still he would have remained tenant of the house. It would clearly have been an unfurnished letting and he would be protected from eviction. That follows from *Seabrook v. Mervyn* (7), a decision of this court which is binding on us, and with which I fully agree. If once it is conceded that in that case Cockram would have been protected from eviction, it follows inevitably that the standard rent would be 25s., for, if Cockram had asserted his right to stay in the house after the contractual tenancy had come to an end, there can be no doubt that he would only have had to pay 25s. a week. There would, indeed, be no other figure which could be suggested to be the standard rent.

In this particular case, however, I cannot regard the purchase of the furniture by Cockram as having so fundamental an effect as to change the character of the letting. It is not as if Cockram stayed on for any length of time after buying the furniture. He only stayed on a few weeks and he had not fully paid for the furniture when he left. He was still paying the weekly instalments of 5s. for it. He started off paying 25s. a week for the house furnished, and he ended by paying 25s. a week for it with the same furniture still there. The furniture had become his, no doubt, but it was not fully paid for, and I cannot help thinking that the letting retained the same character throughout. It was simply a case of giving a man a roof over his head for a short time after he was bombed out and letting him have furniture to use, because he had lost all his own, and he only paid what he could afford. The letting started off as a furnished letting, and there was no such fundamental change as to reverse the character of it. The rent of 25s. was rent fixed for a furnished letting and it never lost that character. It was, therefore, not the standard rent. Once the 25s. is discarded as immaterial, it follows that the standard rent is £3 10s., for that was clearly material. I agree, therefore, that the appeal should be allowed.

BIRKETT, L.J., stated the facts and continued: The question which arises is whether the standard rent is 25s. per week or £3 10s. per week, bearing in mind the relevant provisions of the Rent Restrictions Acts and the relevant decisions thereof. The fact that the landlord was moved by considerations of sympathy or kindness when letting the furnished premises to Mr. Cockram, or when he sold him the furniture and left the rent unaltered, or reduced it to 20s. per week, on the authority of *Insall v. Nottingham Corpn.* (2) is irrelevant for the decision what is the standard rent. Equally, if this was a furnished

letting to Mr. Cockram originally, and thereafter it never changed its essential character, that letting to Mr. Cockram can be disregarded too, on the authority of *Signy v. Abbey National Building Society* (1). There is no doubt that the original letting to Mr. Cockram was the letting of furnished premises, and the time of the original contract of tenancy is the material time to consider. The real question before us is whether the sale of the furniture to Mr. Cockram in the course of the tenancy in February, 1941, altered the tenancy from a furnished tenancy to an unfurnished tenancy for the purpose of fixing the standard rent.

At first sight, it seems a natural and a logical thing to say that, if there is an original furnished letting, and then a purchase of the whole of the furniture, and a continuance of the tenancy, the tenancy is at once transformed from a furnished letting to an unfurnished letting from the date of the purchase, and, if this unfurnished letting is the first letting after the appropriate date, then the amount of the rent must be taken to be the standard rent. I do not, however, think the matter can be disposed of as simply as this, in view of the cases decided in this court. *Jozwiak v. Hierowski* (3) decides that, if the letting was originally a furnished letting, subsequent variations in the quantity or value of the furniture will not necessarily alter the essential character of the letting. It seems to be equally clear from *Seabrook v. Mervyn* (7) that, if the essential character of the letting is changed (and this, it would seem, must be decided on the facts of the particular case), a letting, which at the commencement of the letting was a furnished letting, may become an unfurnished letting for the purposes of the Acts. The principle underlying *Jozwiak v. Hierowski* (3) was followed in *Welch v. Nagy* (5), and it was there held that, although in the course of a tenancy which was originally a furnished tenancy the tenant actually bought the furniture, nevertheless on the whole of the facts of the case the furnished tenancy was not converted into an unfurnished one. The authorities would seem to combine to say that the exact facts of each case must be considered before deciding whether any such essential change has taken place. Looking at the undisputed facts of this case, at the date of the commencement of the tenancy it was a furnished letting. Mere variation in the quantity or value of the furniture would not be enough to change its essential character, and I do not think that the purchase of the furniture in this case, with its very special and peculiar circumstances, changed the essential character of the tenancy. The original character was retained throughout the short tenancy of Mr. Cockram. In this connection, it is not unimportant to observe that, when the change in the ownership of the furniture occurred, there does not seem to have been any thought of changing the amount of the rent payable or of making any change whatever, and the reduction of the rent by 5s. a week was not made consequent on the change itself, but was merely a concession to the poverty of Mr. Cockram. It follows from all this that, in my view, the first unfurnished letting was the letting to the tenant in June, 1941; at the weekly rent of £3 10s. per week. For these reasons, I am of opinion that the county court judge came to a wrong conclusion, understandable enough in the face of decisions which might seem, at first sight, to be irreconcilable, and the appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Dixon, Ward & Co.* (for the landlord); *Piesse & Sons*, agents for *Abbot, Sturgess & Co.*, Richmond (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

HINCKLEY URBAN DISTRICT COUNCIL v. WEST MIDLANDS GAS BOARD.

Affirmed. C.A. post, p. 788.

[CHANCERY DIVISION (Lloyd-Jacob, J.), November 16, 17, December 13, 1950.]

Gas—Nationalisation—Financial adjustment—Power of local authority to apply surplus revenue in aid of general rate—Unappropriated profit of working period up to vesting date—Liability of area gas board to remit—Gas Act, 1948 (c. 67), s. 19 (1), s. 56 (2).

The Gas Act, 1948, s. 19 (1), provides that where a local authority have before "the vesting date" (May 1, 1949) made arrangements for the making of financial adjustments, as between the accounts of the gas undertaking of the local authority and any other account of the local authority, in respect of any transaction or matter affecting both their functions as a gas undertaker and other functions of the authority, and in pursuance of those arrangements any amounts would, but for the Act, have fallen on or after the vesting date properly to be debited or credited in the accounts of the gas undertaking and credited or debited in some other account of the local authority, the area board concerned shall pay those amounts to the local authority or be entitled to receive those amounts from the authority as the case may be. Section 56 (2) of the Act provides in effect that all local enactments in force at the vesting date and applicable to any statutory gas undertakers shall as from the vesting date have effect as if for references to the undertaker there were substituted references to the appropriate area board: "Provided that any such local enactment which provides for the regulation of charges made by the undertaker and any other such local enactment which is inconsistent with or rendered redundant by the provisions of this Act shall cease to have effect, as from the vesting date, so, however, that this proviso shall not be taken as affecting any local enactment which contains special provisions for the protection of any person or class of persons and is not rendered redundant by the provisions of this Act."

Until the vesting date a local authority supplied gas to a certain area, and on that date their undertaking became vested in the defendant board under the Gas Act, 1948, s. 17 and s. 18. In their accounts for the last accounting period up to the vesting date the local authority included £30,178 12s. 7d. as unappropriated profit (which amount was unascertained at the vesting date). Under the Hinckley Local Board Gas Act, 1880, s. 43 (as amended by the Hinckley Gas Order, 1922, and the Hinckley Gas Order, 1928) the local authority had the option, if there was surplus revenue not required to be retained as a working balance, to apply the surplus to price reduction or in aid of the general rates of their area. Over the sixty years of their working, the local authority had transferred approximately £10,000 to the general rate fund. In the circumstances which occurred, the local authority had neither the occasion nor the opportunity to consider the application of the surplus of the last working period up to the vesting date to any purpose other than rate aid, and they sought to recover the admitted surplus (*viz.*, £30,178 12s. 7d.) from the defendants, expressing the intention, if successful, to carry the amount to the credit of their general rate fund.

HELD: the unappropriated profit did not vest in the defendants subject to any obligation as to its disposal either (i) under s. 19 (1), because no appropriation had been determined on before the vesting date, or (ii) under s. 56 (2), because s. 43 of the Act of 1880 was inconsistent with or was rendered redundant by the Act of 1948 and was not saved by the exception to the proviso to s. 56 (2) which must be read as intended to preserve provisions which relieved persons from liability or default and not those prescribing the regular manner in which the funds of the undertaking were

to be administered, and, therefore, it was unnecessary to decide whether any such obligation required the remission claimed by the local authority.

[FOR THE GAS ACT, 1948, s. 19 and s. 56, see HALSBURY'S STATUTES, Second Edn., Vol. 10, pp. 886, 935.]

A ACTION by the Hinckley Urban District Council, who until May 1, 1949, had been gas undertakers for their area, claiming from the West Midlands Gas Board, the present gas undertakers for the area, a sum representing unappropriated profits for a period of thirteen months up to May 1, 1949. The facts and relevant statutory provisions are set out in the judgment.

Capewell, K.C., and *Keen* for the plaintiffs.

Heald, K.C., and *J. P. Ashworth* for the defendants.

Cur. adv. vult.

B Dec. 13. LLOYD-JACOB, J., read the following judgment. The plaintiffs seek to recover from the defendants the sum of £30,178 12s. 7d., which amount represents the profit derived from the operation of the undertaking for the supply of gas carried on by the plaintiffs during the last accounting period up to May 1, 1949, on which date the undertaking became vested in the defendants under the provisions of the Gas Act, 1948, s. 17 and s. 18. C This accounting period extends from Apr. 1, 1948, until Apr. 30, 1949, and includes, in addition to the yearly period of normal working, an additional month. The accounts for this period, in the form of an annual account and a separate account for April, 1949, were prepared for and adopted by the plaintiffs in October, 1949, subject to audit, and the amount now claimed is D agreed to represent the unappropriated profit properly included in such accounts. The basis on which these accounts were prepared differed in only one particular from the basis previously obtaining, in that a figure for "unbilled" gas was included. In the normal operation of the undertaking the reading of meters and the collection of coins from pre-payment meters was not timed to coincide precisely with the plaintiffs' financial year or its regular divisions, with the consequence that at any particular accounting date the cost of producing and E distributing such outstanding "unbilled" or "unread" or "un-metered" gas would not be balanced by appropriate receipts.

F With the gradual growth of the undertaking over the years, the value of gas "unbilled" at the close of each financial year had increased so as to form a substantial hidden reserve, amounting by May, 1948, to some £12,000, but the inclusion in a balance sheet of a properly estimated value for such gas would, in my judgment, have been justified in any period, and was essential in a final period of working, and this is in accord with the suggestions offered by the defendants to local authorities such as the plaintiffs when the defendants were anticipating taking-over.

G The rights and obligations of the plaintiffs in respect of this gas undertaking derive from the Hinckley Local Board Gas Act, 1880 (43 & 44 Vic. c. clvii), as amended by the Hinckley Gas Order, 1922 (S.R. & O. 1922, No. 608) and the Hinckley Gas Order, 1928 (S.R. & O. 1928, No. 512). For the purposes of these proceedings, the only material provisions are s. 43 of the Act of 1880 (as amended by the Order of 1922) and art. 25 of the Order of 1928, which replaces s. 44 of the Act of 1880. For convenience of reference, the expressions s. 43 and s. 44 are hereinafter used, but the reference must be I understood to relate to the provisions in respect of (a) accounts and application of receipts, and (b) deficiency in receipts, respectively, which were operative during the twenty years preceding the take-over by the defendants.

Section 43 provides:

"From and after the transfer the local board shall keep accounts in respect of their receipts and expenditure on capital account under this Act and accounts in respect of their receipts and expenditure on revenue

account under this Act separate from each other, and from all their other accounts, and shall, save as hereinafter otherwise expressly provided, apply all moneys from time to time received by them in respect of the undertaking (except borrowed money, and except money produced by the sale of superfluous lands), as follows, (that is to say,) 1stly. In payment of the working and establishment expenses, and costs of the maintenance of their gasworks and the undertaking; 2ndly. In payment of their costs, charges, and expenses of and incidental to the collecting and recovery of gas rents and rates, and of the borrowing of money under this Act. 3rdly. In payment of the interest on the said loans of the company (if any) which shall be outstanding at the time of the transfer according to their several priorities; 4thly. In the payment of the interest on the Hinckley Local Board Gas Debenture Stock issued under or in pursuance of this Act; 5thly. In the payment of the annual sums due on annuity certificates, interest on debentures, and interest on money borrowed under or for the purposes of this Act; 6thly. In providing the requisite sinking fund and annual appropriations, and for securing the discharge of or in paying off the Hinckley Local Board Gas Debenture Stock issued under or in pursuance of this Act; 7thly. In providing the sums annually required for paying off debentures in accordance with the provisions of this Act, and the requisite sinking fund and annual appropriations, and otherwise for securing the discharge of loans borrowed under or for the purposes of this Act; 8thly. In setting apart if the council think fit a yearly sum not exceeding ten pounds per centum of the said moneys from time to time received by them as aforesaid for the purpose of forming a reserve fund to provide for any extraordinary expenditure in connection with the gas undertaking; 9thly. In improving and extending the gasworks and mains, and in payment of any charges and expenses for the time being paid out of the general district rate in respect thereof; And they may if they think fit carry forward to the credit of the revenue account of their gas undertaking for the next succeeding year for the purpose of providing a working balance any sum not exceeding £5,000 and subject thereto shall either carry to the district fund any surplus or balance remaining in any year or apply the same in reduction of the price charged by them for the supply of gas."

There follows a proviso which is not pertinent to the action. The expression "district fund" is to be understood, since the Rating and Valuation Act, 1925, as a reference to the general rate fund.

Section 44 (as substituted by art. 25 of the Order of 1928) provides:

"Any deficiency in the revenues and receipts of the council on account of the undertaking to make any of the payments or provide any of the funds to which the moneys received by them in respect of the undertaking are applicable under the provisions of s. 43 (accounts and application of receipts) of the Act of 1880 as amended by s. 32 (reserve fund) of the Order of 1922 shall be from time to time made good out of the general rate in such manner as the council may from time to time determine: Provided that the general rate shall not without the consent of the Minister of Health be applicable to meet any such deficiency unless all persons supplied with gas by the council have been charged for the same the maximum prices authorised by art. 15 of this Order throughout the period during which such deficiency shall have arisen."

This latter section is material only to indicate a contingent liability, in certain circumstances, on the general ratepayers to make good losses incurred in the working of the gas undertaking. No such circumstances ever arose, the credit balance carried forward in the preceding year for all the seven instances of a loss in working being found sufficient to meet the deficiency.

So far as concerns s. 43 it will be noted that it specified the purposes to which the receipts from the gas undertaking were to be applied, and it provided that, if there remained a surplus or balance in the opinion of the plaintiffs not required to be retained as a working balance, the plaintiffs had an option either to apply the amount to price reduction or to transfer it for rate aid. Over the sixty odd years of working, approximately £10,000 has been transferred to the general rate fund.

Before the vesting date, the plaintiffs had not considered the question of disposing of the surplus, if any, for the period Apr. 1, 1948, to Apr. 30, 1949. In the circumstances which have happened, the plaintiffs, as from May 1, 1949, have had neither occasion nor opportunity to consider the application of the surplus of the last working period of the gas undertaking to any purpose other than for rate aid, and, if so applied, it would represent approximately 3s. 4d. in the pound on the rateable value of property in the area. By this action they seek to recover the admitted surplus from the defendants (to whom the assets of the gas undertaking have been transferred) and they express the intention, if successful, to carry the amount to the credit of their general rate fund.

It becomes necessary, therefore, to examine the terms of the Gas Act, 1948, to ascertain to what extent, if at all, the plaintiffs retain any right to, or to the disposition of, any funds forming part of the assets of the undertaking after the date when the provisions of that Act became effective. The general purposes of the Act included the transfer to area gas boards of property, rights, obligations and liabilities of gas undertakers and other persons: see Part II, s. 15 to s. 40 inclusive; and it is not in dispute that on May 1, 1949, pursuant to the provisions of s. 17 and s. 18 of the Act and the Gas (Vesting Date) Order, 1949 (S.I. 1949, No. 392), made thereunder, the property, rights, obligations and liabilities of the plaintiffs wholly or mainly relating to their gas undertaking became vested in the defendant board. Immediately prior to such vesting there was included within the property a sum, not then ascertained, of the surplus of unappropriated profit from the operation of the gas undertaking since its previous accounting date, which sum was later ascertained to be the amount herein claimed.

Two questions, therefore, arise: (i) Did this property vest subject to any obligation as to its disposal, and (ii) If yes, does such obligation require the remission of the amount claimed to the plaintiffs? As to the first of these, apart from the general obligations resting on the area boards contained in Part I of the Act, which can for present purposes be disregarded, there are two sections which are directly relevant, s. 19 and s. 56. Section 19 provides:

"(1) Where a local authority have before the vesting date made arrangements for the making of financial adjustments, as between the accounts of the gas undertaking of the local authority and any other account of the local authority, in respect of any transaction or matter affecting both their functions as a gas undertaker and other functions of the authority, and in pursuance of those arrangements any amount would, but for this Act, have fallen on or after the vesting date properly to be debited or credited in the accounts of the gas undertaking of the local authority and credited, or, as the case may be, debited, in some other account of the local authority, the area board in whom property, rights, liabilities and obligations of the local authority vest by virtue of this Act shall, subject as hereinafter provided, pay those amounts to the local authority or be entitled to receive those amounts from the authority, as the case may be, at the times at which, but for this Act, those amounts would have fallen to be debited or credited in the accounts of the gas undertaking of the local authority: Provided that this sub-section shall not apply in relation to any apportionment of establishment charges between the

accounts of the gas undertaking and other accounts of the local authority. (2) The said area board and the local authority may agree or the Minister of Health, may, on the application of either party in default of such agreement, determine that, having regard to the circumstances in which any such arrangements were made and the circumstances arising under this Act, the last preceding sub-section shall not apply to those arrangements or shall apply thereto with such modifications as to the payments to be made by the board or the local authority as may be so agreed or determined, and the said sub-section shall have effect subject to any such agreement or determination. Any other question arising under the last preceding sub-section as to the payments to be made thereunder shall, in default of agreement, be determined by the Minister of Health. (3) Any payment made by the said area board or the local authority under the preceding provisions of this section which would, but for this Act, have been debited or credited as a capital payment shall be deemed to be a capital payment, and any other such payment shall be deemed to be an annual payment."

Sub-section (4), which is not material, deals with arrangements made as to loans or advances.

The appropriation of surplus profit of the gas undertaking to the relief of rates would, in my judgment, be an arrangement for the making of financial adjustments as between the accounts of the gas undertaking of the local authority and another account of the local authority, and it would be in respect of a matter affecting their functions both as a gas undertaker and as a local authority. If, therefore, such an appropriation had been determined on before the vesting date, but no actual adjustment made before the transfer of the assets of the gas undertaking, this section would apply, and the assets would be charged with the obligation to implement such adjustment subject to agreement, or in default thereof, to determination by the Minister. As no such appropriation had, in fact, been made the subject of arrangements prior to the vesting date, it does not avail the plaintiffs.

Section 56 (1) imposes on area boards certain obligations in connection with gas supply. Sub-section (2) provides:

"All local enactments in force at the vesting date and applicable to any statutory undertakers, except enactments applicable to any electricity boards, local authorities or composite companies otherwise than in relation to their gas undertakings, shall as from the vesting date have effect— (a) as if for references to the undertaker there were substituted references to the area board in whom property, rights, liabilities and obligations of the undertaker vest by virtue of this Act; (b) as if for any references (however worded and whether expressed or implied) to the gas undertaking or any part thereof or to the limits of supply of the undertaker or any part thereof there were substituted a reference to so much of the business carried on by the area board as corresponds to that undertaking or part thereof or, as the case may be, a reference to the area comprised in the said limits of supply immediately before the vesting date or part thereof; and shall also have effect, as from such date as may be prescribed, which may be prior to the making of the regulations but not to the vesting date, with such other adaptations and modifications (if any) as may be prescribed, being adaptations and modifications required in consequence of the provisions of this Act: Provided that any such local enactment which provides for the regulation of charges made by the undertaker and any other such local enactment which is inconsistent with or rendered redundant by the provisions of this Act shall cease to have effect, as from the vesting date, so, however, that this proviso shall not be taken as affecting any local enactment which contains special provisions for the protection of

any person or class of persons and is not rendered redundant by the provisions of this Act."

The Hinckley Local Board Gas Act, 1880, was in force at the vesting date and was applicable, so that as from the vesting date sub-s. (2) (a) would cause the substitution of the defendants for the plaintiffs in the operation of that Act, subject to the effect of the proviso to the sub-section. Section 43 of the Act of 1880 provides for the regulation of charges made by the undertaker (and, even if it did not specifically so provide, it would, in my judgment, be proper to hold that the scheme for distribution of profits contained in the section was inconsistent with the Gas Act, 1948), so that, unless it is saved by the exception for protective clauses, s. 43, notionally amended by the substitution of the name of the defendants for that of the plaintiffs, would cease to have effect as from the vesting date.

Is it so saved? The reference to "special provisions for the protection of any person or class of persons" is not, in my view, apt to describe the regular, prescribed manner in which the funds of the undertaking are to be administered, however much such administration may provide benefits to the ratepayers or gas users as a class. It must rather be read as intended to preserve the operation of a statutory provision which relieves a person or class of persons from liability or default, of which s. 39 of the Act of 1880 is an instance. It follows, therefore, that as from the vesting date s. 43 ceased to have effect, and that there rests on the defendants no obligation or liability to deal with any assets taken over by them from the plaintiffs in accordance with its provisions.

Some indirect support for this conclusion is, in my judgment, to be derived from s. 19 and s. 37 of the Gas Act, 1948. Section 19 has already been referred to, and s. 37, in effect, qualifies the statutory right of the local authority, between Feb. 10, 1948, and the vesting date, to apply its trading surpluses. It would be strange to find that an Act which limited the freedom of a local authority in the exercise of its statutory duty pending take-over and made special provisions for implementing the decisions of a local authority not fulfilled at the date of take-over should preserve the freedom of the local authority to make any effective decision after the date of take-over in relation to property which had vested. The answer, therefore, to the first question must be that the whole property in the gas undertaking of the plaintiffs vested in the defendants subject to the general obligations under s. 56 (1) of the Act of 1948 (which are common to all area boards), but not subject to any obligation as to the specific disposal of any part of it.

The second question does not, therefore, arise, and it becomes unnecessary to decide whether, had the provisions of s. 43 of the Act of 1880 remained operative, but exercisable by the defendants, the plaintiffs could have required such exercise to be in favour of a grant to the general rate fund. On the hypothesis of these provisions continuing, the whole rights of allocation among the various objects set out in the section would *prima facie* continue, and the restriction to the residuary purpose which would now characterise the exercise of the power by the plaintiffs would not, it would appear, be necessarily imposed by circumstances on the defendants. Nor am I concerned to decide how, should the position be other than as I have stated it, the crediting of the amount claimed to the general rate fund could have been secured by an order of this court.

Action dismissed with costs.

Solicitors: *Lees & Co.*, agents for *J. G. S. Tompkins*, Hinckley (for the plaintiffs); *Sherwood & Co.*, agents for *A. C. Croasdale*, Birmingham (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

BODDINGTON v. WISSON

Dictum of SIR RAYMOND EVERSHERD, M.R., at p. 169, applied. COATES v. DIMENT, post, p. 890.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., ~~WIGMORE, L.J., and~~ Vaisey, J.), December 1, 4, 1950.]

Agriculture—Agricultural holding—Notice to quit—Consent of Minister not obtained—Notice given before, but expiring after, date of revocation of regulation requiring consent—Effect of revocation—Interpretation Act, 1889 (c. 63), s. 38 (2)—Defence (General) Regulations, 1939, reg. 62 (4A)—Defence Regulations (No. 3) Order, 1948 (S.I. 1948, No. 336), art. 1.

On Oct. 8, 1947, the landlord of an agricultural holding served on the tenant a notice to quit on Oct. 11, 1948. Under reg. 62 (4A) of the Defence (General) Regulations, 1939, the notice was "null and void" unless the Minister of Agriculture and Fisheries consented in writing thereto. No written consent of the Minister was obtained by the landlord. On Mar. 1, 1948, reg. 62 (4A) was revoked by the Defence Regulations (No. 3) Order, 1948 (S.I. 1948, No. 336).

HELD: (i) apart from the provisions of the Interpretation Act, 1889, the effect of the revocation of reg. 62 (4A) was that that regulation must be treated as having been non-existent *ab initio*.

(ii) the words of s. 38 (2) of the Act of 1889 were not appropriate to preserve the effect of reg. 62 (4A) in relation to the notice in question, and, therefore, the notice was valid and the landlord was entitled to possession.

[FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 62 (4A), see HALSBURY'S STATUTES, Vol. 40, p. 1420; FOR THE INTERPRETATION ACT, 1889, s. 38 (2), see *ibid.*, Second Edn., Vol. 24, p. 229.]

Cases referred to:

- (1) *Re Kendrick's Agreement*, [1948] 2 All E.R. 101; [1948] Ch. 430; [1948] L.J.R. 1332; 2nd Digest Supp.
- (2) *Kestell v. Langmaid*, [1949] 2 All E.R. 749; [1950] 1 K.B. 233; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE LAWSON CAMPBELL, made at Biggleswade County Court on Oct. 3, 1950, whereby he held that a notice to quit an agricultural holding given before, but expiring after, the revocation of reg. 62 (4A) of the Defence (General) Regulations, 1939, was effective, although no consent in writing of the Minister of Agriculture and Fisheries had been obtained by the landlord. The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

Gordon Hardy for the tenant.

T. H. K. Berry for the landlord.

SIR RAYMOND EVERSHERD, M.R.: On Oct. 8, 1947, the landlord gave to the tenant a notice to quit his agricultural holding on Oct. 11, 1948. At the time when the notice was given there was in operation reg. 62 of the Defence (General) Regulations, 1939, passed by virtue of the Emergency Powers (Defence) Act, 1939. Paragraph (4A) of that regulation, as it stood at the relevant date, was in these terms:

"Where the whole or any part of an agricultural holding is subject to a contract of sale made since Sept. 3, 1939, or has been sold in pursuance of a contract of sale made since that date, any notice to quit that holding or any part thereof given to the tenant so as to expire at any time after the end of the year 1941 shall be null and void: Provided that this paragraph shall not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consents in writing thereto."

In the present case the holding was sold under a contract made since Sept. 3, 1939. Therefore, by virtue of that regulation the notice to which I have alluded was null and void (whatever those words on their true construction mean), subject to the proviso or condition that the notice could be rendered fully effective for all purposes, assuming it was otherwise a good notice, if at any date before Oct. 11, 1948, the Minister of Agriculture and Fisheries consented in writing thereto.

A The Agriculture Act, 1947, altered in many ways the law relating to landlords and tenants of agricultural holdings. That Act, so far as it would apply to a holding of this kind, came into force on Mar. 1, 1948. In pursuance of the policy of the new Act there was brought into operation on the same date another defence regulation, made by virtue of the Supplies and Services (Transitional Powers) Act, 1945 (as amended), which had taken the place of the Emergency Powers (Defence) Act, 1939. The Defence Regulation (No. 3) Order, 1948 (S.I. 1948, No. 336) provides:

"1. Paragraph . . . (4A) . . . of reg. 62 of the Defence (General) Regulations, 1939 (which . . . make[s] . . . provision with respect to the termination of agricultural tenancies) [is] hereby revoked . . ."

C When, therefore, the notice expired on Oct. 11, 1948, reg. 62 (4A), which had applied to this notice up to Mar. 1, 1948, had ceased to apply. The landlord never asked the Minister of Agriculture and Fisheries to give his consent to the notice, and no consent was ever given. The landlord, however, contended that from the date of the revocation of reg. 62 (4A) he became wholly free from any obligation to obtain the Minister's consent as a condition of enforcing his notice to quit. On the other hand, the tenant said that, either by virtue of the Interpretation Act, 1889, or otherwise, the revocation did not make good the notice to quit which, in the absence of a ministerial consent, had been disabled once and for all by reg. 62 from having any effect.

D The county court judge, who decided in favour of the landlord, referred in his judgment to the interpretation which this court has put on the formula E "null and void." He concluded by saying:

"It is perfectly obvious that the regulation made in 1948 was being framed to do away with the whole of the procedure laid down by reg. 62 (4A) and it would be an odd thing to say that, where it is doing away with the whole thing, it does not apply to any case where notice has been given already. I cannot believe that it means that. I say it is revoked entirely so that the regulation ceases to have any effect . . . This is supported by the fact that the law was then in a state of transition. This was one stage in moving from the old code to a new one. For these reasons I feel that the moment reg. 62 became inoperative, all consents became unnecessary."

F G With that conclusion of the learned judge I agree, though I would like, since the matter is of some importance and has been carefully argued, to state the steps by which I arrive at that conclusion.

First, it is necessary to see what this phrase, "null and void," means. When reg. 62 (4A) was originally introduced in 1941 the proviso was in a different form and was to the effect that a notice to quit would be null and void unless prior to the giving of it a consent had been obtained. If that had been its form throughout, I think the words "null and void" would have been appropriate. The change, however, in the form of the proviso and the use of words which show quite plainly, as the court has held in *Re Kendrick's Agreement* (1), that the ministerial consent may be given at any time up to the expiry of the notice make the words "null and void" obviously inappropriate, at least without substantial reservations. A notice to quit which expires in a year's time cannot be said to be effective in one sense of the word until the date arrives on which

it is to take effect, and if, notwithstanding the first part of the regulation, a notice can always be made fully effective by a consent given at any time up to the expiry of the notice, it seems inappropriate, pending the giving of the consent, to treat the words "null and void" as meaning wholly nugatory and without any force and effect in any circumstances. Indeed, in *Kestell v. Langmaid* (2) expression was clearly given to that view by this court. There a notice had been given, the Minister's consent was never asked for and was never obtained, but the tenant went out of possession when the notice expired and then sought compensation under the Agricultural Holdings Act, 1923, s. 12 (1), on the ground that the tenancy of his holding had terminated "by reason of a notice to quit" given by the landlord and in consequence of that notice. The landlord argued that no tenant could be said to have quitted a holding by reason or in consequence of something which was null and void. This court pointed out, however, that "null and void" had no such destructive signification and that in the circumstances it came to no more than that the notice was not enforceable by the landlord against the tenant unless the ministerial consent has been obtained before its expiry. The example of *Kestell v. Langmaid* (2) is important as showing that, even where no consent has been given, if the tenant acts on the notice, then, for the purposes of attracting compensation, it retains the quality that it would have at common law of being a valid and effective notice to quit. That, as will be seen, is important.

I return to the regulation which revoked para. (4A) of reg. 62. It is well established that, apart from the Interpretation Act, 1889 (which took the place of an earlier Act of 1850), the effect of the repeal of an Act of Parliament is that the Act repealed is treated as having been *ab initio* non-existent. The matter is stated thus in MAXWELL ON INTERPRETATION OF STATUTES, 9th ed., p. 404:

"Where an Act . . . was repealed, it was formerly regarded, [*i.e.*, before the Interpretation Act, 1889] in the absence of provision to the contrary, as having never existed, except as to matters and transactions past and closed."

Apart, therefore, from the Interpretation Act, 1889, the effect of the revocation of para. (4A) would be that, *quoad* this notice, the regulation would be treated as though it had never existed. In other words, the only thing which qualified or in any way disabled the effect that that notice would have had at common law has been removed. I think that that would be so even though the words "null and void" were to have their full signification, although, in my opinion, since "null and void" has been given a much more limited meaning, it becomes still more difficult to say that after the regulation which imposed the condition has gone, the notice suffers from its initial disabling characteristic.

That, however, is not the end of the matter, because it is provided by reg. 99B of the Defence (General) Regulations, 1939, that the Interpretation Act, 1889, shall apply to regulations of this kind, as it applies to statutes. Regulation 99B now provides:

"The Interpretation Act, 1889, shall apply to the interpretation of any Order in Council, order, rule or bye-law made under or by virtue of the Emergency Powers (Defence) Act, 1939, the Supplies and Services (Transitional Powers) Act, 1945, or the Emergency Laws (Transitional Provisions) Act, 1946, as it applies to the interpretation of an Act of Parliament, and for the purposes of s. 38 of the Interpretation Act, 1889, any such Order in Council, order, rule, or bye-law as aforesaid shall be deemed to be an Act of Parliament."

Section 38 of the Interpretation Act, 1889, provides:

"(2) Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention

appears, the repeal shall not—(a) revive anything not in force or existing at the time at which the repeal takes effect.”

- A If reg. 62 (4A) had retained its original form so that the notice in question would have been wholly inoperative, or “null and void,” from the moment of its service because of the non-fulfilment of the condition precedent, then I think that the effect of s. 38 (2) (a) of the Act of 1889 would have been that the common law rule to which I have alluded would not have applied so as again to give life to this notice to quit, but, as I have pointed out, the effect of reg. 62 (4A) was not so destructive. There is great force in the argument of counsel for the landlord that reg. 62 (4A) is not within the words of s. 38 (2) (a) at all. It cannot be said of this notice to quit, even before reg. 62 (4A) was revoked, that it was not “in force.” For some purposes it was. It was only conditionally enforceable, but it was in force in the sense that it could have been acted on at any rate by the tenant. Equally it could not be said that it was not existing. So long as it was not wholly null and void, for some purposes it must have existed. There is a still further difficulty. Reg. 62 (4A) confers on the Minister a power and a duty to give his consent in appropriate cases, and that consent takes away the disqualification to which, without it, the notice, by virtue of the regulation, might be subject. It seems very difficult to say that s. 38 (2) (a) was effective to keep alive a ministerial or executive function of the Minister to give consents to notices and thereby to make then enforceable where they otherwise would not be. Sub-section (2) (b) provides that the repeal is not to affect anything duly done under another statute. I do not think that that paragraph can assist the tenant, nor do I think that the tenant’s protection under the regulation could be fairly described in the words of sub-s. (2) (c) as a “right” or “privilege”, or the limitation of the landlord’s right be fairly described as an “obligation” or “liability,” nor do I think that it is a penalty or a punishment in respect of an offence within para. (d). Counsel for the tenant put forward an argument of some ingenuity on para. (e), which says that the repealing Act shall not
- E “affect any investigation . . . in respect of any such right, privilege, obligation, liability . . . as aforesaid.”

- If there is here no right or privilege—and I have said that, in my view, there is not—the case cannot be covered by “investigation” because the only investigations referred to are in respect of such rights as are previously mentioned.
- F The argument has failed to satisfy me that the investigation which reg. 62 (4A) supposes the Minister will, if he performs his ministerial duties aright, undertake before giving his consent is an investigation as envisaged by the final words of para. (e). Nor do I think the landlord’s right to ask for consent could be described as a right within para. (c) or as a right to require an investigation within para. (e).

- G I, therefore, take the view which the learned judge below took—that the words of s. 38 (2) are not appropriate to preserve the procedure and results of reg. 62, para. (4A), *quoad* this particular notice. I would be disposed to agree with counsel for the tenant that the result is, perhaps, one which Parliament, if asked, would have said it did not contemplate. We, however, must interpret the language Parliament has thought fit to use. It may well be that this is *casus omissus*, but, looking at the language of the two statutory instruments together, I cannot see any such ambiguity as would entitle us, by investigating the policy of the Agricultural Acts, to import into the second regulation words which would keep alive, for the purposes of this notice and other notices like it, the full effect of the revoked regulation. The decision of the High Court in *Re Kendrick’s Agreement* (1) shows clearly what was the true meaning of the proviso to reg. 62 (4A). It may be that until that decision it had not been fully appreciated that the language used, whether intentionally or not,
- H

had the effect that the ministerial consent could be given at any time up to the expiry of the notice. After that decision, the Ministry concerned proceeded to deal with the excepted cases in S.I. 1948, No. 336, that is to say, they proceeded to deal with Scotland, and the Defence Regulations (No. 8) Order, 1948 (S.I. 1948, No. 2343) which came into operation on Nov. 1, 1948, took this form:

"1. Paragraph . . . (4A) . . . of reg. 62 of the Defence (General) Regulations, 1939, . . . [is] hereby revoked in [its] application to Scotland: Provided that, notwithstanding the foregoing revocation and without prejudice to the provisions of s. 38 of the Interpretation Act, 1889, the provisions of para. (4A) aforesaid shall apply to any such notice to quit referred to in the said paragraph as has been given to a tenant prior to the date of coming into operation of this Order."

That form of instrument supports the view I have formed, that, having regard to the true construction of reg. 62 (4A), without a proper saving clause it was not sufficient to rely on the Interpretation Act to keep alive for all purposes *quoad* notices then current the revoked para. (4A) of reg. 62. For these reasons I think that the decision of the court below was correct and that this appeal fails.

SINGLETON, L.J.: I agree.

VAISEY, J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Iliffe, Sweet & Co.*, agents for *Wilkinson & Butler*, St. Neots (for the tenant); *Alexander Farr & Son*, Bedford (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. HAMPSTEAD AND ST. PANCRAS RENT TRIBUNAL.

Ex parte GOODMAN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.), December 14, 1950.]

Rent Control—Reasonable rent—Withdrawal of application—Jurisdiction of tribunal to proceed with hearing—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 1 (1).

On Sept. 5, 1949, the tenant of a flat applied to a rent tribunal, under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, to determine a reasonable rent for the premises. In February, 1950, before the application had been heard, the parties came to an agreement whereby the rent was reduced, and sought to withdraw the application. The tribunal, however, took the view that the Act of 1949 made no provision for the withdrawal of an application once it had been made.

HELD: an applicant under s. 1 (1) might withdraw his application at any time before the tribunal gave its decision, and the tribunal then had no jurisdiction to proceed with the hearing.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1094.]

MOTION by the landlord, Dr. Theodore Goodman, for an order of prohibition prohibiting the Hampstead and St. Pancras Rent Tribunal from further proceeding with an application under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, made by the tenant on Sept. 5, 1949, in respect of premises at 21c Cannon Place, Hampstead, on the ground that the tribunal had no jurisdiction

to deal with the application since it had been withdrawn by the tenant. The tribunal were of the opinion that the wording of s. 1 (1) of the Act of 1949 did not permit the withdrawal of an application once it had been made, but agreed to adjourn the hearing pending the hearing of the motion.

Gallop, K.C., and *Dennis Lloyd* for the landlord.

The Attorney-General (Sir Hartley Shawcross, K.C.), and *J. P. Ashworth* for the tribunal.

I. H. Jacob and *Nunes* for the tenant.

LORD GODDARD, C.J. : Counsel for the landlord moves for an order addressed to the Hampstead and St. Pancras Rent Tribunal to prohibit them from further considering an application made to them under s. 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, by the tenant, Dr. Wing, in respect of a tenancy of 21c, Cannon Place, Hampstead, which he holds on a fourteen years' lease from Sept. 29, 1947, from the landlord, Dr. Goodman.

The rateable value of the premises is under £100, and, accordingly, the case is one in which the tribunal would have jurisdiction. After the application had been made on Sept. 5, 1949, the parties agreed on a reduced rent to be paid by the tenant, and they so informed the tribunal. The tribunal, however, intimated to the parties that, in their opinion, an application having been made, they were bound to continue the hearing, but they adjourned the matter pending an application to this court for an order of prohibition.

One has to remember the genesis of the Rent Control Act, 1949. In September, 1939, the Rent and Mortgage Interest Restrictions Act, 1939 was passed which brought under control a great number of houses which had not previously been controlled, and it was provided that the standard rent should be the rent at which the premises were let on Sept. 1, 1939, or, if let thereafter, the rent at which they were first so let. That gave an opportunity to landlords, where the premises had not been let on Sept. 1, to fix any rent they liked, and the rent so fixed became the standard rent. In 1949 Parliament intervened and conferred on rent tribunals power to alter the standard rent fixed by the Act of 1939 and to substitute a "reasonable" rent. Section 1 (1) of the Act of 1949 provides:

"Where apart from this section the standard rent of a dwelling-house would be—(a) the rent at which it was let on a letting beginning after Sept. 1, 1939, or (b) an amount ascertainable by apportionment of the rent at which a property of which it formed part was let on such a letting as aforesaid (whether such an apportionment has been made or not), then, subject to the provisions of this section, the landlord or the tenant may make application to the tribunal to determine what rent is reasonable for that dwelling-house, and on any such application the tribunal shall determine that rent and shall notify the parties of their determination: Provided that an application shall not be made in respect of a dwelling-house if a previous application in respect thereof has been made under this subsection."

Observe that the application can be made either by the landlord or the tenant, and, if a rent has been fixed by the tribunal, no further application can be made. It seems to me that until an application has been adjudicated on it is always open to any landlord or tenant of the premises to go to the tribunal and ask for the rent to be fixed, but is there any reason why we should construe the section as meaning that once an application, in the sense of the filling in of forms, has been made, the tribunal must go on so as to fix a rent which will adhere to the premises for ever? I think that s. 1 (1) must mean that there must be a subsisting application at the time when the tribunal shall determine the rent, and that we must read the words as meaning: "... on any such

application *made and not withdrawn* the tribunal shall determine that rent and shall notify the parties of their determination: Provided that an application shall not be made in respect of a dwelling-house if a previous application in respect thereof has been made under this sub-section." It seems to me that, in the absence of strong words in the section to the contrary a tribunal only has jurisdiction so long as an application subsists. In my view, an applicant may withdraw his application at any time. So, if the parties to an application choose to withdraw it by consent, the tribunal is not under any duty to—and, indeed, cannot—proceed with the hearing. Any subsequent tenant, however, can go to the tribunal because there will not have been an application which fixed the rent. It is only where there is an application which results in the fixing of the rent that it becomes final. For these reasons, I think the order for prohibition must go.

One other point has been mentioned by the Attorney-General on which he says it is desirable that we should give a decision, and that is: Up to what time can the application be withdrawn? This does not strictly arise in this case, but for my part I think it can be withdrawn up to any time before the tribunal gives its decision.

HILBERY, J. : I agree with all that has fallen from my Lord. It appears to me that the policy of this Act is to give a right to two people personally to go to the tribunal on an application to obtain the decision of the tribunal on what shall be the reasonable rent of premises. It is of importance to notice that in this Act no power is given to a local authority of its own motion to seek the decision of the tribunal so as to fix *in rem* a standard rent on premises. The right given is a personal right to the landlord and to the tenant, and it is to make an application on which the tribunal will determine what rent is reasonable for the dwelling-house. The jurisdiction of the tribunal is to determine a matter which is brought to them for decision on the exercise of personal rights by certain persons, and I cannot conceive as a matter of general principle, apart from the argument about the contents of other statutes put forward by the Attorney-General, why in those circumstances the parties should not, at any time before the tribunal gives its decision, say to the tribunal: "We no longer wish to exercise the rights thus given to us, and we no longer ask the tribunal to give its decision on what is the reasonable rent." On some occasions it must be an advantage to the parties to be able to do that. I can conceive of cases where, by a bargain made after an application has been put in by the tenant, the tenant may obtain, as a matter of arrangement with the landlord, a rent which he thinks is even lower than the tribunal would award. For these reasons, in addition to those given by my Lord, I agree.

PARKER, J. : I agree with the judgments given by my Lords.

Prohibition issued. No order as to costs.

Solicitors: *E. Royalton Kisch & Co.* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal); *E. Duchin* (for the tenant).

[Reported by F. GUTTMAN, Esq., *Barrister-at-Law.*]

NOTE.

R. v. GATENBY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 18, 1950.]

*Criminal Law—Appeal—Court of Criminal Appeal—Error in order of court—
A Inherent power of court to ensure that its own orders are properly carried out.*

On November 20, 1950, the Court of Criminal Appeal, finding that an irregularity had been committed in a case, in that the recorder at quarter sessions had failed to take the formal verdict of the jury after the appellant had withdrawn a plea of Not Guilty and had pleaded Guilty, set aside the judgment and ordered a *venire de novo* to issue. In error, the order issued by the Criminal
B Appeal Office stated: "The court doth finally determine the [appeal] and doth allow the said appeal and doth quash the conviction and direct a judgment and verdict of acquittal on the indictment whereon the appellant was convicted to be entered, but doth order that the appellant be kept in custody and remitted for trial at the Manchester Assizes now in progress."

C The appellant did not appear.

J. H. Buzzard for the Crown.

LORD GODDARD, C.J.: We consider that we have ample power—the inherent power of the court—to see that its orders are properly carried out, and we set aside the order which has been issued and order in these terms:

"The court doth allow the appeal and doth order that the conviction and
D judgment on the indictment whereon the appellant was convicted be set aside and annulled, and that the appellant do appear at the present assizes at Manchester and plead to and answer the said indictment, and that in the meantime the appellant be remanded in custody."

Solicitor: *Director of Public Prosecutions.*

H.McL.M.

HIGHAM v. HAVANT AND WATERLOO URBAN DISTRICT COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 7, 8, 14, 1950.]

*Town and Country Planning—Compulsory acquisition—Compensation—Possibility
of service of enforcement notice—Notice to treat served after the passing of the
Town and Country Planning Act, 1947, and before the "appointed day"—
G Planning permission—Caravan site—Licence under Public Health Act,
1936 (c. 49), s. 269 (1)—Town and Country Planning Act, 1947 (c. 51), s.
75 (1).*

The claimant owned two sites which she had purchased in plots at dates prior to Apr. 16, 1931, and Aug. 27, 1936, respectively, and, except during the war, had used the whole of one site and part of the other as caravan sites. On Dec. 4, 1937, she applied for and acquired a licence under the Public Health Act, 1936, s. 269, to use the land for caravans. No town planning scheme had been prepared for the area in which the sites were situated, but on Dec. 7, 1928, the Minister of Health confirmed a resolution to prepare a scheme passed by the then local planning authority, the interim development order applicable at that time being the Portsmouth and District Town Planning (General Interim Development) Order, 1928. No application
I

for consent to the user of the sites for caravans under the Town and Country Planning Acts had been made or granted. By the Havant and Waterloo Urban District Council Act, 1947, power was given to the relevant local authority to acquire (*inter alia*) the two sites in question, and on June 17, 1948, notices to treat were served on the claimant. The compensation fell to be assessed under Part V of the Town and Country Planning Act, 1947 (in particular, s. 55 thereof), which was passed on Aug. 6, 1947, Part V coming into force immediately. The remainder of the Act, including s. 75 (which deals with the position where existing development contravenes previous planning control), by virtue of the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948, dated Feb. 9, 1948, came into force on July 1, 1948. In the assessment of compensation to be paid to the claimant the question arose whether on or after July 1, 1948, the actual use of the two sites could be the subject of an enforcement notice under s. 75 of the Act of 1947, and, if so, whether the arbitrator might take that into account in assessing compensation.

HELD: (i) the grant of a licence under s. 269 of the Act of 1936, even though it was granted by the local authority which was also the planning authority, did not amount to planning permission, and, therefore, as no permission for the use of the land for caravan sites had been given by or under the interim development order, having regard to s. 75 (9) of the Act of 1947 the claimant's use of the land was begun in breach of previous planning control.

(ii) on the true construction of s. 75 (1) of the Act of 1947 (which applies Part III of the Act with regard to enforcement notices, including, in particular, s. 23, and provides that an enforcement notice shall not be served in respect of any use at any time after three years from the appointed day) that sub-section provided a substituted, and not an additional, limitation to that provided by s. 23 (which imposes a limitation of four years from the beginning of the change of user), and, therefore, an enforcement notice served when s. 75 came into force would not be out of time.

(iii) it could not be implied, having regard to s. 75 (6), that where no enforcement notice had been served the arbitrator could not take into consideration the possibility of its being served; although at the date of the notices to treat s. 75 had not become law, it was then known that the section would come into force on July 1, 1948, and that an enforcement notice could then be served; and, therefore, the arbitrator was not debarred from taking into consideration the possibility of such service.

[FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 75, see HALSBURY'S STATUTES, Vol. 40, pp. 812-815.]

Case referred to:

- (1) *Pilling v. Abergale Urban District Council*, [1950] 1 All E.R. 76; [1950] 1 K.B. 636; 114 J.P. 69.

CASE STATED by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1).

The arbitrator made alternative awards of compensation to the claimant in respect of the compulsory acquisition of her land by the Havant and Waterloo Urban District Council, subject to the opinion of the High Court on the questions (i) whether, on or after July 1, 1948, the actual use of the land in question could be the subject of an enforcement notice under the Town and Country Planning Act, 1947, s. 75, and, if so, whether the arbitrator might take that into account in assessing compensation; and (ii) whether a licence under the Public Health Act, 1936, s. 269, was personal to the licensee. The court did not find it necessary to answer question (ii).

Sandlands, K.C., and G. Howard for the claimant.

H. B. Williams, K.C., and W. L. Roots for the urban district council.

Cur. adv. vult.

Dec. 14. **PARKER, J.**, read the following judgment of the court. This is a Special Case stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 6 (1), making alternative awards of compensation in respect of the compulsory acquisition of land, subject to the opinion of the court on two questions.

The facts, so far as they are material to the determination of the questions raised, are as follows. The claimant was the owner of two pieces of land in the parish of Havant in the county of Southampton known as "the Sealand site," about one acre, and "the Creek Road site," about half an acre. The various parcels making up these two sites were purchased by the claimant, in the case of the Sealand site, at various dates prior to Apr. 16, 1931, and, in the case of the Creek Road site, at various dates prior to Aug. 27, 1936. From the time of purchase the claimant used the Sealand site and part of the Creek Road site for moveable dwellings, that is, as sites for caravans, and except for a period during the war when such user was prohibited, continued to do so down to the date of the notices to treat. Prior to the purchases by the claimant, the land had been used for agricultural purposes. No town planning scheme had ever been prepared covering the area in which the two sites were situated, but on Dec. 7, 1928, the Minister of Health had confirmed a resolution to prepare a scheme passed by the Portsmouth City Council, the predecessors of the Havant and Waterloo Urban District Council, the acquiring authority. At that time and when such user by the claimant was begun, the interim development order applicable was the Portsmouth and District Town Planning (General Interim Development) Order, 1928. No application for consent to such user had ever been made or granted. On Dec. 4, 1937, however, the claimant applied for a licence under the Public Health Act, 1936, s. 269, to use the land for moveable dwellings, and, the application not having been refused within four weeks, was, by virtue of s. 269 (4), deemed to have been granted unconditionally on Jan. 1, 1938. By the Havant and Waterloo Urban District Council Act, 1947, a private Act, the acquiring authority were given powers to acquire certain areas of land, including the claimant's two sites, for sea defence works, and on June 17, 1948, notices to treat were served on the claimant in respect of the said sites.

The compensation falls to be assessed under Part V of the Town and Country Planning Act, 1947. That Act was passed on Aug. 6, 1947, and by s. 120 certain sections, including those contained in Part V of the Act, were to come into force at once, whereas the remainder, including, in particular, s. 75 (which deals with the position where existing development contravenes previous planning control) was not to come into force until such day as the Minister might appoint. By the Town and Country Planning Act, 1947 (Appointed Day) Order, 1948 (S.I. 1948, No. 213) dated Feb. 9, 1948, the Minister fixed July 1, 1948, as the appointed day. The questions raised for the determination of this court are: (i) whether on or after July 1, 1948, the actual use of the two pieces of land (or any part thereof) could be the subject of an enforcement notice under the Town and Country Planning Act, 1947, s. 75, and, if so, whether the arbitrator may take this into account in assessing compensation; (ii) whether a licence under the Public Health Act, 1936, s. 269, is personal to the licensee. If the first question is answered in the affirmative, the second question does not arise.

As will be seen from the foregoing, the notices to treat served on June 17, 1948, were served after the passing of the Act and before the appointed day, and, accordingly, compensation falls to be assessed under s. 55 of the Act which adapts the provisions of s. 51 (which deals with acquisitions after the appointed day) to the limited class of acquisitions between the passing of the Act and the appointed day. By s. 55 (2) it is provided:

"The value of any interest in land which is compulsorily acquired as aforesaid shall be ascertained by reference to prices current immediately before Jan. 7, 1947, and for that purpose the interest shall be deemed to have been subsisting immediately before that day subject to all incidents to which it is subject on the date of the notice to treat, and the land shall be deemed to have been immediately before Jan. 7 in the same state as it is at the date of the notice to treat."

It is contended on behalf of the acquiring authority that one of the incidents to which the land was subject on June 17, 1948, was the risk that in two weeks' time, when the appointed day arrived, an enforcement notice might be served prohibiting the use of the land for moveable dwellings pursuant to the provisions of s. 75 and s. 23 of the Act and that such a risk was a matter which the official arbitrator was entitled to take into consideration in assessing the compensation. By s. 75 (9) it is provided that the use of the land shall be deemed to have been begun in contravention of previous planning control, where at the material time the land was subject to a resolution to prepare a planning scheme, if begun otherwise than in accordance with permission granted in that behalf by or under the interim development order. On the facts of this case it is clear, and, indeed, it is admitted, that, unless the licence deemed to have been granted under the Public Health Act, 1936, amounts to such permission (a point with which we will deal hereafter) the claimant was in breach of previous planning control. Section 75 (1), so far as it is material, provides that, where any use to which land is put on the appointed day was begun in contravention of previous planning control,

"... the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission ... Provided that an enforcement notice shall not be served by virtue of the provisions of this section in respect of any works or use (not being works or a use carried out or begun during the war period as defined by the Building Restrictions (War-Time Contraventions) Act, 1946) at any time after three years from the appointed day."

Part III of the Act includes s. 23.

On behalf of the claimant various points are taken. It is said, in the first place, that no enforcement notice could have been served when s. 75 came into force because there had been no breach of previous planning control in that the unconditional licence deemed to have been granted under the Public Health Act, 1936, s. 269, amounted to planning permission. We do not think that such a proposition is tenable. As was pointed out by this court in *Pilling v. Abergele Urban District Council* (1), the Public Health Act, 1936, is concerned solely with matters relating to health and sanitation, and town planning considerations are outside the purview of that Act. The mere grant of a licence under s. 269 of that Act, even when granted by the local authority which is itself the planning authority, cannot amount to planning permission. It is said, secondly, that no enforcement notice could have been served when s. 75 came into force because under s. 23 no notice can be served after four years have elapsed since the development (which includes a change in the use of the land: see s. 12) was begun, and that this was begun in the case of both sites well over four years before July 1, 1948. It is argued that s. 75 (1), in adapting the provisions of s. 23, preserves the limitation that any notice must be served within four years of the beginning of the change of use, and by its proviso adds a further limitation that such notice must also be given within three years of the appointed day. In other words, it is said that such a notice can only be served within three years of the appointed day if it is also served within four years of the beginning of the change of use.

A The acquiring authority, on the other hand, contends that the second part of s. 75 (1), though in form a proviso, is providing a substituted, and not an additional, limitation. On the whole, we prefer this latter construction. It must be remembered that s. 23, which imposes a limitation of four years from the beginning of the change of user, is dealing with a change of user occurring after the appointed day and that s. 75 is adapting in general terms the provisions of that section as a part of Part III of the Act to the circumstances of a change of user begun before the appointed day. The adaptation is itself stated to be "subject to the provisions of this section," and the proviso, which is part of the section, provides another limit. In order to determine the question whether the proviso lays down a limitation in addition to or in substitution for that laid down in s. 23, some help is, we think, to be derived from s. 75 (2) and (3). These sub-sections deal with works carried out, or a use begun, broadly speaking, during the war, and if the claimant's argument is right, enforcement notices could only be served in respect of the limited number of works carried out or user begun since July 1, 1944. Moreover, it is relevant to observe that prior to the appointed day when the Town and Country Planning Act, 1932, was repealed, and s. 75 came into force, the claimant was liable to have the user prohibited without compensation when a scheme was actually prepared. It is further contended on behalf of the claimant that in any event the official arbitrator cannot take into account the possibility of such a notice being served in that (i) s. 75 (6) expressly provides that where an enforcement notice has been served the arbitrator is to take it into consideration, and that, accordingly, by implication he is not to take into consideration the possibility of its being served thereafter, and (ii) in any event s. 75 had not become law at the date of the notices to treat.

B As regards the first contention, it is to be observed that where land compulsorily acquired falls to be valued under s. 51 of the Act, the arbitrator is told to value on certain assumptions which are, broadly speaking, such as will ensure that the value is the existing use value. Where, therefore, an enforcement notice has been served, some express provision would be necessary to enable the arbitrator to depart from the existing use value, and s. 75 (6) provides what is to happen. It says that he is to calculate the compensation

E "... having regard to the requirements of the notice, and the assumptions required to be made for those purposes shall be modified accordingly."

That sub-section being clearly necessary to provide for such a case, we do not think that it can be argued that there is any implication therefrom that the possibility of a notice being served in the future must be disregarded. As regards the second contention, it is true that s. 75 was not law at the date of the notices to treat, and that, at that date, there was no power to serve an enforcement notice under the Town and Country Planning Act, 1932, which was then in force, since the powers of enforcement under that Act were limited to the case where a scheme had been actually prepared. On the other hand, the claimant was in breach of previous planning control, and it was known that that section would come into force on July 1, 1948, and that then an enforcement notice could be served, even though only a resolution to prepare a scheme had been passed. We do not think that in these circumstances it can be said that as a matter of law the arbitrator is debarred from taking into consideration the possibility of such a notice being served. What weight he should attach to such a possibility and the extent to which the value of the land should be diminished by that possibility may be difficult questions, but they are, of course, matters for him with which this court is not concerned. This court, therefore, answers the first question in the affirmative, and the second question does not arise.

Order accordingly. No order as to costs.

Solicitors: *Mortimer Silverman & Co.*, agents for *James Barnes*, Hayling Island (for the claimant); *Lees & Co.* (for the urban district council).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

REGIONAL PROPERTIES, LTD. v. FRANKENSCHWERTH AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton, L.J., and Danckwerts, J.), December 4, 5, 1950.]

Rent Restriction—Assignment without consent of landlord—Assignment by contractual tenant—Need for prohibition in tenancy agreement against sub-letting—Right of landlords to damages for failure of tenant to deliver up premises at end of term—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1), sched. I (d).

By an agreement dated July 25, 1946, the landlords let to the tenant a flat to which the Rent Restrictions Acts applied. The tenancy was terminable by monthly notice and the agreement contained a covenant to deliver up the premises at the end of the tenancy, but there was no covenant against assignment or sub-letting, and at some time during the tenancy the tenant, without the consent of the landlords, sub-let the premises furnished to the sub-tenant. The landlords served a notice to quit expiring on June 18, 1950, and on June 15, 1950, the tenant again without consent assigned the tenancy to the sub-tenant. On a claim by the landlords for possession under para. (d) of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933,

HELD: (i) (a) "tenant" in para. (d) included a contractual tenant, and (b) no qualification was to be implied that the paragraph only applied where consent to an assignment was required by the tenancy agreement, and, therefore, the court had power to make an order for possession.

(ii) in view of the absence in the tenancy agreement of a prohibition against assignment and the fact that the landlords had obtained an order against the sub-tenant for possession, rent, and costs, they were not entitled even to nominal damages against the tenant for being a party to the creation of a statutory tenancy in the sub-tenant and so being in breach of the covenant to deliver up the premises at the end of the term.

[AS TO RESTRICTIONS ON THE LANDLORD'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 20, pp. 329-334, paras. 392-399; and FOR CASES, see DIGEST, Vol. 31, pp. 576-581, Nos. 7256-7297, and Digest Supp., and 2nd Digest Supp.].

Cases referred to:

- (1) *Skinner v. Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; Digest Supp.
- (2) *Roe v. Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; Digest Supp.
- (3) *Dalrymple's Trustees v. Brown*, 1945 S.C. 190; [1945] S.L.T. 220; 2nd Digest Supp.
- (4) *Rhodes v. Cornford*, [1947] 2 All E.R. 601; 2nd Digest Supp.
- (5) *Cumming v. Danson*, [1942] 2 All E.R. 653; 112 L.J.K.B. 145; *sub nom. Cumming v. Dawson*, 168 L.T. 35; Digest Supp.
- (6) *Bell London & Provincial Properties, Ltd. v. Reuben*, [1946] 2 All E.R. 547; [1947] K.B. 157; [1947] L.J.R. 251; 176 L.T. 92; 2nd Digest Supp.
- (7) *Henderson v. Squire*, (1869), L.R. 4 Q.B. 170; 38 L.J.Q.B. 73; 19 L.T. 601; 33 J.P. 532; 31 Digest 546, 6925.
- (8) *Keats v. Thompson*, [1939] N.Z.L.R. 30; Digest Supp.

APPEAL by the defendants from a judgment of His Honour JUDGE CLOTHIER, sitting at Lambeth County Court, dated Oct. 5, 1950. The landlords claimed possession of a flat, to which the Rent Restrictions Acts applied, from the assignee of the tenant, on the ground that the premises were assigned without the landlords' consent. The landlords further claimed against the tenant damages for breach of the covenant to deliver up, committed by the assign-

ment of the premises. The county court judge made an order for possession and awarded £2 nominal damages against the tenant. The facts appear in the judgment of SIR RAYMOND EVERSLED, M.R.

Pearl for the tenant.

Lester for the sub-tenant.

A. R. Campbell for the landlords.

A SIR RAYMOND EVERSLED, M.R.: The landlords own a flat known as 125, Pullman Court, Streatham, which admittedly is, and at all material times was, a dwelling-house within the Rent Restrictions Acts. The first defendant in the action was the tenant of the premises by virtue of a contract of tenancy, dated July 25, 1946, at a monthly rent of £9 11s. 9d. The agreement, which provided that the tenancy should be determined by one month's notice, **B** contained in a usual form a covenant by the tenant to deliver up the premises at the end of the tenancy, but it contained no restriction on assignment or sub-letting. Indeed, such a covenant was deliberately struck out of the form of agreement. Some little time ago, the tenant sub-let furnished this flat to the sub-tenant, who has remained in occupation at all material times. **C** Ultimately, the landlords served on the tenant a notice to quit in accordance with the terms of the contract which was due to expire on June 18, 1950. On the service of the notice the tenant was willing that vacant possession should be given to the landlords, but, out of sympathy for the sub-tenant or some other motive, he sought to put the sub-tenant into a position in which he could assert the Rent Restrictions Acts and so after the termination of the tenancy remain in possession of the flat as statutory tenant. A meeting **D** took place between the representatives of the tenant and sub-tenant, and there then came into existence what has been described as a "device" which consisted in two steps being taken. The first was to take advantage of the fact that under the tenant's agreement he was free to assign the term to a third party, and he executed an assignment in favour of the sub-tenant. **E** Secondly, the furniture which belonged to the tenant was moved away wholly or substantially, and the sub-tenant put in his own furniture. The result of those transactions was that for the remainder of the term—and I should state that that was then three days—the sub-tenant was the assignee of the tenant, and was entitled to the interest of the tenant under the original demise. The notice then expired. The tenant had removed himself from all contact with the premises, but the sub-tenant then asserted that, he having on the expiry **F** of the notice to quit been the contractual tenant by assignment, he then became, and, indeed, the landlords so alleged and pleaded, a statutory tenant.

The landlords, bringing proceedings for possession against both the tenant and the sub-tenant relied on the provisions of sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which is in these terms:

G "A court shall . . . have power to make . . . an order . . . for the recovery of possession of any dwelling-house to which the [Rent Restrictions] Acts apply . . . (where the court considers it reasonable so to do) if —(d) the tenant without the consent of the landlord has at any time after July 31, 1923, assigned or sub-let the whole of the dwelling-house or sub-let part of the dwelling-house, the remainder being already sub-let."

I The case of the landlords is of the simplest character. Counsel on their behalf argues that the words "the tenant without the consent of the landlord has . . . assigned" means precisely what they say, neither more nor less; here there was an assignment without the landlords' consent; and, therefore, jurisdiction is conferred on the court to make an order for possession if the court thinks it reasonable so to do. An argument was presented by counsel for the sub-tenant (for, I think, it is convenient to deal first with his appeal) that either the words "the tenant" mean only a statutory tenant, or, if the words "the

tenant" include a contractual tenant, then the few words I have read must be deemed to have read into them a substantial qualification to this effect: "in the case of a contractual tenant where a consent to assign is required by the contract of tenancy." I will say at once that, treating this as an ordinary matter of construction of simple words in the English language, I cannot accept that alternative submission. I think the words mean what they say. I am prepared to follow the adjuration of counsel for the sub-tenant and read these words in the light of the whole context in which they appear. It is true that in the other paragraphs of the schedule the ground conferring jurisdiction is some breach of obligation or similar act on the part of the tenant against whom the proceedings is brought for possession, but, in considering the case which para. (d) plainly contemplates of an assignment of the whole term demised, that, I should have supposed, as a simple matter of English, referred to an event, namely, an assignment, the result of which has been to put into possession the assignee and not the original assigning tenant. Because the other cases dealt with in the schedule refer to acts of the kind I have mentioned on the part of the tenant, seems to me to be no reason to expand the language of para. (d) so that it is confined to similar occasions.

I feel a degree of sympathy for the sub-tenant. Though I have used the word "device," I am not imputing any dishonest intention or other reprehensible conduct on his part. Moreover, I sympathise with the view put forward on his behalf that at first approach it might well be supposed that para. (d) must be read in one or other of the alternative ways suggested. I think there is much force in that, but, to take the first alternative, there is this great difficulty in the way of supposing that para. (d) refers only to a statutory tenancy. The paragraph first appeared as s. 5 (1) (h) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (as substituted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923), and, as SCRUTTON, L.J., observed in *Skinner v. Geary* (1), the court was then in the process of formulating the view, which it thereafter very firmly laid down on more than one occasion, that the so-called statutory tenancy was not a right of property capable of transmission by assignment or gift or devise. If, therefore, as the cases establish, between 1923 and 1933 the court had laid it down clearly that a statutory tenancy was not capable of assignment, it seems almost impossible to suppose that Parliament (which according to well-established principles must be taken to legislate in the light of judicial decisions on existing Acts) should have repeated the words of s. 5 (1) (h) of the Act of 1923 ten years later if the supposed case, namely, assignment by a statutory tenant, was something which the law did not recognise. I do not propose to refer to the cases which counsel for the sub-tenant mentioned—*Roe v. Russell* (2), and those which follow it—save just to say that I think the language of SCRUTTON, L.J., cannot, on any view, be said to amount to a determination that s. 5 (1) (h) of the Act of 1920 applied exclusively to statutory tenancies. In any case, we have to consider sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which was passed and became law after the decision in *Roe v. Russell* (2) and *Skinner v. Geary* (1). It is of significance that from quite a short time after the passing of the Act of 1933 the view of text-book writers has been clearly to the effect that para. (d) of the schedule must be read as including the case of an assignment during the term.

In RENT AND MORTGAGE INTEREST RESTRICTIONS, by the Editors of "Law Notes," 17 ed. (1938), p. 201, there appears this note:

"This was a new paragraph introduced by the Act of 1923. It is re-enacted here without alteration. Since the statutory tenancy is not assignable, this paragraph can only refer to assignments of an existing contractual tenancy."

That view has been consistently maintained, and is also referred to in THE RENT ACTS by R. E. MEGARRY. I thus derive support for the view which I

have indicated—that, as a matter of language and in the light of the decisions of the court, the proper construction of these words in sched. I (d) is not to confine the words “the tenant” so as to mean the statutory tenant. It is unnecessary here finally to say whether the words would cover the case of a purported assignment by a statutory tenant, but I am satisfied that the paragraph does cover, and is intended to cover, the case of an assignment by the contractual tenant before the contractual term comes to an end.

The reason for such a provision, I think, is not far to seek. No one has better laid down the principles of the Rent Restrictions Acts than SCRUTTON, L.J., and in *Skinner v. Geary* (1) he pointed out ([1931] 2 K.B. 559) that the object of the Acts was to protect tenants from eviction and not to provide some means whereby tenants could make a financial gain out of dealings with rent-controlled property. I am not saying that this is that type of case. The evidence is that the tenant made no profit and received nothing out of the transaction, but it might be otherwise in other cases, and I think what Parliament was saying in the Act was: “If somebody who had been a contractual tenant and who, if he remained there living in the place as his home, would have then become entitled to the protection of the Act, chose, instead of doing that, for consideration large or small or no consideration, to say: ‘I do not want the benefits of this Act. If you like to have them, I will put you in the position of being able to claim them,’ we are not interested in that type of person. If the real tenant does not want to live in the premises, there is no reason why the landlord should not have some say on the question who should occupy his property. Therefore, we say, if that has happened, the court is given jurisdiction to make an order.”

The alternative contention, if the words “the tenant” include a contractual tenant, is that para. (d) is to be confined to cases where consent is required by the contract. Counsel for the sub-tenant submitted that that must be so because otherwise the results would be so surprising. I confess that they have not surprised me. These words in the statute seem perfectly simple and straightforward, and, unless there is something which compels me to do so, I cannot see what can be the justification for reading into them a qualification which Parliament never imposed. It is plain that during the term of the contract, if there is no prohibition against assignment or underletting, the tenant can assign or underlet without asking the landlord’s consent or leave, but what Parliament has said is, whether or not consent is necessary, if, in fact, there has been an assignment without the landlord’s consent, then, for the reasons which I have indicated, it is fair that the court should have power to make an order for possession against the assignee who, *ex concessis*, is somebody unknown to and not approved of by the landlord.

It is said that in this case, because of the form of the lease, the definition clause of which provides that the word “tenant” shall include an assignee, and because (though I doubt if this is admissible in evidence) a clause prohibiting assignment was struck out, therefore it must be said that any assignment made at any time during the term by the tenant has inferentially the consent of the landlord within the meaning of para. (d). I cannot accept that argument. I think that this paragraph means what it says, and that “the consent of the landlord” means the consent actively given to a particular tenant. I am supported in that opinion by the view taken by the Inner House of the Court of Session in *Dalrymple’s Trustees v. Brown* (3). A decision of that court is not binding on this court, but since the Acts to be construed are the same in both Scotland and England, and since, further, it is known that from time to time cases under those Acts go to the House of Lords from Scotland and from England, it is plainly desirable that the construction of the relevant parts of the Acts should be the same on both sides of the border. I should, therefore, always be inclined in cases of this kind to follow a decision of the Inner House

of the Court of Session, and the language of the Lord President (LORD NORMAND), is, to my mind, persuasive, and conveys the point which I think is the answer to this part of the argument. That was a case, not of assignment, but of a sub-letting by the tenant of urban property in Scotland during the pendency of the contract of letting without the landlord's consent. It was argued that, since by the law of Scotland it is unnecessary in such cases to get the consent of the landlord to sub-let, therefore, it must be supposed that proleptically the consent is given in each case. The answer to the argument is thus concisely stated by LORD NORMAND (1945 S.C. 192):

"The law is that the tenant of urban tenements in Scotland has an implied power to sub-let without the consent of the landlord; and not that there is an implied consent of the landlord to every urban sub-let. Moreover, any sub-let at common law endures at common law only for the period of the tenant's lease, and has nothing to do with the protection for an extended period under the Rent Restrictions Acts. I am clear that the words 'without the consent of the landlord' in para. (d) of sched. I to the Act of 1933 mean without actual consent given by the landlord either expressly or by implication. That necessarily requires that the landlord should have had knowledge of the sub-lease."

He says that in that case the landlord had no knowledge and gave no consent, express or implied. I respectfully adopt that reasoning and apply it to this case.

The result, therefore, in my judgment, is that the county court judge was right when he concluded that there was here jurisdiction on his part to make an order. [HIS LORDSHIP considered the facts, and said that the county court judge was entitled to form the view that it would be reasonable to make an order for possession, and that, therefore, the sub-tenant's appeal failed, and continued:] There is also an appeal by the tenant and this is, indeed, a strange case. I regret that the time of the court has been taken up in debating matters of which the issue is whether the tenant ought to pay 40s. to the landlords, for that is what the appeal is about. The particulars of claim alleged that the assignment had the effect, as I think it had, of creating a statutory tenancy in favour of the sub-tenant when the contractual lease determined, and it is pleaded that the creation of that statutory tenancy involved a breach of the covenant for delivery up at the end of the term, and for that breach a claim is made for damages. It is said that the claim is in two parts, nominal damages and a full indemnity as to costs. I am anxious to confine myself to this particular case. I do not say that there might not be cases in which a tenant of a protected dwelling-house would be liable in damages of some measure to a landlord for something done, or said to be done, at the end of the tenancy. The question in the present case is whether, having regard to the fact that the landlords have got an order for possession against the sub-tenant, plus an order for payment of rent or mesne profits (which is compensation for the value of the premises during the sub-tenant's possession), plus an order for the costs of the action of ejectment, in a case in which it is not suggested that the sub-tenant is a man of straw, it can be suggested either that there is a case which may be formulated for damages for breach of contract or that any damages could be said to flow from the breach, if any, so committed? I must say I think the answer is plainly: No. The judge came to a different conclusion. The matter is somewhat briefly stated, but I gather that since, in his opinion, there was an obligation to deliver up the premises and that the so-called device prevented the tenant from fulfilling that covenant, he put the landlords to certain expense in coming to court, and, therefore, the landlords were entitled to £2 damages.

Under the common law, it is clear enough that if a tenant contracts to deliver

up possession at the end of a lease and then by his own act puts somebody into the place as a sub-tenant or licensee and that latter person does not go out when the term ends, the tenant is liable in damages (at any rate, unless he shows that he has taken all reasonable and proper steps to get rid of the intruder), the measure of damages being, as was stated in *Henderson v. Squire* (7) (L.R. 4 Q.B. 173) by COCKBURN, C.J., and BLACKBURN, J., a sum to com-

A pensate the landlord for loss of rent while he was getting the intruder out and the costs he was put to in getting the intruder out. In the present case there is an order for mesne profits and the costs of the action. It is not clear to me that there is any further damage which the landlords sustained, but, in any event, my view is that that state of the common law has been substantially modified by the impact of the Rent Restrictions Acts. It has been pointed
B out by the court that, when a statutory tenancy is created the terms of that tenancy are those which are found in the contract of tenancy save so far as they are inconsistent with the Acts. The whole scheme of the Rent Restrictions Acts shows that the common law effect of the covenant to deliver up is inconsistent with the protection given to the sitting tenant. Counsel for the landlords was forced to concede that, if his argument was right the tenant would
C always be liable to some nominal damages although the person in possession was a sub-tenant whose occupation had been assented to at all material times by the landlord and it was in every respect lawful and free from any sort of disclaimer. That seems to me to be a very unlikely result. Counsel for the landlords relied on a decision of the Supreme Court of New Zealand in *Keats v. Thompson* (8). I am not persuaded by the judgment in that case to any view
D contrary to that which I have indicated. I am not satisfied that the position in that case and in this is comparable, for the judge in New Zealand pointed out that the sub-tenant whose failure to give up possession gave rise to the point in that case was not protected by any statutory provision comparable to s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The point argued here does not appear to have been taken.

E In the present case it is conceded that until the termination of the contract the tenant was free to assign his tenancy. If either the tenant or an assignee were in possession in the ordinary sense of that term when the contract ended, it must have been well understood by the parties to the contract from the first that the covenant for delivery up could be qualified necessarily by the statutory right of that tenant, or assignee, as the case might be, to remain there unless
F and until a court made an order for ejectment. In other words, I think the basis on which such cases as *Henderson v. Squire* (7) were decided under the common law has very seriously to be qualified where the contract in question relates to a rent-controlled dwelling-house. In those circumstances, I do not accept the view, with all respect, which the judge below accepted, that the deliberate grant of this assignment, the deliberate putting into possession of the sub-tenant so that he could be, as he did become, the statutory tenant,
G was a breach of the contract as contemplated by the parties to it. I have already said that, even if it were, I am not satisfied that any damages flowed from the breach. I do not wish to be taken as stating that in no case where the subject-matter is a rent-controlled house can there be a claim for damages against the tenant from whom possession is not obtained on the termination of the contractual tenancy. Every case must be decided on its own particular facts, but, on the facts of this case and having regard to all its circumstances, I am satisfied that there was no basis on which a claim for damages could be successfully asserted against the tenant. I, therefore, would allow the tenant's appeal for the reasons I have indicated, while rejecting that of the sub-tenant.

I SINGLETON, L.J.: I am of the same opinion. The claim of the landlords was based on para. (d) of sched. I to the Rent and Mortgage Interest

Restrictions (Amendment) Act, 1933. Much criticism has been directed to the complications of the Rent Acts, but I do not think there is any complication to be found in para. (d) of sched. I to the Act of 1933. Counsel for the sub-tenant referred to a considerable number of authorities in seeking to persuade the court to put the construction which he desired on that paragraph. We have before us an assignment of June 15, 1950, between the tenant, of the one part, and the sub-tenant, of the other part. It is clear that there was an assignment of the whole of the dwelling-house from the one to the other on that date, to which the consent of the landlords was not asked. Counsel for the sub-tenant submitted that that was not necessary as there was no provision against sub-letting in the original agreement. I do not think that it is necessary to refer to authorities to answer that problem—in any event, the words of LORD NORMAND in *Dalrymple's Trustees v. Brown* (3) are clear, and I accept them. If these words in para. (d) are to be read in their ordinary sense, it is plain beyond measure that the tenant, without the consent of the landlords, after July 31, 1923, assigned the whole of the dwelling-house.

The remaining point is whether it was reasonable to make an order for possession? [HIS LORDSHIP considered the evidence and continued:] The judge considered it reasonable to make an order, and I see no reason whatever to interfere with the judgment which he formed.

On the landlords' claim for damages against the tenant, I agree with my Lord that, if the landlords recover from the sub-tenant all that they are out of pocket—if they recover possession and rent or mesne profits—there is no reason why they should have judgment even for nominal damages against someone else for an extra £2. At the same time I do not wish it to be thought that in certain circumstances a claim might not be put forward in tort. If there was a conspiracy to defeat the rights of the landlords or something of that kind, it would have to be the subject-matter of a plea in order to entitle the landlords to succeed upon it. Counsel for the landlords said he could not plead anything of that kind. It may well be in some such case that a landlord could put forward a good claim for damages if there was a conspiracy of the kind I have suggested. I agree in the present case that counsel for the landlords has not made out any such claim.

DANCKWERTS, J.: I also agree. The Master of the Rolls has expressed the reasons for dismissing the appeal of the sub-tenant so fully that it is unnecessary for me to add anything in regard to those reasons, with which I agree. A tenant, assignee, or sub-tenant, who continues in possession after the contractual tenancy has come to an end in the case of a house to which the Rent Restrictions Acts apply retains his possession lawfully under s. 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and he continues to occupy on the terms of the tenancy so far as applicable to that situation. Sub-section (3) of that section recognises him as having an interest. In those circumstances it seems to me that the sum which is awarded to a landlord who is given an order pursuant to the Act to recover possession should be described more properly as rent rather than as mesne profits. That leads me to the observation which I wish to make in regard to the claim of the landlords against the tenant for damages. Here it seems to me clear that the assignment was lawful. There was no restriction on assignment or under-letting in the terms of the tenancy, and as long as the period of the tenancy persisted the tenant was at liberty to assign or underlet. Having done that, the sub-tenant as assignee remained lawfully in possession. It seems to me that those circumstances, by themselves, distinguish this case from such cases as *Henderson v. Squire* (7) where a sub-tenant or some other person remained in possession unlawfully without any authority and had to be evicted. Furthermore, the date of the tenancy agreement in this case was July 25, 1946, when the situation which might be created by the Rent Restrictions Acts was

well known to all persons concerned with property. It seems to me that, in those circumstances, landlords and tenant contracted on a footing which was different from that known to the common law, and, therefore, it may well be that any covenant to deliver up possession at the end of the tenancy must be read and construed subject to those conditions.

Appeal of tenant allowed with costs. Appeal of sub-tenant dismissed with costs.

Solicitors: *Godfrey Davis & Foster* (for the tenant); *Bieber & Bieber* (for the sub-tenant); *Theodore Goddard & Co.* (for the landlords).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

POLSKY v. S. AND A. SERVICES.
S. AND A. SERVICES v. POLSKY.

[KING'S BENCH DIVISION (Lord Goddard, C.J.), December 1, 7, 1950.]

Bill of Sale—Assurance of personal chattels by way of security—Purported sale of car followed by hire-purchase agreement—Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), s. 3.

On June 21, 1948, the plaintiff purchased from a dealer a motor car for the sum of £895 and paid for it by cheque. On June 22, wishing to obtain a sum of £400 to pay into his bank to meet the cheque, the plaintiff entered into a transaction with the defendants who carried on the business of financing the purchase of cars. Their usual practice was to buy a car from a dealer on behalf of a purchaser, the purchaser himself paying part of the purchase price either to the defendants or direct to the dealer and the defendants paying the remainder, and then to let the car on hire-purchase terms to the purchaser, the car remaining the property of the defendants until the full purchase price had been paid by the purchaser. On this occasion, although the plaintiff had purchased the car himself and merely sought a loan of £400, the transaction was carried out by means of the documents which were used by the defendants when financing purchases of cars, and they purported to buy the car from the plaintiff and to let it out to him under a hire-purchase agreement, dated June 22, 1948. In the proposal form signed by the plaintiff the value of the car was given as £895 and it was stated that an initial payment of £495 had been made, leaving £400, plus £50 for charges, as "balance of hire" to be paid by the plaintiff in eighteen monthly payments of £25 each. Among the other documents signed by the plaintiff in connection with the purported sale and hire of the car, one contained a receipt saying: "Received cheque £400 payment for the car," and another contained a statement by the plaintiff that he clearly understood that he was selling the car to the defendants. The plaintiff brought an action against the defendants claiming a declaration that the hire-purchase agreement was a bill of sale within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, being in reality an assurance of personal chattels as security for a debt, and that, as it was unregistered, it was void under s. 8 of the Act.

HELD: the main object of the Act of 1882 being to protect borrowers against lenders, it was the duty of the court to look behind the documents to discover the true nature of the transaction; the facts set out in the proposal form were incorrect, and the transaction was not a genuine sale and re-hire, but was merely a loan of £400 by the defendants to the plaintiff on the security of the car; and, therefore, the hire-purchase agree-

ment of June 22, 1948, was a bill of sale within s. 3 of the Act of 1882, and, as it was not registered, it was void under s. 8.

Re Watson, Ex p. Official Receiver in Bankruptcy (1890) (25 Q.B.D. 27), and *Madell v. Thomas & Co.* ([1891] 1 Q.B. 230), *applied*.

Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd. ([1934] 2 K.B. 305), *distinguished*.

[AS TO TRANSACTIONS WITHIN THE BILLS OF SALE ACTS, see HALSBURY, A Hailsham Edn., Vol. 3, pp. 13, 14, para. 18; and FOR CASES, see DIGEST, Vol. 7, pp. 15-18, Nos. 67-80.]

Cases referred to:

(1) *Yorkshire Railway Wagon Co. v. Maclure*, (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 10 Digest 737, 4607.

(2) *British Railway Traffic & Electric Co. v. Kahn*, [1921] W.N. 52; Digest Supp. B

(3) *Re Watson, Ex p. Official Receiver in Bankruptcy*, (1890), 25 Q.B.D. 27; 59 L.J.Q.B. 394; 63 L.T. 209; 7 Digest 17, 74.

(4) *Madell v. Thomas & Co.*, [1891] 1 Q.B. 230; 60 L.J.Q.B. 227; 64 L.T. 9; 7 Digest 17, 75.

(5) *Victoria Dairy Co. v. West*, (1895), 11 T.L.R. 233; 7 Digest 10, 33. C

(6) *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.*, [1934] 2 K.B. 305; 103 L.J.K.B. 613; 151 L.T. 396; Digest Supp.

ACTION for a declaration that a hire-purchase agreement, made between the plaintiff and the defendants on June 22, 1948, was a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and, being unregistered, was void under s. 8 of the Act, and that the plaintiff was at all material times the owner of the motor car which was the subject-matter of the agreement. In a second action, in which the defendants in the first action were plaintiffs and the plaintiff in the first action was defendant, the defendants in the first action claimed the return of the car from the plaintiff and damages for its detention. D

The plaintiff, wishing to obtain a loan of £400 to place in his bank to meet a cheque for £895 which he had given to a motor car dealer in payment for a car which he had purchased from them, entered into a transaction with the defendants, whereby the defendants purported to purchase his car and then to let it out to him on a hire-purchase agreement. The plaintiff contended that the real transaction was an assurance of personal chattels as security for a debt within the Bills of Sale Acts. The facts appear in the judgment. E

Laskey for the plaintiff (the defendant in the second action).

Melford Stevenson, K.C., and *Hallis* for the defendants (the plaintiffs in the second action). F

Cur. adv. vult. G

Dec. 7. **LORD GODDARD, C.J.**, read the following judgment. The question for decision in this case is whether or not a hire-purchase agreement, dated June 22, 1948, whereby the defendants purported to let on hire an Austin motor car to the plaintiff, is a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and, therefore, void under s. 8 of that Act as being unregistered. The defendants carry on the business of financing purchases of motor cars. This has now become quite a common and well known class of business and is carried out in this way. The would-be purchaser of a motor car who is unable, or unwilling, to pay the full amount at the time of purchase enters into an agreement with a finance company whereby the latter acquires a car from a dealer. As a general rule the would-be purchaser has to find some portion of the purchase money, which he may pay either to the dealer or to the finance company, and the latter finds the rest of the money and buys the car. H

from the dealer. The car then becomes the property of the company, which lets it out on hire-purchase terms to the purchaser, and it follows that the car remains the property of the finance company until the full purchase price is paid. The plaintiff seems to have had some transaction with the defendants in the early part of 1948, but I had no evidence as to the precise nature of the transaction which then took place between them. On June 21, 1948, without any previous communication on the subject with the defendants, the plaintiff bought a second-hand Austin car from a dealer, Graham Fine, Ltd., for the sum of £895 and paid for it by cheque. In so doing, there is no doubt that, as he put it, he over-spent himself. His account at the bank at that moment was in credit for something between £300 and £400, though he told me, and I have no reason to doubt it, that he could have overdrawn up to £600. However that may be, the plaintiff wished to obtain a sum of money to pay into his bank to meet this cheque. He, therefore, approached the defendants, and a transaction took place between the parties which was carried out by means of the documents which would have been used had this been one of the ordinary transactions whereby the defendants finance purchases of cars. The difference between those ordinary cases and this is that the defendants were purporting to buy the car, not from a dealer, but from the plaintiff, who, undoubtedly, had the property in it.

The first document, which is, in my opinion, the most significant, is what is known as the proposal form. It begins:

"I desire you to purchase and let to me a second-hand Austin car HOM 924 on your hire-purchase plan."

The document contains the full name of the proposer, *i.e.*, the plaintiff, his private and business addresses, and the name of his bankers, and the defendants' name is given as that of the company with which he had previously entered into a hire-purchase agreement. Certain details are set out beneath the plaintiff's signature. The total value of the car is given as £895, initial payment £495, leaving a balance of £400 to which is added: "charges £50." These are totalled and the result is shown as "balance of hire £450," and then is added: "eighteen monthly payments of £25 each." The next document purports to be an invoice from the defendants to the plaintiff, and reads:

"To one s/h [second-hand] Austin car [then follow the chassis number, engine number and registered number] £895 less first payment due under your agreement £495 . . ."

showing a balance due of £400. Under that is a receipt given in these terms: "Received cheque £400 payment for the car. M. Polsky." There was also another document on which great reliance was placed by the defendants. It is addressed to them by the plaintiff, and reads:

"With reference to the transaction which you are carrying through for me at my request I hereby certify that the Austin car registered No. HOM 924 is my own property and free from any incumbrance. It has been explained to me and I clearly understand that I am now selling the car to you and that it will become your property. As requested by me you are now hiring the car to me under your usual agreement with option of purchase."

At the same time the plaintiff wrote another letter to the defendants, saying:

"I beg to inform you that I have this day, June 22, 1948, taken delivery of the Austin car in approved condition."

Then a hire-purchase agreement was executed, by cl. 1 of which the hirer agreed to pay to the owners the sum of £495 on the signing of the agreement in consideration of the option of purchase and for which amount credit would

only be given in the event of a purchase, and it was further provided that that sum should become the absolute property of the owners. By cl. 2 the hirer agreed to pay the monthly rent of £25 for the hire of the motor car, and finally, by cl. 15, it was provided that, if all the terms and conditions of the agreement should have been strictly performed and observed by the hirer, he might at any time during the hiring become the purchaser of the car by paying to the owners the difference between the sum of £945 and the amount previously paid under cl. 1 and cl. 2, or, if he should continue the hiring strictly in accordance with all the terms and conditions until the total sum of £945 should have been paid, the car should then become his sole property. The £945 was apparently made up of the two figures £895, representing the total value of the car, and £50 charges, the latter, I suppose, being mainly for interest. A

If the defendants had bought this car from a dealer, all these documents would have been completely in order and no question could have arisen as to the Bills of Sale Acts having any application to the transaction. What I have to decide is whether this transaction was in fact what it purported to be or whether it was in truth no more than a loan by the defendants of £400, with interest, on the security of the car. If the latter is the true view of the transaction, it is clear that the hire-purchase agreement was no more than an assurance of personal chattels by way of security for the payment of money, and, accordingly, it is a bill of sale within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and, being unregistered, it is void under s. 8 of the Act. A considerable number of cases were cited to me on the point which may, I think, be conveniently divided into two lines of authority. There is, on the one hand, the class of case, of which *Yorkshire Railway Wagon Co. v. Maclure* (1) and *British Railway Traffic & Electric Co. v. Kahn* (2) are good examples, where the transaction in question has been held to be a genuine sale followed by a hire-purchase agreement, and, therefore, unaffected by the Bills of Sale Acts, and, on the other hand, there is the class, which includes *Re Watson, Ex p. Official Receiver in Bankruptcy* (3) and *Madell v. Thomas & Co.* (4), where the court has held, on facts not very dissimilar from those in the present case, that the real transaction was one of loan, and, therefore, it was avoided by reason of the Acts. There is no doubt, I think, as to the deciding principle. The court has to determine whether the transaction in question is a genuine sale by the original owner of the chattel to the person who is finding the money and a genuine re-letting by the latter to the original owner on hire-purchase terms, or whether the transaction, though taking that form, is nothing more than a loan of money on the security of the goods. It is perfectly clear from the judgments of LORD ESHER, M.R., in *Re Watson* (3) and in *Madell v. Thomas & Co.* (4), that that is the question which has to be determined. The court is not to look merely at the documents. It must discover what the real transaction was. As LORD ESHER, M.R., said ([1891] 1 Q.B. 234) in *Madell v. Thomas & Co.* (4): B C D E F

" . . . the court is to look through or behind the documents, and to get at the reality; and, if in reality the documents are only given as a security for money, then they are bills of sale." G

The question, indeed, is simply one of fact: see *per* WRIGHT, J. (11 T.L.R. 233) in *Victoria Dairy Co. v. West* (5).

Counsel for the defendants contended that in approaching this case I should bear in mind—as, indeed, I do—that both the parties might fairly be described as business people, and, as the plaintiff had deliberately signed a document in which he stated that he clearly understood that he was selling the car to the defendants, I ought not to find that the transaction was anything else but a sale. If that, however, is the true and only approach, it would mean that I could not look behind the documents to ascertain the true nature of the transaction. I must equally bear in mind, as LORD ESHER, M.R., pointed out H

([1891] 1 Q.B. 233) in *Madell v. Thomas & Co.* (4), that the object of the Bills of Sale Acts is:

" . . . to protect borrowers against lenders as well as to protect other persons who might be creditors of borrowers. The main object of the Act of 1882 is to protect borrowers as against lenders."

In *Madell's* case (4), too, both parties to the transaction were business men.

A When a person has bought a car, be he business man or not, and finds that his resources do not enable him to pay for it, or that, if he does pay, he will be left in an embarrassed position, he may fairly be described as a somewhat needy borrower.

It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents themselves

B accurately set out the deal between the parties as it took place and at the time when it took place, or whether the facts, or some of them, therein recorded do not truly represent that which happened, but give the transaction what I may call an innocent appearance. This transaction started with the proposal form. Now that proposal form, as filled in, would be completely appropriate to the class of transaction whereby the finance company buys from a dealer,

C while at the same time some of the purchase price is provided by the prospective buyer. It states that an initial cash payment of £495 has been made, but no such payment had ever been made. It shows a balance on the purchase price of £400. The £400 had, in fact, been found by the defendants and handed straight to the plaintiff, and was not a sum of money found by them to pay to the original owner of the car, in this case Graham Fine, Ltd. It was a sum

D of money paid to the plaintiff who desired to put his bank account into credit, so that the cheque he had given might not be dishonoured or his account put into overdraft. This class of case was considered by MACKINNON, J., in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (6), in which, having contrasted the two classes of case which I have mentioned, the learned judge came to the conclusion that the case before him fell on the side of the line illustrated

E by *Yorkshire Railway Wagon Co. v. Maclure* (1). When one examines with care the facts in *Staffs Motor Guarantee, Ltd. v. British Wagon Co., Ltd.* (6), it will be seen how materially they differ from those in the case now before me. In the former case one Heap, a dealer in motor cars, owned a six ton lorry. He approached the defendants in that case, who were a finance company carrying on the same sort of business as the present defendants, and asked them to

F enter into a transaction of the usual type, *i.e.*, he invited them to buy the lorry from him and let it out on hire-purchase to a third party. For some reason the defendants were unwilling to do the business in that way and eventually it was agreed that Heap should sell the lorry to the defendants and that they should let it to him on hire, giving him liberty to sub-let it to the third party on hire-purchase. The learned judge said ([1934] 2 K.B. 311):

G "It seems to me to be highly likely that the defendants adopted this course because they supposed that if they departed from their printed forms it might be necessary to employ a solicitor to prepare the proper guarantee, and that from a business point of view the more convenient way of carrying out that transaction would be to make use of their ordinary documents."

H That case seems to me wholly different from the present. It is quite clear that the real object in that case was to get the lorry into the hands of the third party, and there were the three parties who are usually found in these hire-purchase transactions. Heap was a dealer in cars, his customer was the third party, and the defendants were the financiers. If they, as was usual, had bought from Heap and re-let the lorry direct to the third party, no question could have arisen. That was the essence of the transaction which was carried

out in a different way by their entering into a hire-purchase agreement with Heap and giving him leave to sub-let to the third party. In the case now before me, in spite of the documents, there had been no initial payment of £495 by anyone. The transaction which the documents would accurately record would have been one in which the plaintiff had paid the sum of £495 either to the defendants or to Graham Fine, Ltd., and then the defendants had completed the purchase of the motor car by paying £400 for it. In my opinion, the true transaction here was nothing more or less than a loan of £400 by the defendants to the plaintiff on the security of the car and a provision for the payment of £50 as a bonus or interest, and, in my opinion, it is exactly the class of transaction at which the Bills of Sale Acts strike.

I should, perhaps, state my finding on one other matter of fact, although, in my opinion, whichever way it is found would make no difference to the result. The plaintiff said that, when he went to the defendants' office to carry out this transaction, he did not take the car with him. The defendants' managing director, on the other hand, said that the car was brought there and left in Whittington Avenue, and that he went out and sat in it before he agreed to buy it. He seemed to think that by so doing he was in some way taking actual possession of the car. I am not prepared to find, if this curious proceeding has any materiality, that it in fact took place. On cross-examination it seemed to me probable that the managing director was confusing this transaction with another which took place in August when another car formed the subject of a dealing between the parties. In any case, even if he did go out and sit in the car before the details of the transaction had been agreed between them, I cannot see how his action could have any bearing on the case.

Soon after the transaction, the plaintiff sold the car. He continued, however, to pay the instalments and paid altogether six. When he was one month in arrear the defendants found out that he had sold the car, and—apparently, for the purpose of punishing him for having done so—when the full amount of the balance then due to them was offered to them, they refused to accept it and endeavoured to get possession of the car. The conduct of the parties at that time does not throw any light on what the true nature of the transaction was when it was entered into, but, considering that the defendants had been repaid £150 in monthly instalments, if they were then entitled to take possession of the car although they were offered the balance of what they had provided, it seems to show that this is a case in which, as LORD ESHER, M.R., pointed out in *Madell v. Thomas & Co.* (4), the Bills of Sale Acts are required for the protection of a borrower. There will be judgment for the plaintiff for a declaration that the hire-purchase agreement, dated June 22, 1948, made between the parties is a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and, therefore, void under s. 8 of that Act as it was not registered, and for a declaration that at all material times the plaintiff was the owner of the said Austin motor car, and he will have the costs of the action. The second action, in which the present defendants are the plaintiffs and the present plaintiff is the defendant, is one in which the present defendants were claiming a return of the car and damages for its detention, and, as my judgment in the first case disposes of the second, that action will be dismissed with costs.

Judgment for the plaintiff with costs.

Solicitors: *Canter, Hellyar & Co.* (for the plaintiff); *Gouldens* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

PORTMAN BUILDING SOCIETY v. YOUNG.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Lord Radcliffe and Singleton, L.J.), December 19, 1950.]

Mortgage—Attornment clause—Creation of relationship of landlord and tenant—Application of Rent Restrictions Acts.

A mortgage of a dwelling-house provided: "The mortgagor hereby attorns tenant to the [mortgagee] of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s. 0d. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the [mortgagee] may at any time without giving previous notice in that behalf determine the tenancy created by such attornment." The monthly payments fell into arrear, and the mortgagee issued an originating summons for possession. The master took the point that the Rent Restrictions Acts applied to the relationship of the mortgagee and mortgagor.

HELD: on the issue of the originating summons the contractual relationship, whatever its character, created by the attornment clause, in so far as it partook of a tenancy, ceased, and when the matter came before the court there was no relationship of landlord and tenant between the mortgagee and mortgagor; the Rent Acts, in dealing with the rights of a tenant to remain in occupation of premises after the termination of the contractual relationship, referred only to cases in which the person in occupation was in the true sense a tenant of premises "let" to him by the person who was in ordinary language the landlord and owner of the premises; where the real relationship between the parties was that of mortgagor and mortgagee and the case did not fall within those parts of the Rent Acts which specifically related to mortgages the case could not be brought within the protection of the other part of the Acts by an attornment clause; and, therefore, the premises in the present case were not protected.

Decision of DANCKWERTS, J. ([1950] 2 All E.R. 443); reversed.

[AS TO RELATIONSHIP EFFECTED BY ATTORNMENT CLAUSE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 325, 326, para. 489; and FOR CASES, see DIGEST, Vol. 35, pp. 327-331, Nos. 712-737.]

Case referred to:

(1) *Ex p. Isherwood. Re Knight*, (1882), 22 Ch.D. 384; 52 L.J.Ch. 370; 48 L.T. 398; 35 Digest 328, 719.

APPEAL by the Portman Building Society from a decision of DANCKWERTS, J., on June 30, 1950, reported [1950] 2 All E.R. 443.

The Portman Building Society, as mortgagees, issued an originating summons under R.S.C., Ord. 55, r. 5A, claiming possession of the mortgaged premises from the mortgagor and costs. The master took the point that the Rent Restrictions Acts applied to protect the mortgagor, and DANCKWERTS, J., so held. DANCKWERTS, J., further held that in the circumstances, notwithstanding that he was able to order possession to be given to the building society, he had no power to award them costs.

Heathcote-Williams, K.C., and *L. A. Blundell* for the Portman Building Society.

The mortgagor did not appear.

SIR RAYMOND EVERSLED, M.R.: This action was started by originating summons dated Feb. 7, 1950, and issued under R.S.C., Ord. 55, r. 5A, whereby the plaintiff building society claimed as first mortgagees of certain property known as 122, Merewood Road, Crayford, Kent, (i) possession of that property, (ii) further and other relief, and (iii) costs. When the documents were examined it was found that at the relevant date, i.e., on

Feb. 7, 1950, the relationship between the society and the defendant was constituted by two deeds, one dated Apr. 17, 1948, and the other, a supplemental deed, dated Apr. 30, 1949. By the combined effect of those two deeds the society was legal chargee of the premises, the owner (and I am using that word without prejudice to anything I say hereafter) and mortgagor being the defendant. The amount due under the mortgage was repayable by monthly instalments which took account of the principal and interest. The monthly sum was £9 16s. 0d.

The difficulty was created by the last clause of the supplemental deed which provides:

"The mortgagor hereby attorns tenant to the society of such parts of the property as may at any time be in the occupation of the mortgagor at the monthly rent of £9 16s 0d. to be paid on the days hereinbefore appointed for payment of monthly instalments and such rent is to be applied in or towards satisfaction of such instalments. Provided always that the society may at any time without giving previous notice in that behalf determine the tenancy created by such attornment."

There was a further proviso that the tenancy should not render the society liable to account as mortgagees in possession. The point suggested was that, as the rent of £9 16s. 0d. was not less than two-thirds of the rateable value of the property and it is conceded that the property was within the economic ambit of the Rent Acts, it would follow that the tenancy which was referred to in this attornment clause was one protected by the Acts, with the result that, in seeking possession of the premises, the plaintiff society had to bring themselves within one or other of the provisions of the Acts which give to the court jurisdiction to make an order for possession. They succeeded in doing so because they were able to show that the rent, so-called, was in arrear, and that, therefore, the court was entitled to make an order under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sched. I, para. (a), and DANCKWERTS, J., made an order for possession. That order has in fact been implemented.

That, however, still left this further point. Since *ex hypothesi* the order sought and the order obtained was one under the Acts, the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17 (2), prevented the court, in answer to the third part of the prayer of the summons, making any order in the society's favour in respect of costs. The terms of the sub-section, so far as relevant, are:

"A county court shall have jurisdiction to deal with any claim . . . arising out of this Act . . . notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

In the present case the deprivation of the plaintiffs of their costs meant that they could not add them to the amount of their security, and the decision, and the basis on which the order went, *viz.*, that because of the attornment clause this case was covered by the Rent Acts, raised a point of real substance for the plaintiff society, because, if it were right, whenever there was such a clause at a rent which was not of a sufficient sum to exclude the operation of the Acts, then, if the society desired to obtain possession, they would have to bring their case, somehow or another, within one or other of the relevant provisions of the Act, and then persuade the court that it was reasonable in the circumstances to make the order. I confess that at first sight it seemed a strange case for the invocation of the Acts. It did not look as though it was the sort of case Parliament desired to protect in this way. Still, the mortgagees, for their own purposes, and to give themselves certain procedural advan-

tages, had thought fit to insert this attornment clause, and it might be said that they must take the rough with the smooth and must prove what was necessary to bring their case within the class in which an order for possession under the Acts can be made, though, being mortgagees, they would almost inevitably have to sue in the High Court where they would be deprived of costs.

The question whether or not an attornment clause in general does create what SIR GEORGE JESSEL, M.R., called a real tenancy between a real landlord and a real tenant is one which might be perceptible of a good deal of argument. In the days when *Ex p. Isherwood. Re Knight* (1) came before this court, a mortgage commonly took the form of a conveyance of the fee simple so that at law the mortgagee was the owner of the property and the mortgagor his tenant at will. The position in equity was superimposed, and, in fact, controlled the relationship, but, as I have said, in those days the mortgagee became the owner at law, and, that being so, it was, perhaps, somewhat easier to say that in reality a position of landlord and tenant was created by putting the attornment clause in the mortgage deed. Under modern conveyancing practice, the mortgagee does not become the legal owner. He becomes a chargee. He may become a lessee under a term of years, but he does not become the owner. The mortgagor remains at law, as well as in equity, the owner subject to the charge and otherwise to the provisions of the mortgage deed. I do not think it necessary to pursue that aspect of the case further, nor do I think it necessary (and, indeed, on this we have heard no argument) to decide whether, having regard to the terms of the attornment clause and the uncertainty which, it is said, surrounds the description of the parcels, it would be right to say that no tenancy in the true sense of the term ever came into existence.

In my judgment, there is another and shorter answer to the suggestion that the Rent Acts at the relevant date, *i.e.*, when the case came before the court, applied to the premises, a point suggested by LORD RADCLIFFE at an early stage of the argument. As I stated when reading the clause, the relationship, whatever it may be, created by the attornment clause, is, according to the clause itself, determinable at any time on the part of the society and without giving previous notice in that behalf. It would, therefore, appear that, if the society, before starting any proceedings, had determined the attornment clause or the tenancy alleged to be created by it, then, at any rate, as a matter of contract, it would have ceased altogether to exist. There is no evidence that the society in this case ever did so determine the tenancy before the date when they issued their originating summons, *viz.*, Feb. 7, 1950, but by the issue of that summons claiming possession, it seems to me plain that the contractual relationship, whatever its character, created by the attornment clause, in so far as it partook of a tenancy, ended, and had ceased to be when the matter came before the court. That having happened, what is there which enables the tenant to require the court to say that the premises were protected by the Acts so that in respect of them no order for possession could be made save under conditions specified in the Act?

I have come to the conclusion that the answer to the question is: Nothing. Where there has been a contractual tenancy within the scope of the Acts and when that tenancy has come to an end, the policy and operation of the Acts is to protect the occupant from eviction at the suit of the person who would be properly described as his landlord. That appears plainly enough from the language of s. 15 (1) of the Act of 1920, which, so far as is relevant, provides:

“A tenant who by virtue of the provisions of this Act retains possession of any dwelling-house to which this Act applies shall, so long as he retains possession, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of this Act . . .”

I think that that section, as well as s. 3 of the Act of 1933 and sched. I to that Act, makes it plain that the whole idea and scheme of the Acts, so far as they relate to protected dwellings and the right of the person in occupation to continue in occupation, is to deal with premises of which the person in possession is, in a true and sensible meaning of the word, a tenant of them from someone else who is in ordinary language the landlord and their owner. After all, for the Acts to apply at all to any premises for the purpose of protecting occupation, the premises must be "let" as a separate dwelling. If that be accepted as right, it appears immediately that the necessary foundation for the application of the Acts is absent here.

In the present case the true position is that the person in occupation is the owner and the person seeking possession is a chargee wishing to realise his charge. Once contractual situation created by the attornment clause is gone, it is impossible with any sense of the meaning of words to refer to their relationship as that of landlord and tenant. Consider what would happen if that were not right. Is the mortgagor, the owner of the house, in possession as tenant of his mortgagee for ever and a day at the rent of £9 16s. 0d. a month? Is he to continue so to be after the principal and interest have been paid off, and after, therefore, the mortgagee would cease to have any right or interest of any sort or kind in the property? Once the particular contractual relationship has finished, it results in an absurdity to suppose that this relation of landlord and tenant continues.

So far, I have been speaking as though the Rent Acts deal only with cases where the person in possession is being protected from eviction by a landlord, but that is an incomplete statement of their purpose, and a more detailed statement, I think, supports the view I have suggested. The Acts are also concerned to protect mortgagors as such. There are sections of the Acts which form a code dealing specifically, not with the position of landlords and tenants, as regards the right of the latter to occupation, but with the position of mortgagees and mortgagors as regards the rights of the former to enforce the terms of the mortgage. If a mortgage is within the Acts as such, then the Acts apply to it and the mortgagor can get the appropriate protection as such. I think it unnatural to suppose that cases where the real relationship is that of mortgagee and mortgagor, but which are not within the protection of the Acts relating to mortgages, should by a side wind be brought under the protection of the other part of the Acts which is not concerned with mortgages at all.

For these reasons I have come to the conclusion that when this originating summons was issued, the attornment clause and all the contractual rights, however they should be defined, which it operated to give to the parties, came to an end altogether, and that thenceforward there was no subsisting relationship of landlord and tenant or anything analagous to it which would as such bring into operation the Rent Acts so that the mortgagee, in pursuing his remedies as mortgagee had, in order to get possession, to bring the case within one or other of the provisions of those Acts entitling a landlord to possession. That being so, the bar which the learned judge thought prevented him giving costs in the ordinary way did not subsist. The learned judge could have awarded, and I think it is quite plain would have awarded, costs in the ordinary way to the mortgagees which they would be entitled to add to their security. I think the appeal ought to be allowed.

LORD RADCLIFFE: I agree.

SINGLETON, L.J.: I agree.

Appeal allowed; order varied by directing that the costs below be added to the security. No order as to costs of appeal.

Solicitors: *Hewlett & Co.* (for the building society).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. CITY OF LONDON, ETC., RENT TRIBUNAL.

Ex parte HONIG.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, J.J.),
December 8, 1950.]

Rent Control—Rent tribunal—Jurisdiction—Determination of collateral question on which jurisdiction depends—Existence of tenancy at time of reference—Review of decision—Certiorari—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 2 (1) (2).

At the hearing of a reference under s. 2 (1) of the *Furnished Houses (Rent Control) Act, 1946*, the landlord contended that the tribunal had no jurisdiction because a notice to quit given by him had expired before the date of the reference and so there was no contract of tenancy to refer to the tribunal. There being no documentary evidence as to the nature of the tenancy, the tribunal decided on the evidence of the parties that the notice to quit was invalid, that there was a subsisting tenancy between the parties, and that, therefore, the tribunal had jurisdiction to entertain the reference and to reduce the rent. On a motion by the landlord for *certiorari*,

HELD: (i) since it was on the collateral question whether or not a tenancy subsisted that the jurisdiction of the tribunal to determine a reasonable rent depended, the tribunal was entitled to decide that collateral question first before proceeding to the main matter under consideration.

(ii) it was open to a party who complained of that decision to ask the High Court to review the matter on an application for *certiorari*.

(iii) in the present case the landlord had not discharged the onus on him of satisfying the court that the tribunal had come to a wrong conclusion, and, therefore, *certiorari* would not issue.

[FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 2 (1) (2), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1086.]

E Cases referred to:

- (1) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; *sub nom.*, *R. v. Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332; 28 Digest 97, 580.
- (2) *R. v. Lincolnshire JJ., Ex p. Brett*, [1926] 2 K.B. 192; 95 L.J.K.B. 827; 135 L.T. 141; 90 J.P. 149; Digest Supp.
- (3) *R. v. Brighton and Area Rent Tribunal, Ex p. Marine Parade Estates (1936), Ltd.*, [1950] 1 All E.R. 946; [1950] 2 K.B. 410; 114 J.P. 242.
- (4) *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, Ex p. Ascot Lodge, Ltd.*, [1947] 2 All E.R. 12; [1947] K.B. 973; [1947] L.J.R. 1003; 176 L.T. 560; 111 J.P. 349; 2nd Digest Supp.
- (5) *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe*, [1950] 2 All E.R. 211; 114 J.P. 384.
- (6) *R. v. Barnet, etc., Rent Tribunal, Ex p. Millman*, [1950] 2 All E.R. 216; [1950] 2 K.B. 506; 114 J.P. 340.

MOTION by the landlord, Emanuel Honig, for an order of *certiorari* to remove and quash a determination of a rent tribunal, dated June 28, 1950, on a reference made to them under the *Furnished Houses (Rent Control) Act, 1946*, whereby they reduced the rent of two furnished rooms let by the landlord to one, Albert Shomade, from £1 7s. a week to 17s. 6d. a week.

At the hearing before the tribunal the landlord claimed that the tribunal had no jurisdiction under the Act because notice to quit the premises expiring on Monday, May 1, 1950, had been served on the tenant and the contract was at an end before the reference to the tribunal was made on June 1, 1950. No rent book had been issued in connection with the tenancy, and there was no contract

in writing, but the tribunal accepted the evidence of the tenant that the tenancy was a weekly one running from Saturday to Saturday, and held that the notice to quit was invalid. Alternatively, they held that, even if the notice was valid, the acceptance of rent by the landlord for periods after May 1, 1950, created a fresh contract, and, therefore, the tribunal had jurisdiction to entertain the reference. The landlord now contended that the tribunal had no power under the Act of 1946 to inquire whether or not the tenancy had been lawfully determined.

S. W. Magnus for the landlord.

J. P. Ashworth for the tribunal.

LORD GODDARD, C.J.: This case raises a question of some importance, *viz.*: Where a tenant refers a purported contract of tenancy to the rent tribunal under the Furnished Houses (Rent Control) Act, 1946, or now to the tribunal established under the Landlord and Tenant (Rent Control) Act, 1949, and the landlord maintains that the tenancy has been determined, can the tribunal inquire into the question whether the tenancy has been lawfully determined, to enable them to decide whether or not they have jurisdiction to hear the application? I do not think that it could be contended that if, before the contract was referred, the tenancy had been lawfully determined, at any rate under the Act of 1946, the tribunal would have any jurisdiction. In the present case the landlord purported to give a notice to quit on a particular day. After that date, but while the tenant was still in occupation he referred the matter to the tribunal. The tenant might have been holding over merely as a trespasser, or he might have been holding over by agreement or under the terms of his tenancy. That question had never been determined.

When the matter came before the tribunal the landlord took the objection that there was no contract of tenancy in existence at the time when the matter was referred because he had given a valid notice to quit. On the other hand, the tenant contended that the notice to quit was invalid. The question between the parties was whether the tenancy was one from Saturday to Saturday or one from Monday to Monday. The landlord maintained that the tenancy ran from Monday to Monday, and he had given the notice to quit on that basis. The tribunal inquired into the matter and came to the conclusion that the tenancy was one from Saturday to Saturday, that there had been no valid notice to quit, that there was still a subsisting tenancy between the parties, and, therefore, that they had jurisdiction to decide what was a fair rent for the premises.

The landlord now moves for an order of *certiorari* on the ground that the tribunal had no jurisdiction to inquire whether the notice to quit was good or bad. In my opinion, they clearly had such jurisdiction because it is only if there was a tenancy in existence at the time of reference that they would have jurisdiction to act. Section 2 (1) of the Furnished Houses (Rent Control) Act, 1946, provides:

"Where a contract has . . . been entered into whereby one person . . . grants to another person . . . the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . ."

Then the tribunal is to fix what they consider to be a reasonable rent in respect of the tenancy. By s. 5, if the tribunal give a decision, the Act gives the tenant three months' security of tenure from the date of that decision unless the tribunal fixes a shorter period.

Unless the tribunal could first decide on the question of the existence of a tenancy they could only proceed in a case where both parties agreed that a contract was in existence and it would always be open to the landlord to dispute the existence of the tenancy. That would result in an action in the county court,

and if the county court judge decided one way, the tenant would be able to go on with his reference, but if he decided the other way he would not. I cannot think that it was intended that that should take place in regard to proceedings under this Act. The principles on which such tribunals as these can act seems to me to be well established by decided cases. First, one has to consider whether the tribunal must, to enable itself to obtain jurisdiction, find that a certain state of affairs collateral to the main question exists. The question whether or not there is a contract seems to me clearly to be collateral to the main question which the tribunal has to decide, *viz.*, what is a reasonable rent under the contract of tenancy?

In *R. v. Income Tax Special Purposes Comrs.* (1), which is the leading case usually cited on this question, LORD ESHER, M.R., stated the law in this way (21 Q.B.D. 319):

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction."

Then he points out that the legislature may give power to the court to come to a final decision on that matter, and that if the statute does not give a right of appeal the matter cannot be questioned in any other court. In my opinion, the present case is clearly one where, if a certain state of facts exists, *i.e.*, if there is a tenancy of the class contemplated by the Act, the tribunal has jurisdiction to proceed to do what they are entitled to do, *viz.*, to fix the rent, but their decision is not conclusive and can be reviewed in this court, as can the collateral matter which the tribunal has decided, *viz.*, the existence of a tenancy.

Counsel for the tribunal called our attention to *R. v. Lincolnshire JJ., Ex p. Brett* (2), and, more particularly, to the judgment of ATKIN, L.J., in which he quoted with approval ([1926] 2 K.B. 202) the statement of the law set out in HALSBURY'S LAWS OF ENGLAND, vol. 10, p. 193, para. 375, as follows:

"The case is more difficult where the jurisdiction of the court below depends, not upon some preliminary proceeding, but upon the existence of some particular fact. If the fact be collateral to the actual matter which the lower court has to try, that court cannot, by a wrong decision with regard to it, give itself jurisdiction which it would not otherwise possess. The lower court must, indeed, decide as to the collateral fact, in the first instance; but the superior court may upon *certiorari* inquire into the correctness of the decision . . ."

That is what we have to do. I am of opinion that the tribunal had power to inquire into the collateral fact, namely, whether there was a contract, because it was only if there was a contract that they could exercise the jurisdiction which the Act of Parliament has given them. Having decided that, it is open to the person who complains of that decision to ask this court to inquire into it by means of *certiorari*. In some cases, this court has been able to inquire into the matter by means of documents and other information put before it and has come to a conclusion that the tribunal decided erroneously. In the present case the decision of the tribunal depended entirely on oral evidence. They heard both parties and came to a decision on the question of fact, and there is nothing before us now which can satisfy us that the tribunal came to a wrong conclusion. Some day Parliament may consider it desirable that there should be some form of appeal. On the other hand, I can understand the view that, perhaps, has

been taken—that there should not be any appeal in these matters because it was thought when this legislation was passed that the tribunals would be for the benefit of poor people. We now know from *R. v. Brighton and Area Rent Tribunal, Ex p. Marine Parade Estates* (1936), *Ltd.* (3) that professional men and men in receipt of good incomes and landlords who have embarked thousands of pounds in property are apt to be brought before the tribunals. There is nothing here in the case before us to show that the tribunal came to a wrong decision in fact. Therefore, *certiorari* cannot issue and the application must be refused. A

HILBERY, J.: I am of the same opinion for the same reasons.

PARKER, J.: I agree and I would only add that in more than one case this court has already held that furnished houses rent tribunals are rather of the first type referred to by LORD ESHER, M.R., in *R. v. Income Tax Special Purposes Comrs.* (1). I need only refer to *R. v. Hampstead and St. Pancras Furnished Houses Rent Tribunal, Ex p. Ascot Lodge, Ltd.* (4), and the two more recent cases concerning premiums, *viz.*, *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe* (5) and *R. v. Barnet, etc., Rent Tribunal, Ex p. Millman* (6). As the result, it must not merely appear to these tribunals that the condition precedent to their jurisdiction exists, but it must, in fact, exist. In the two recent cases to which I have referred the jurisdiction of the tribunal depended on whether there was a premium within the Landlord and Tenant (Rent Control) Act, 1949, and this court decided that it must not merely appear to the tribunal that a premium existed, but, in fact, a premium must exist before their jurisdiction arose. It seems to me that the present case is very similar to those cases. It must not merely appear that a contract exists on which they could exercise their jurisdiction, but it must, in fact, exist. The onus is on an applicant to this court to show that the decision of the tribunal was erroneous. Where that depends almost entirely on oral testimony, the onus is particularly high, and in the present case the landlord has not satisfied me that the decision was erroneous. C D

Application dismissed with costs.

Solicitors: *J. Dalton* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal). E

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. BIRMINGHAM (WEST) RENT TRIBUNAL. *Ex parte* EDGBASTON INVESTMENT TRUST, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 12, 1950.] G

Rent Control—Premium—Payment by tenants to builders for conversion of dwelling-houses into flats—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (1), s. 18 (2), sched. I, Part I, para. 1.

By an agreement, dated July 31, 1948, between the landlords, eighteen prospective tenants, and a firm of builders, it was agreed that the builders should convert six dwelling-houses into eighteen flats for the sum of £18,000, of which £9,000 was to be paid by the landlords and £500 each by the prospective tenants, and that on completion of the work the landlords would grant to the tenants leases for fourteen years of the flats at rents varying between £100 and £175 a year. On June 22, 1950, on an application by three of the tenants the rent tribunal decided that each of the sums of H

£500 paid by them to the builders was a "premium" required by the landlords "as a condition of the grant of a tenancy" within the meaning of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), certified that Part I of sched. I, to the Act applied, and determined the rental equivalent in each case at £8 18s. 6d. a quarter. On an application by the landlords for an order of *certiorari* to bring up and quash the certificate and determination of the rent tribunal,

HELD: (i) to constitute the payment of a premium within the Act of 1949 there must be a payment to the landlord and not to a third person; in the present case there had been no payment to the landlords; and, therefore, no premium had been required as a condition of the grant of a tenancy within s. 2 (1), and the certificate and determination of the rent tribunal must be quashed.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 1 (5), s. 2 (1), (5), s. 18 (2), and sched. I, Part I, para. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 13, pp. 1095, 1097, 1110.]

Cases referred to:

- (1) *King v. Cadogan (Earl)*, [1915] 1 K.B. 821; 84 L.J.K.B. 779; *affd.* [1915] 3 K.B. 485; 84 L.J.K.B. 2069; 113 L.T. 895.
- (2) *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe*, [1950] 2 All E.R. 211; 114 J.P. 384.
- (3) *R. v. Barnet, etc., Rent Tribunal, Ex p. Millman*, [1950] 2 All E.R. 216; [1950] 2 K.B. 506; 114 J.P. 390.

MOTION by the landlords, Edgbaston Investment Trust, Ltd., for an order of *certiorari* to bring up and quash a certificate and determination of the Birmingham (West) Rent Tribunal, dated June 22, 1950.

In 1947 the landlords purchased six dwelling-houses which had suffered war damage. By an agreement, dated July 31, 1948, between the landlords, eighteen prospective tenants, and a firm of builders, the builders undertook to convert the dwelling-houses into eighteen flats, *i.e.*, three flats to a house, for the sum of £18,000, of which £9,000 was to be paid by the landlords and the balance of £9,000 by the tenants, each of whom was to pay £500. It was further agreed that on completion of the work the landlords would grant to each of the tenants a lease of one of the flats for a term of fourteen years at an agreed rent. The conversion was carried out and each of the tenants paid £500 to the builders. In May, 1950, three of the tenants applied to the rent tribunal, alleging that each of the sums of £500 which they had paid was a premium required by the landlords as a condition of the grant of the tenancy of each flat within the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1) and sched. I, Part I, para. 1. The tribunal accepted this contention, certified that Part I of the schedule applied, and determined the rental equivalent of the premium under Part I, para. 3 (1) (a), and Part III, para. 8, of the schedule. The facts appear in the judgment of LORD GODDARD, C.J.

Dare for the landlords.

R. J. Parker (J. P. Ashworth with him) for the tribunal.

LORD GODDARD, C.J.: Counsel for the landlords moves for an order of *certiorari* to bring up a decision of the Birmingham (West) Rent Tribunal under which they determined the rental equivalent of a premium at £8 18s. 6d. per quarter. The tribunal have also issued a certificate under para. 1 (b) of Part I of sched. I to the Act to certify that they are satisfied that since the premium was paid and before Mar. 25, 1949, the reversion had been conveyed or assigned for a consideration in money or money's worth. The point we have to determine is whether or not a certain sum of money, in circumstances to which I will refer, is a premium within the meaning of the Landlord and Tenant (Rent Control) Act, 1949.

Some old houses in Hagley Road, Birmingham, which had suffered war damage, were acquired by the present landlords, the Edgbaston Investment Trust, Ltd. The landlords then conceived the plan of converting these old houses into eighteen flats, three flats to a house, and on July 31, 1948, the following agreement was made

"... between Edgbaston Investment Trust, Ltd. ... (hereinafter called 'the landlords' ...) of the first part, Birmingham Builders, Ltd. ... (hereinafter called 'the builders' ...) of the second part and the persons whose names addresses and occupations or descriptions are set out in sched. I hereto (hereinafter called 'the tenants' ...) of the third part. Whereby it is agreed as follows: (1) The landlords and the tenants hereby agree with the builders that the builders shall forthwith proceed to convert the six dwelling-houses Nos. 287 289 291 293 295 and 297 Hagley Road Edgbaston in the city of Birmingham into a block of eighteen flats under the inspection and direction and to the satisfaction of the surveyor for the time being of the landlords for the sum of £18,000 which shall be paid as to £9,000 part thereof by the landlords and as to the balance of £9,000 by the tenants who shall each be responsible for payment of £500 only. (2) The builders hereby agree that in consideration of the said sum of £18,000 to be paid to them in manner aforesaid they will as soon as reasonably possible after the date hereof complete the conversion of the said six residences into eighteen flats fit for immediate occupation ... (3) If the said buildings and works shall be completely finished to the satisfaction of the said surveyor (to be evidenced by his certificate in writing to that effect) the landlords shall grant and each of the tenants shall accept and execute a counterpart of a good and sufficient lease of one of the said flats to each of the tenants with their appurtenances for the term of fourteen years from Sept. 29, 1948, at the yearly rent specified in sched. I hereto as applicable to the flat selected by the tenant such rent to be paid clear of all deductions ..."

When most of the flats had been constructed the three tenants with whom we are concerned took tenancies of three of the flats on the terms contained in the agreement I have just read. The tribunal has decided that the £500 which each tenant paid to the builders was a premium and caught by the Act of 1949, and, therefore, that they were entitled to find the rental equivalent of that premium and reduce the rent by the amount of that rental equivalent over a given number of years.

Section 1 (5) of the Act, which deals with cases where a premium is paid before the coming into force of this Act [*i.e.*, on June 2, 1949]—which is the case here—provides:

"In determining under this section what rent is reasonable for a dwelling-house, no regard shall be had to the fact that any premium has been paid in respect of the grant, continuance or renewal of a tenancy; but the provisions of Part I of sched. I to this Act shall have effect in relation to such premiums paid before the commencement of this Act."

Part I of sched. I provides:

"1. Where on an application under s. 1 of this Act made within twelve months from the date of the commencement of this Act it appears to the tribunal that before the commencement of this Act any premium has been paid (whether lawfully required or not) in respect of the grant, continuance or renewal of a tenancy of the dwelling-house to which the application relates, whether by the tenant or by a previous tenant of the dwelling-house, and has not been fully repaid or recovered, the tribunal shall, if the tenant so requires, certify that this Part of this schedule applies ..."

Thereupon the tribunal may make the certification to which I have referred. By s. 18 (2) it is provided:

"In this Act . . . the expression 'premium' includes any fine or other like sum and any other pecuniary consideration in addition to rent . . ."

Section 2 of the Act provides:

"(1) A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent . . . (5) Where, under an agreement made after Mar. 25, 1949, any premium has been paid which, or the whole of which, could not lawfully be required under the foregoing provisions of this section (or, if the premium was required before the commencement of this Act, which could not lawfully have been required if this Act had then been in force), the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be, shall be recoverable by the person by whom it was paid."

The person paying the premium is, therefore, given a right to recover the amount paid.

The whole question here depends on whether or not, on its true construction, this Act has any application to a case where the sum of money alleged to be a premium is paid, not to the landlord, but to some other person. As counsel for the tribunal has pointed out, the definition does not say that the expression "premium" includes a pecuniary consideration in addition to the rent paid to the landlord, but, in our opinion, this Act can only apply to premiums which are paid to the landlord. In the interpretation section "premium" is not defined, but it is stated that it includes "any . . . pecuniary consideration in addition to rent" which is paid as consideration for the grant of a lease. In *King v. Cadogan (Earl)* (1)—a case which was first before the Divisional Court, where BRAY, J., delivered a very useful judgment on the subject—LORD COZENS-HARDY, M.R., said in his judgment in the Court of Appeal ([1915] 3 K.B. 490) that: "'Premium' is a word of art." Although what the term includes is stated in s. 18 (2) of the Act of 1949, the whole conception of a premium is a sum of money paid to a landlord as consideration for the grant of a lease. Here, under the terms of the agreement, it is clear that Birmingham Builders, Ltd., were willing to convert these premises for £18,000 and only looked to the landlords for half that sum. It is abundantly clear from that agreement that Birmingham Builders, Ltd., could never have sued the landlords for anything more than £9,000. For the balance they had to look to the tenants, each of whom had agreed to pay them £500. Each tenant had to pay that money, not to the landlords, but to Birmingham Builders, Ltd. The landlords never had any claim against any tenant for the £500, although, I think, we may take it that the landlords would not have granted a lease to anybody who had not agreed to sign the agreement of July 31, 1948. Birmingham Builders, Ltd., could only recover the balance of the £9,000 from the various tenants up to £500 each. When the tenant paid that money, he paid it before the Act came into force. Supposing this had been a case after the Act came into force, from whom could the tenant have recovered the money. He could not have recovered it from Birmingham Builders, Ltd., because the consideration which supported the premium was, not the grant of the lease, but the work which the builders did in converting the premises, and he could not recover it from the landlords because the landlords had not received it.

I think we are bound to construe the word "premium" in this Act as meaning a payment to a landlord and not a payment to a third person, although that third person may be a party to an enterprise to which both the landlord and also the tenant are parties. If we did not construe the Act in that way, extraordinary difficulties would arise, because, as I have already said, the construction we give to the word "premium" under sched. I must equally apply to premiums under s. 2, where the right of action is given to recover a premium.

For these reasons it seems to me that this sum of money was not a premium.

To my mind the case is not on all fours with *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Philippe* (2). There a tenant was taking a lease of premises and one of the terms of the lease was that he should do certain work on the premises. Instead of his doing the work himself, it was agreed between him and the landlord that the landlord would do the work. Under that agreement the landlord was in the position of an independent contractor. It was as if the tenant had employed a third person to do the work, and, therefore, it was held that the Act did not apply. Those are not the same facts as we have here. Here the money was actually being paid to a contractor. Again, in *R. v. Barnet, etc., Rent Tribunal, Ex p. Millman* (3), in the judgment of the court delivered by PARKER, J., it was pointed out ([1950] 2 All E.R. 219):

"Read in their widest sense the words 'in respect of' would cover the payment of money for whatever purpose so long as it could be said that no tenancy would have been granted but for the payment. Thus, the words would cover the purchase price of the stock taken over or the reimbursement to the landlord of the proportion of any outgoings such as rates, insurance and the like, paid in respect of the period covered by the tenancy. No doubt, it may not be easy in some cases to say whether a payment comes within these words, but where, as here, a payment is made for the genuine purchase of the goodwill of a business and against the seller entering into a restrictive covenant not to carry on a similar business, we do not think that it can be said to have been paid 'in respect of' the grant."

I only refer to that case, which was very different on the facts to show that although it may be that the tenant would never have got the premises if he had not agreed to buy the goodwill of the business which was attached thereto, the court would not regard the money that was paid for that goodwill as money paid in respect of the grant of the tenancy. Here I prefer to base my judgment on the ground that on the true construction of this Act it is clear that it was intended to apply to a pecuniary consideration paid to the landlord. If the landlords here had entered into an agreement under which they had made themselves liable to the builders for the full amount and then insisted that the tenant, as a condition of the grant of the lease, should discharge a part of that liability, the tenant would obviously be paying a sum on behalf of the landlords, which would be the same as if he paid the landlords, but when one examines this agreement one sees clearly that its scheme is that the landlords are liable for no more than £9,000 and that the rest of the money due to the builders has to be found by the tenants. Therefore, in my opinion, there has been no payment of a premium in respect of the grant of a tenancy within the Act, and I think *certiorari* must issue.

HILBERY, J.: I agree. I find further support for the view my Lord has expressed in the language of the Act itself, when one remembers what in law that language has come to mean. The word "premium" is, as my Lord has pointed out, a word of art, and in *King v. Cadogan (Earl)* (1), WARRINGTON, L.J., said ([1915] 3 K.B. 492):

"Now the legislature in expressing its intention has chosen to use two words—'rent' and 'premium'—both of which in connection with leases have perfectly well known legal meanings. I need not say anything about the meaning of the word rent, but 'premium,' as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained."

When one bears in mind the evil at which the Act of 1949 and the earlier Acts relating to this subject-matter were aimed, it is clear that "premium" was

intended to bear that meaning in the Act of 1949. In a number of cases houses had standard rents which had been fixed under the Rent Restrictions Acts and could not be increased notwithstanding all the increases in the cost of labour and materials to which the landlord might be put in keeping the premises in repair and notwithstanding that rents everywhere had increased and the rent of any house would be much greater than the standard rent if it were not controlled. To meet that situation landlords demanded premiums for lettings at the standard rent to recoup themselves the difference between the standard rent and the market rent. That evil related to a premium payable to the landlord, a premium in the true legal sense of the word. In addition, s. 18 (1) of the Act provides, not a true definition of "premium," but a statement that it shall include certain things. There is, in my view, additional ground in support of the interpretation which we are putting on the Act today in the fact that in that so-called definition it is said that

"... the expression 'premium' includes any fine or other like sum and any other pecuniary consideration in addition to rent."

An addition to rent would normally be something payable to a landlord.

PARKER, J.: I agree.

Order of certiorari granted. No order as to costs.

Solicitors: *Church, Rendell*, agents for *Westwood, Morris & Co.*, Birmingham (for the landlords); *Solicitor, Ministry of Health* (for the tribunal).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

R. v. COHEN.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.), December 5, 18, 1950.]

Customs—Harbouring uncustomed goods—Ingredients of offence—Knowledge that goods uncustomed—Intent to defraud—Prima facie case—Goods found on premises of accused—Onus on accused to prove that goods customed or that he did not know duty had not been paid—Customs Consolidation Act, 1876 (c. 36), s. 186, s. 259—Criminal Evidence Act, 1898 (c. 36), s. 1 (f).

The appellant was charged on indictment with knowingly harbouring certain uncustomed goods and was found Guilty of harbouring 352 watches. He carried on the business of a jeweller and when questioned by Customs officers about his purchases of watches gave the names of two firms from whom he had bought goods. He produced thirty watches and said there were no others on his premises, but, on making a search at his invitation, the officers found 439. The grounds of appeal were that the deputy chairman misdirected the jury as to the onus of proof; that he should not have questioned the appellant in regard to certain invoices relating to watches not the subject of the charge; and that he should not have asked the appellant if he was an undischarged bankrupt.

HELD: (i) the offence of knowingly harbouring goods subject to duty was committed when it was shown that the accused person had harboured the goods and had known when he did so that they were uncustomed.

(ii) once it was proved that the goods were in his possession a *prima facie* case was established that he had knowingly harboured them and s. 259 of the Customs Consolidation Act, 1876, shifted the burden of proof and placed on him the onus of giving an explanation from which the jury could infer that

the goods were in fact customed, or that, having acquired them in the ordinary way of business, he did not know that duty had not been paid. In considering what amount of evidence was necessary to shift that burden the court must have regard to the opportunities of knowledge of the facts to be proved possessed by the parties.

R. v. Kakelo ([1923] 2 K.B. 793), *applied*.

(iii) intent to defraud was also an ingredient of the offence and such intent must be inferred from the surrounding circumstances. In the present case, where the appellant not only had the goods in his possession in order to sell them, but also lied to the Customs officers when challenged, there was ample evidence of intent to defraud.

(iv) the questions put to the accused in regard to invoices for watches not the subject of the charge were not irrelevant as they were material to the issue whether he was an honest trader and as such admissible.

(v) the question whether the appellant was an undischarged bankrupt was put to test his evidence regarding purchases of goods and in the circumstances did not offend against the Criminal Evidence Act, 1898, s. 1 (f).

[FOR THE CUSTOMS CONSOLIDATION ACT, 1876, s. 186 and s. 259, see HALSBURY'S STATUTES, Vol. 16, p. 339 and p. 359, respectively.]

AS TO THE FACTS THAT MUST OR MAY BE PROVED IN A CRIMINAL PROSECUTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 183-189, paras. 267-271; and FOR CASES, see DIGEST, Vol. 14, pp. 368-376, Nos. 3892-3959 and Digest Supp. and 2nd Digest Supp.]

Cases referred to:

- (1) *R. v. Kakelo*, [1923] 2 K.B. 793; 92 L.J.K.B. 997; 129 L.T. 477; 87 J.P. 184; Digest Supp.
- (2) *R. v. Fitzgerald*, (1948), unrep.
- (3) *R. v. Neal*, [1949] 2 All E.R. 438; [1949] 2 K.B. 590; 113 J.P. 468; 2nd Digest Supp.

APPEAL against conviction and sentence.

The appellant, Robert Abraham Cohen, was convicted at Middlesex Quarter Sessions of knowingly harbouring uncustomed goods with intent to defraud, contrary to s. 186 of the Customs Consolidation Act, 1876, and was sentenced to twelve months' imprisonment.

Marshall, K.C., and *M. Waters* for the appellant.

Widgery for the Crown.

Cur. adv. vult.

Dec. 18. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was charged on indictment before the deputy chairman of Middlesex Quarter Sessions with knowingly harbouring certain uncustomed goods, namely, 382 Swiss watches and other articles, with intent to defraud His Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876. The jury found him Guilty and found the number of watches harboured was 352. The appellant was sentenced to twelve months' imprisonment.

The facts, so far as it is necessary to state them, are that the appellant carried on a jewellery business at his house at Edgware and since early in 1948 had done a considerable business in buying and selling watches. On Feb. 19, 1949, two officers of the Customs visited his house and asked him where he acquired the watches which he was selling. The appellant gave the names of two firms—Abrahams, of Hatton Garden, and Peter Rees, of Maida Vale. He also showed the officers about thirty watches which, he said, he had for repair, and, being asked if he had any more on the premises, he replied: "No, you are welcome to look round." The officers searched the ground floor and found nothing.

On going upstairs they found seventy-six new Swiss watches in cardboard boxes in a bedroom, and the appellant's explanation was that these were all to be returned to Abrahams and that he had forgotten them when speaking to the officers downstairs. The officers then made a further search and found two gold Swiss watches in a drawer of a wardrobe which the appellant said he had bought a year previously at Marlow. It does not seem that much

A point was made about those two watches, but under a bed the officers found two canvas bags containing no fewer than 361 new Swiss watches and five gold wrist bands of American manufacture, which, again, the appellant said he had forgotten. When giving evidence at the trial the appellant sought to excuse the untruths he had told by saying that he was frightened because he thought the Customs officers were men who had come to do a hold-up and steal his property. That this explanation was palpably untrue is shown by the

B fact that not only did the officers produce various of the invoices which had led to their inquiries, but they produced their cards showing their authority, and the appellant invited them to look round when they asked him if he had any more watches.

This appeal is brought, first, on the ground of misdirection; secondly, on

C the ground of certain questions which were put by the deputy chairman to the appellant when he was giving evidence; and on certain other grounds to which we will refer in the course of the judgment.

The first ground of appeal is that the deputy chairman misdirected the jury on the onus of proof, or, at least, did not adequately direct them, and, indeed, it was this ground that largely influenced this court in giving leave to appeal.

D The matters raised are of considerable general importance in this class of case and we hope that our judgment may prove of assistance to courts of quarter sessions who nowadays not infrequently have to deal with indictments for offences under this section. First, let us consider the ingredients of the offence and what has to be proved by the prosecution in order to establish a *prima facie* case. Apart from an intent to defraud, with which we will deal separately,

E the offence consists in knowingly harbouring uncustomed goods, and, in our opinion, that means that the accused knowingly harboured goods and also knew that they were uncustomed. To prove a conscious harbouring it would usually be enough to show that goods which were subject to duty were found in the possession of the accused. If they are found in his house, warehouse or other place under his control, that would establish a *prima facie* case that he

F knowingly harboured them, though, no doubt, he could rebut this by proving that he did not know of their presence, for instance, by showing that someone had "dumped" them there without his knowledge or privity. Once it is proved that he knowingly harboured goods subject to duty, s. 259 throws on him the onus of proving that the goods are, in fact, customed. To do this he would have to prove that the duties had actually been paid, or, at least, that

G they had been declared and that the customs officers, in the exercise of a discretion which, as is well known, they are allowed, had permitted the goods to enter. The latter case would probably seldom arise and could only occur in the case of a small amount of spirits, tobacco, jewellery or the like, and we need not deal further with this.

In a case such as the present, unless the accused is or knows the actual

H importer, so that a receipt for the payment of duties can be produced or first-hand evidence of payment given, it would probably always be difficult, and often impossible, for him to prove actual payment. Though the powers of Customs officers are always used with discretion, it is in law possible for them to require anyone, be he trader or not, who has dutiable goods in his possession to show that duty had been paid. If the person challenged cannot prove payment, it does not follow that he must be taken to have committed the offence of what for convenience we will call unlawful harbouring. He will not be guilty unless

he knew that duty had not been paid. The prosecution having proved that the accused was in possession of dutiable goods in such circumstances as would entitle a court to find that he was consciously in possession of them and the accused having failed to prove that the duty had in fact been paid, there is then, in the opinion of the court, an onus on him to give some explanation of his possession from which a jury might infer that he did not know that duty had not been paid. It must be for him to give this explanation because the facts relating thereto must be exclusively within his knowledge. There is, in fact, a shifting of the burden of proof, and in considering the amount of evidence necessary to shift the burden of proof the court has regard to the opportunities of knowledge with respect to the facts to be proved which may be possessed by the parties respectively: see STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 12th ed., art. 104. That this applies to criminal cases no less than civil is shown by *R. v. Kakelo* (1). A

A simple way of proving lack of knowledge is to prove that the goods were bought in the ordinary course of trade. If a man buys a box of cigars in a shop at the ordinary price, why should it be supposed that he knew they had been smuggled, if, in fact, they had been? In the course of his summing-up the deputy chairman quoted a passage from a recent judgment of this court in *R. v. Fitzgerald* (2), in which I said: B

"If a man buys something from a trader in the ordinary way (it does not matter whether it is wholesale or retail), you would presume that he has bought it honestly and that the duty on it has been paid." C

It would, perhaps, have been more accurate if I had said: "that he had no knowledge or reason to believe that the duty had not been paid." Having arrived thus far, it appears to the court that counsel for the Crown was right in his submission that these cases are closely analogous to those of receiving stolen goods when the evidence relied on for the prosecution is merely possession of goods recently stolen. That has always been held to be *prima facie* evidence of guilty knowledge, or, in other words, to raise a presumption of guilt, so that if no explanation is given by the receiver the jury are entitled, though not compelled, to convict. On the other hand, if the explanation given either satisfies the jury or raises a doubt in their minds as to guilty knowledge, the defendant is entitled to an acquittal. A case is never proved if the sum of the evidence leaves the jury in doubt. So, in the present class of case, once it is proved that the accused was knowingly in possession of dutiable goods which he has not proved had paid duty, if he gives no explanation, he may be convicted of harbouring. If he does give an explanation, the jury should be told that if it either satisfies them that he did not know the goods were uncustomed or leaves them in doubt whether he knew, he should be acquitted. D

Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. That there may be cases where the circumstances would negative the intent is possible, but, ordinarily speaking, it is, indeed, difficult to see how it could be found he did not intend to defraud the revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling, but told lies to the officers when challenged on the matter. E

Having thus dealt with the onus on the prosecution and defence respectively, we must see how the deputy chairman charged the jury. In the early part of F

the summing-up, after dealing with what the Customs must prove to establish a *prima facie* case, he said:

“You have to inquire whether the defendant was knowingly harbouring uncustomed goods with intent to defraud, or has satisfied you that these goods have paid the duties.”

A That says nothing about the appellant's knowledge, but it has to be remembered that at the outset of the case, and in the absence of the jury, it had been agreed that, if the appellant satisfied the jury that he had bought the goods in the ordinary way of business from Abrahams and Rees, the prosecution would accept that as proof that the duty had been paid. That did not mean that if some, maybe a few, were shown to have been bought from these traders, that would cover every watch, but it would cover those about which the jury B were satisfied had been so bought, and, when returning their verdict, the jury gave the number of watches about which they were not satisfied. It might, perhaps, have been better and more accurate had the agreement been that the prosecution would accept proof of purchase as proof that the appellant did not know that duty had not been paid, but clearly the case was tried C throughout on the footing that proof of purchase in the ordinary way of trade should be equivalent to proving that duty had been paid and should be accepted as discharging the onus that s. 259 put on the appellant. Accordingly, knowledge as a separate issue became irrelevant, because the agreement was that, if he proved that the goods were bought in the ordinary course of business, he was entitled to an acquittal. This also explains the reference by the deputy chairman to the passage from the judgment of this court to which I have D already referred. Later, the deputy chairman said:

“The defendant's case is that he is an honest trader and he bought these things in the honest way in the course of business. If you accept that he is an honest trader and if you accept that he bought all these things from Abrahams and Rees, you will acquit him. If your minds are in doubt E (it being for him to establish that they have come to him honestly) whether he has established that they have come to him honestly—and you think he has not quite established it—then his good character stands by him—and if you have a reasonable doubt about it, a business doubt, as you would have about your own transactions, then again you will acquit him, but if he has failed to satisfy you, you will convict him.”

F That, we think, was, and was intended to be, a direction on the lines now given in cases where there is an onus on an accused, that the same high standard of proof is not required from him as from the prosecution, and the deputy chairman concluded by saying:

“If he has satisfied you, acquit: if your minds are in reasonable doubt, acquit: if he does not satisfy you, convict.”

J We do not think any reasonable jury could be in any doubt as to how to regard the onus. That there was an onus on the appellant is clear, and the jury were told that if they were in doubt as to whether he had discharged it they should acquit. It may be that was really putting it too favourably to the appellant. It certainly was not putting it too strongly against him. In the result, having I regard to the course taken at the trial with the assent of both counsel, we cannot hold that there has been any misdirection on this matter.

The next matter urged in support of the appeal has given the court some trouble. There were in the hands of the prosecution certain invoices for watches supplied by the appellant to one Hutchins of Penzance which were not the subject of the charge. A discussion took place at the opening of the trial, the result of which was that counsel for the prosecution agreed not to refer to the invoices in opening, but he clearly reserved his right to refer to them or to call

evidence about them by way of rebuttal should they become relevant on account of the defence which might be developed. The deputy chairman said that, if necessary, the matter could be discussed again. Counsel for the prosecution, in the exercise of his discretion, and we are far from saying that he did not exercise it wisely, did not refer in any way to those invoices in his cross-examination of the appellant. The deputy chairman, however, took up this matter after the appellant's evidence had been given. He had him re-called and put a good many questions to him about the invoices, obviously with the view to testing his evidence that he was an honest trader. There were 191 watches sold to Hutchins in a comparatively short time, though over a year before the seizure of the watches the subject of the charge. We cannot say that the examination was irrelevant as it was material to the question whether the appellant was an honest trader. In his reference to this matter in his summing-up, it is true that the deputy chairman did not point out that those watches might have come from stock or that the appellant might have a difficulty in remembering where he got them, especially as he was giving evidence some two years after the sale. The deputy chairman, however, did remind the jury that though the appellant might not have satisfied them that he got the watches from Abrahams or Rees, they were to consider his evidence that they might have come from elsewhere, and that, if they were left in some doubt as to his explanation, they should acquit.

We think that on this part of the case the jury must have understood the direction to be: "If you think his explanation possible, though you have some doubt about it, you should acquit." This court thinks it would have been better, at that late stage of the evidence, had the deputy chairman not put this cross-examination to the appellant, but, as we have said, it was not irrelevant. It was also said that the appellant was improperly cross-examined by the deputy chairman as to character, because he was asked if he was not an undischarged bankrupt. The deputy chairman, it would seem, asked that question because the appellant had said that he bought a stock of watches and a shop from a man named Scatterfield, again for the purpose, apparently, of accounting for his possession of some at least of the watches sold to Hutchins. Certainly it was a somewhat odd transaction and the appellant gave the vaguest possible account of it. The deputy chairman put this question and reminded the jury that he did so not so much on a question of character as to test his evidence as to the truth of this alleged purchase. We cannot hold, in these circumstances, that the question offended against the Criminal Evidence Act, 1898, s. 1 (f), and, moreover, as the deputy chairman said, the appellant had put his character in issue.

We allowed counsel for the appellant to deal with a matter that had not been raised by the notice of appeal, which was that the deputy chairman handed to the jury the notebook which the Customs officer had used to refresh his memory, but which had not been put in by either side as evidence. This was done without objection during the summing-up and was evidently thought of so little importance that it was not included in the notice of appeal. We could not allow a matter of that sort, certainly if it stood alone, to influence the result of an appeal. This court has said more than once that, if a slip is made in the course of a case that can be remedied, an accused person cannot lie by and take no objection and then use it as a ground of appeal. On this point we would call attention to what was said in *R. v. Neal* (3). There the irregularity was of so novel a character that we did not think counsel could fairly have been expected to deal with it when it emerged suddenly just before the jury returned their verdict. Here, obviously, the matter was not thought to be of any importance, and, as the prosecution had no notice that this point would be raised on appeal, they were unable to produce the book for our inspection when the appeal was heard.

Finally, counsel for the appellant submitted that the sum of the matters with which we have dealt, whatever the effect of any one of them standing alone might have been, rendered the trial so unsatisfactory as to merit the conviction being quashed. In the opinion of the court, there has been nothing here that can possibly have resulted in a miscarriage of justice. A misdirection on law has always been treated as a ground for quashing, but for the reasons given when dealing with the direction on the onus of proof, we are of opinion that, having regard to the course of the trial, there was no misdirection. In spite of the other matters which it would have been better to have omitted, the case for the Crown was really overwhelming. The circumstances under which the watches were found, the untruths told by the appellant, the explanation of why he told them (which could deceive no one), all point to this being a case in which it would have been impossible for a reasonable jury to have returned any other verdict than the one they did, and this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Arnold Lee & Co.* (for the appellant); *Solicitor of Customs and Excise* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

COURT AND ANOTHER v. ROBINSON AND ANOTHER.

[COURT OF APPEAL (Asquith and Denning, L.JJ., and Harman, J.), December 18, 19, 1950.]

Rent Restriction—Standard rent—Premises originally let for business purposes—Change of user—Knowledge of landlord's rent collector—Implication of landlord's consent—Later letting at higher rent—Determination of standard rent under Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 6—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (a).

On Sept. 1, 1939, premises were let under a lease containing covenants by the tenants to use the premises only for the purposes of a working men's social club. There was evidence that at various times one of the tenants under that letting had lived on the premises to the knowledge of the rent collector of the landlords, but there was no evidence that the landlords had ever assented affirmatively to a change of user. By a lease, dated Nov. 5, 1947, the premises were let to a tenant for use as a shop and dwelling-house at a rent substantially in excess of that under the lease current on Sept. 1, 1939. With regard to the standard rent of the premises,

HELD: (i) the letting of the premises for use as a working men's social club was a letting for business purposes and not a letting as a dwelling-house; the user prescribed in the lease and not the actual user was the essential factor to be considered: *Wolfe v. Hogan*, [1949] 1 All E.R. 570; the premises could not be regarded as let as a dwelling-house because of the residence on the premises of one of the tenants unless there was a new contract or a variation of the existing contract so as to permit the changed user; knowledge of changed user by the rent collector was insufficient to imply the landlords' consent to a variation of the terms of the lease; and, therefore, the standard rent was the rent under the lease of 1947.

(ii) the court could not determine the standard rent under s. 6 of the Act of 1933, unless (a) the premises had been let as a dwelling-house to

which the Rent Restrictions Acts applied, and (b) it was impracticable to discover at what rent they were so let.

[AS TO BUSINESS PREMISES UNDER THE RENT RESTRICTIONS ACTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 315, 316, para. 371, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 558, 559, Nos. 7054-7067.]

Cases referred to:

- (1) *Wolfe v. Hogan*, [1949] 1 All E.R. 570; [1949] 2 K.B. 194; 2nd Digest Supp. A
- (2) *Whitty v. Scott-Russell*, [1950] 1 All E.R. 884; [1950] 2 K.B. 32.
- (3) *Gidden v. Mills*, [1925] 2 K.B. 713; 134 L.T. 31; 31 Digest 559, 7063.
- (4) *Barrett v. Hardy Brothers (Alnwick), Ltd.*, [1925] 2 K.B. 220; 94 L.J.K.B. 665; 133 L.T. 249; 31 Digest 561, 7090.
- (5) *Epsom Grand Stand Assocn., Ltd. v. Clarke*, [1919] W.N. 170; 31 Digest 581, 7296. B
- (6) *Kitchen's Trustee v. Madders and Madders*, [1949] 2 All E.R. 1079; 2nd Digest Supp.
- (7) *Vickery v. Martin*, [1944] 2 All E.R. 167; [1944] K.B. 679; 113 L.J.K.B. 552; 171 L.T. 89; 2nd Digest Supp.
- (8) *Stagg v. Brickett*, [1951] 1 All E.R. 152. C

APPEAL by the tenant from an order of His Honour JUDGE CLOTHIER, K.C., made at Lambeth County Court on Oct. 26, 1950, whereby he granted possession of a dwelling-house to which the Rent Restrictions Acts applied, on the ground of non-payment of rent. The county court judge further ordered the payment of arrears of rent and mesne profits.

By leases dated Dec. 31, 1935, Jan. 5, 1938, and Apr. 11, 1940, the premises were let at a rent of £65 a year. In each case the lease provided that the premises should be used as a working men's social club only. In 1940 the premises were damaged by enemy action, but on Nov. 5, 1947, they were let by the present landlords at a rent of £208 a year with no restriction as to user. The tenant contended that there was extrinsic evidence to show that between 1935 and 1939 it was the intention of the parties that the premises should be used as a dwelling-house, and, therefore, that the standard rent was the rent at which it was then let, *viz.*, £65 a year, in which case there would be no grounds for forfeiture, and not, as the landlords contended, £208 a year. The issue was referred to the registrar who fixed the standard rent at £208 and, on appeal, the county court judge confirmed that assessment. The facts appear in the judgment of ASQUITH, L.J. D

Fife and Gatehouse for the tenant.

Boreham for the landlords. E

ASQUITH, L.J. : This is an appeal by the tenant against a judgment of His Honour JUDGE CLOTHIER, K.C., on two separate, but related, issues which, although they are the subject of two different formal orders, are dealt with in a single judgment. The landlords at the material times were the owners of the freehold of a house called 86, Gypsy Hill, Upper Norwood, and they sued the two defendants for possession of those premises, the first defendant being the tenant, and the second defendant being a person in whose favour the tenant, in breach of covenant as it was said, had parted with possession of part of the premises. The landlords claimed that the lease was forfeited, and originally based their claim on the ground of breach of this covenant, namely, the parting with possession without written consent. They later discarded this ground, and relied on breach of the covenant to pay rent. They also claim arrears of rent and, as regards the period after the summons, mesne profits on the basis of the rent fixed by the tenant's current lease, namely, £208. F

The lease, to which I shall refer as lease No. 4, was dated Nov. 5, 1947. It became clear quite soon in the proceedings that the issue of possession, and, G

H

indeed, the issue with regard to arrears of rent, could not be satisfactorily resolved unless the standard rent of these premises, which were of a rateable value of between £40 and £50 a year, was first ascertained, for on those figures depended not only the amount, and, indeed, the existence, of the arrears, but also the claim for possession. If the standard rent, as the landlords said, was £208 a year and if the tenant was in breach of his covenant to pay rent, then a large figure of arrears was due. The tenant says, however, that the current lease did not determine the standard rent, but that that rent was determined by the lease on foot on Sept. 1, 1939, or, alternatively, by certain other leases current at certain other times, but all of them providing for a rent of about £1 a week. On this footing, if that lower figure were the standard rent, the sums paid by the tenant on the £208 rent basis were in excess of the standard rent and the balance was recoverable under the Rent Restrictions Acts, and these sums would more than set off any arrears due on the basis of a standard rent of £1 a week and would leave a substantial margin for which the tenant could counterclaim. On this footing, again, no rent would have been in arrear at any time, and the basis of the claim for forfeiture would have been swept away. The issue was referred to the learned registrar who decided it in substance in favour of the landlords, that is to say, he fixed the standard rent at the figure of £208 a year, and the judge on appeal confirmed that assessment and made an order for possession.

It is clear that a determination of what is the true standard rent will also decide whether the order for possession can stand. To do this the statutory provisions for the ascertainment of standard rent must be applied to the peculiar facts of this case. The main provision is s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3 (1) of, and sched. I to, the Rent and Mortgage Interest Restrictions Act, 1939, in its application to a 1939 controlled house, such as was this house. The subsection so amended reads as follows:

“The expression ‘standard rent’ means the rent at which the dwelling-house was let on Sept. 1*, 1939, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said Sept. 1, the rent at which it was first let.”

The material facts on which this provision falls to be applied in the present case are as follows. The premises are at least one hundred years old. They are described in the current lease as “shop and premises.” We know nothing about the premises up to the year 1904. From 1904 to 1935 we know that they were used as a beer-house. There is no evidence to show whether or not at this stage they were let. Later they were let under four consecutive leases. I have already referred to the fourth lease and it remains to say something about the first, second and third. Lease No. 1, dated Dec. 31, 1935, was a quarterly letting by the Express Dairy Co., who were then the freeholders, to two persons called McCarthy and Jones. The rent was £65 per annum. The lease provided (as did also lease No. 2 and lease No. 3) that the lessees should use the premises for the purposes of a working men’s social club only. Leases No. 1 and No. 2 also contained a negative covenant in respect of the same subject-matter. The lessees covenanted that they would not “use or permit to be used the said premises otherwise than for the purposes before described.” Lease No. 2 was, except as to a part of it, identical with lease No. 1. It was dated Jan. 5, 1938, and was from the Express Dairy Co., as lessors, to McCarthy and one Plummer. The rent was again £65 a year payable quarterly from Dec. 1, 1937. The same double provision appeared in lease No. 2 as to the sole use of the premises for the purposes described as had appeared in lease

* This date results from the combined effect of sched. I to the Act of 1939 and the Defence (Commencement of Enactments) Order, 1939, (S.R. & O., 1939, No. 1135).

No. 1. Lease No. 3 was dated Apr. 11, 1940. The parties were the Express Dairy Co. as lessors and Walter Trappitt and Charles King as lessees. The undertaking to use the premises for the purpose of a working men's club only re-appeared in lease No. 3, but the negative counterpart drops out. In 1940 the premises were badly damaged by enemy action and remained for a considerable time unoccupied. On Nov. 5, 1947, came lease No. 4, to which I have already alluded, by Herbert Court and Geoffrey Herbert Court, the landlords in the present action, to Robinson, the first defendant. This lease, unlike the other three, contains no stipulation at all restricting the user of the premises for the purposes of a working men's social club and the rent fixed is £208 a year.

Applying s. 12 (1) (a) to these facts, the tenant by his counsel says that on Sept. 1, 1939, the premises were let as a dwelling-house under the lease of 1938. Undoubtedly, they were let at that time, but were they let as a dwelling-house? *Prima facie*, when the lease itself specifies clearly a particular purpose for which, and, *a fortiori*, for which alone, the premises are to be used, for instance, for an office or for a barn, I should read that as excluding the notion that they were intended to be let, or were let as a dwelling-house, and it is unnecessary to look further as DENNING, L.J., said in *Wolfe v. Hogan* (1).

The excerpts from the material authorities are assembled in *Whitty v. Scott-Russell* (2), in which, delivering the judgment of the court, I said ([1950] 1 All E.R. 887):

"It is, however, argued in answer to this objection that the Court of Appeal, in certain of its decisions of which the most recent is *Wolfe v. Hogan* (1), has held that, where there has been a formal instrument of letting the terms of which express the purpose for which the premises were let, this is conclusive, and evidence of any other purpose derived from, *e.g.*, the actual use, is excluded. In that case DENNING, L.J., used language which lends strong colour to such a contention when he said, in the opening sentences of his judgment ([1949] 1 All E.R. 575): 'In determining whether a house or part of a house is "let as a dwelling" within the meaning of the Rent Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further, but, if there is no express provision, it is open to the court to look at the circumstances of the letting.' In that case there was no express provision in the lease as to the 'purpose.' In the present case the tenant expressly covenanted to use the premises as 'a private dwelling-house only,' and, if the proposition stated by DENNING, L.J., is to be taken as both authoritative and unqualified, it clinches the tenant's argument. EVERSLED, L.J., in the first judgment, appears to accept this view, though whether with some, and, if so, what, qualifications is a question which must be explored. BUCKNILL, L.J., gave no reasons but simply agreed with the judgment of EVERSLED, L.J. EVERSLED, L.J., cited *Gidden v. Mills* (3) and, among other passages from judgments of the Court of Appeal he cited ([1949] 1 All E.R. 574) a passage from the judgment of SCRUTTON, L.J. ([1925] 2 K.B. 227) in *Barrett v. Hardy Brothers (Alnwick), Ltd.* (4): 'The important matter is the rights under the lease, not the *de facto* user.' EVERSLED, L.J., also cited (*ibid.*) a passage from the judgment of BANKES, L.J. ([1919] W.N. 171) in *Epsom Grand Stand Asscn., Ltd. v. Clarke* (5): 'If an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say that they were let as a dwelling-house.' He then went on to approve a passage from MEGARRY ON THE RENT ACTS, 4th ed., p. 19: 'Where the terms of the tenancy provide for or contemplate the use of the premises for some particular purpose, that purpose is the essential factor, not the nature of the premises or the actual use made of them. Thus, if the premises are let for business purposes, the tenant cannot claim that

they have been converted into a dwelling-house merely because somebody lives on the premises . . .’ Mr. MEGARRY goes on to say that actual user at the time when possession is claimed must be considered where the tenancy agreement contemplates no specified use. The only qualification annexed to this general statement by EVERSLED, L.J., is contained in the following passage from his judgment ([1949] 1 All E.R. 574): ‘Again I wish to make it quite plain that I am saying nothing which should be taken as indicating that, if a tenant does change the user and creates a dwelling-house out of what was formerly a shop, and if that fact is fully known to and accepted by the other party to the contract (whether or not there is a prohibition), the result may not very well be that there will then be inferred a contract to let as a dwelling-house, although it may be a different contract in essentials from the contract which was originally made and expressed.’ In other words, where the original contract was for a particular user, but, by the time the plaint is issued, it has been superseded by a subsequent contract providing for a different user, the subsequent contract may be looked to in deciding whether the premises are let as a ‘dwelling’ or ‘separate dwelling.’”

There are cases in which a covenant not to use the premises otherwise than as, say, an hotel or a lodging house or a temperance hotel have been held not to be broken by the tenant sleeping there, nor the house thereby denuded of the protection of the Rent Restrictions Acts. Those cases, however, are clearly distinguishable, to my mind, from the present case because it may be difficult to conduct the business of an hotel efficiently without sleeping there, and in that case to sleep there would be to observe the covenant, not to violate it. That, I think, is the basis on which *Kitchen's Trustee v. Madders and Madders* (6) and *Vickery v. Martin* (7) proceeded. The present case seems to me to be entirely different. I cannot accept the contention of counsel for the tenant that a working men's social club is such an ambiguous expression as to permit one to deduce the intentions of the parties as to the user of the premises from extrinsic evidence. It seems to me to be very nearly as unambiguous as an undertaking to use premises solely as a shop or office or barn. Again, I cannot accept counsel's further argument that the intention deducible from extrinsic evidence in this case was that the premises should be let as a dwelling-house. The last contention, based on the landlords' knowledge—not proved or brought home to them personally, but imputed to them through their rent collector—that McCarthy between 1935 and 1938 or 1939 lived in the premises, and even had a guest staying with him there, is that the lessors thereby assented to his doing so. Leaving aside the question whether the landlords' rent collector's knowledge could in such a matter be ascribed to the landlords—which seems to me on the authorities cited to us to be more than doubtful—much more than knowledge is necessary to repel the user to which the express terms of the lease restrict the lessee. The user prescribed in terms in the lease is what counts. If that is departed from through the parties making a new contract or varying the existing contract so as to permit or provide for a changed user, then the new user may, for the present purposes, be treated as the material one, but nothing short of the new contract or variation of the contract will, to my mind, suffice, and the facts proved in this case seem to me to fall far short of establishing such a contract.

If, contrary to counsel's first contention, the standard rent is not determined by lease No. 2 which was the current lease at Sept. 1, 1939, we must go back and ascertain when the premises were last let as a dwelling-house before Sept. 1, 1939. Counsel first went back to the lease of 1935, but this also contains a provision as to sole user as a working men's club and the same considerations apply to it *mutatis mutandis* as I have already considered in connection with lease No. 2. Going further back, we reach a period when the premises were

used as a beer-house from 1924 to 1935. As regards this period the tenant fails *in limine*, because he cannot show that during this period the premises were let at all. The onus is on him to show that they were let because the premises may have been owner-occupied, as beer-houses often are. The tenant in the court below, through a witness called Spencer, tendered certain evidence which the judge excluded partly on the ground (which was erroneous in law) that at no time were licensed premises within the Rent Restrictions Acts. *Epsom Grand Stand Asscn., Ltd. v. Clarke* (5), is an authority the other way. But there is reason for supposing that, when the learned judge excluded that evidence, he did not do so on that ground alone, and there was, in my view, ready to hand a perfectly valid ground on which the evidence could rightly be excluded, namely, that it could only come from a source which would make it hearsay.

We could not consent to determine the standard rent by the method which was made available in certain cases by s. 6 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. That section, judging by its opening lines, applies only where one starts with a dwelling-house to which the principal Acts apply and which was let on the material date, and where the gap in one's knowledge consists of the rent at which it was so let. I cannot see that that section has any application until it is shown that the house was let. When one has shown that, and shown that it is impracticable to discover what the rent was, say, on Sept. 5, 1939, then, no doubt, there is room for the provision to apply, but even then it is discretionary.

Moving now to the period when the premises were let next after Sept. 1, 1939, we come to the lease of 1940, to Trappitt and King. Here there is no double provision for sole use as a club, but there is a single provision to that effect. Even if a thing is said only once and duplication is thereby avoided, that is no reason why effect should not be given to it, and, therefore, the reasons why, in my view, this lease also does not govern the standard rent are those *mutatis mutandis* which have been stated already in regard to the other leases. Finally, it appears that when lease No. 4 was being negotiated in May or June, 1947, and the bomb damage to the house in question was being repaired, the tenant was allowed to move into the premises and to occupy part of the shop and part of the house. Permission to do that was given to him by letter dated May 15, 1947, as follows:

"We find that you are now occupying part of the domestic premises at 86, Gypsy Hill. Will you kindly note that the rent from Sunday last, the 11th instant, is £2 per week for partial use of the shop and partial use of the house."

The tenant, all his previous arguments failing, relied on this as constituting a letting for £2 a week. He said that although he may at first have occupied part only of the house, he proceeded to occupy the whole of it, and that, therefore, the £2 a week was to be treated as rent for the whole of it. When the tenant said that he occupied the whole, he may, of course, have been referring to a mere *de facto* user of the whole, use, although he had no right to do more than occupy a part; but the learned judge has found as a fact as follows:

"As and when the rooms in the bombed premises, No. 86, became available, Robinson was allowed to move in. £2 a week was fixed as a temporary rent for 'partial use of the house and partial use of the shop.' Therefore, it was only a temporary expedient, and I cannot accept that rent as being the standard rent."

The learned judge has, therefore, found that, according to the terms of that arrangement (which may have been not a tenancy at all but only a mere licence), the consideration of £2 was for only part of the premises and it was not the same subject-matter as that the standard rent for which we are trying to ascertain now.

In any case that arrangement, limited as it was in space, was very limited also in time, because in July, 1947, although lease No. 4 had not yet been entered into, it was still the subject-matter of negotiation and cast its shadow before it. Fifty-two pounds had been paid in July in respect of the quarter ending June 24 of that year, and that obviously superseded the £2 arrangement. In the result I am of the opinion that the judge and the registrar were right in taking lease No. 4 as determining the standard rent, and I think the appeal should be dismissed and the orders appealed from should stand.

DENNING, L.J.: This is another case, of which we have had several lately, where a tenant has sought to push to an extreme length the advantages which have been conferred on him by the Rent Restrictions Acts. In November, 1947, the tenant, being advised by a solicitor, freely took a lease for twenty-one years of a shop and dwelling-house at a rent of £208 a year, that is, £4 a week. Now he turns round and says he can have the benefit of that lease for the full twenty-one years for the sum of £1 a week, or thereabouts, and can reclaim the excess paid. The reason is that he has discovered that the premises were let in 1939 at about £1 a week, and he says that is the standard rent. I would point out that, if the standard rent is the £4 a week and is too high, the tenant can apply under the Landlord and Tenant (Rent Control) Act, 1949, to have it reduced to a reasonable amount, but, if the standard rent is only £1 a week and is too low, there is no power to have it increased to a reasonable amount. I pointed that out in *Stagg v. Brickett* (8) ([1951] 1 All E.R. 157). The only question, however, is: What is the standard rent?

In 1939 the premises were let on a lease which contained an express term that the tenant was "to use the premises for the purposes of a working men's social club only." Was that a business letting or was it a letting as a dwelling? Inasmuch as there was an express term in the lease showing the purpose of the letting, that is the only thing that matters. It is not necessary to look further unless there is evidence from which it may be inferred that the landlords affirmatively assented to a change of user: see *Wolfe v. Hogan* (1). In my opinion, the letting "for the purposes of a working men's social club only" was a letting for business purposes and not a letting as a dwelling. It is true that a steward might lawfully sleep there without being guilty of a breach of covenant, but that does not mean that the premises were let as a dwelling. It is rather like premises let as a warehouse. The fact that a caretaker stays there does not make it a letting as a dwelling. It is quite different from the letting of an hotel or a boarding-house which necessarily involves that the person in charge will use it as a dwelling. A working men's social club does not involve anyone dwelling there. There was no evidence that the landlords ever assented affirmatively to a change of user. It is true that the agent who collected the rents knew that a club member and his family lived there for a time in 1940, but a rent collector has no authority to make a lease or to vary a lease or to assent to a change of user. Even if he had, the acceptance of rent by him for a few months, with knowledge of the user, would not be enough to show that there had been a variation of the original contract as to user: see *Wolfe v. Hogan* (1). In my opinion, therefore, the lettings as a working men's social club can be ignored. The true standard rent is £208 a year, and the appeal should be dismissed.

HARMAN, J.: I agree.

Appeal dismissed with costs.

Solicitors: *Howard G. Thomas* (for the tenant); *Bennett, Welch & Co.* (for the landlords).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

SCOTT v. SCOTT.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Hodson, J.), December 11, 1950.]

Husband and Wife—Maintenance—Application to High Court—“Reasonable maintenance”—Tests of reasonableness—Husband’s common law liability—Previous standard of living—Absence of security or certainty of continuance of existing allowance—Law Reform (Miscellaneous Provisions) Act, 1949 A
(c. 100), s. 5 (1).

The wife left the husband, taking with her the two daughters of the marriage. She contended that she was forced to leave her husband because of his cruelty, but he denied that charge. The wife took out a summons under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), alleging that her husband had been guilty of “wilful neglect to provide reasonable maintenance” for her and her daughters within the meaning of the section. In fact, at all material times since the parting she had been in receipt of £10 a week free of income tax, and the court found that to produce that amount it would be necessary to set aside a capital sum to produce a notional gross income of £945 per year. The husband’s property consisted of £40,000 in cash, the proceeds of the sale of his farm, which was treated by the court as representing a notional income of £1,500. B C

HELD: (i) the question what was “reasonable maintenance” for a wife and children under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, must be considered with reference to the husband’s common law liability to maintain them, and the word “reasonable” must be interpreted against the background of the standard of life which the husband had previously maintained. D

(ii) when the court was applying the test for reasonableness it was not open to the wife to say that that test was not satisfied because there was no security for the amount which she had been receiving, although security for at least the joint lives of the spouses might have been obtained if she had succeeded in a suit for restitution of conjugal rights or succeeded in obtaining an order under s. 5 (1), nor was it open to her to contend that the test was not satisfied because there was no certainty that her allowance would be continued. Provided the husband was paying the wife *prima facie* reasonable maintenance—as was the fact in the present case—that maintenance did not become unreasonable when tested against what the wife might obtain if she had succeeded in proceedings for judicial separation or divorce. E F

[FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1949, s. 5, see HALSBURY’S STATUTES, Vol. 42, p. 574.] G

SUMMONS by the wife against her husband under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), for a maintenance order on the ground of his wilful neglect to provide reasonable maintenance for her and her children. The facts are set out in the judgment of HODSON, J. H

John Latey for the wife.

H. V. Brandon for the husband.

HODSON, J.: This is an application under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, sub-s. (1) of which reads as follows:

“Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court in England, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife,

order the husband to make to her such periodical payments as may be just . . .”

As a matter of history, s. 5 was introduced to simplify the procedure by which in the High Court a wife might, in appropriate circumstances, obtain what are called periodical payments. It is necessary to look at s. 187 of the Supreme Court of Judicature (Consolidation) Act, 1925, which, after providing that a decree for restitution of conjugal rights should not be enforced by an attachment, provides that, in the event of failure to comply with the decree, the court may order the respondent to make the petitioner such periodical payments as may be just. In s. 5 (2) of the Act of 1949 it is provided that the court may order the husband to secure to the wife the periodical payments. Section 5 follows the same line as s. 187, the position now being that, instead of a husband who is living apart from his wife, being given the alternative of taking her back or showing cause why he should not do so, and, failing either, being ordered to provide for her periodical payments, the wife is entitled to periodical payments if she can prove that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her children. The field is wider than it was because a wife who is unwilling to return to her husband is not in a position to apply for a decree of restitution of conjugal rights ordering him to take her back, whereas she may be able to prove that he has been guilty of wilful neglect to provide reasonable maintenance because she has good ground for living apart from him.

On Sept. 15, 1950, the wife in the present case left the husband and took with her the two daughters of the marriage, aged sixteen and twelve years, leaving the husband behind with two sons, aged eighteen and fourteen. She has stated that she was forced to leave her husband because of his cruelty, which has been denied, and alleges that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her children, notwithstanding the fact that she has been in receipt of £10 a week free of income tax at all material times since the parting. The financial position, so far as it is material, is approximately that the husband was a farmer who sold his farm and has some £40,000 in cash representing the proceeds of the sale of the farm and farm stock, while the wife has virtually nothing. The husband has the younger boy with him. The elder boy is described as a farm worker and is not working for his father as he was before the sale. The husband says that his wife has deserted him. Besides the affidavits which have been sworn in these proceedings, the only material I have is contained in some correspondence which has passed between the parties. It appears from a letter of the wife's solicitors, dated Sept. 18, 1950, that during the marriage she claimed to have received £3 10s. a week for housekeeping, out of which she had to pay for music and elocution lessons for her daughters, their pocket money, their dinners at school, and some other amounts. That does not seem a very large allowance having regard to the comparatively large sum which was realised by the husband on the sale of his farm. The question is whether it is possible for the wife to establish that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her children. It is pointed out that, the husband's property being cash and there being no income coming in, the problem, so far as income is concerned, can properly be approached by treating the £40,000 as invested at a rate of something between three per cent. and four per cent., thus producing a notional income of between £1,200 and £1,600 gross, whereas to produce a sum of £520 free of tax for the wife and the two children concerned, it would be necessary to set aside a capital sum producing a notional income of about £945 a year.

In my view, the question what is reasonable maintenance for the wife and children has to be considered with reference to the husband's common law liability to maintain his wife and children, and, no doubt, the word “reasonable”

has to be interpreted against the background of the standard of life which he previously has maintained. Even taking these matters at their highest against the husband, it does not seem to me that the wife can succeed in establishing on these figures that there has been the requisite failure unless she is entitled to say that the reasonableness may be tested in other ways. For example, counsel for the wife seeks to say that, because there is no security for the amount which the wife has been receiving, although security at least for their joint lives could be obtained by the wife if she succeeded either in a suit for restitution of conjugal rights or succeeded in obtaining an order under this section, the test of reasonableness is not satisfied. He goes on to say that as there is no certainty that the allowance will continue, again the test of reasonableness is not satisfied. I am unable to accept those contentions. It seems to me that, provided the existing state of affairs is that the husband is paying what is *prima facie* reasonable maintenance for his wife and two children, as I find is the fact in this case, the maintenance does not become unreasonable when tested against what could be obtained if the wife had succeeded in some proceedings which she might have taken, or, indeed, which she might yet take, because if the wife has left her husband because of his cruelty of which she is complaining, she can take proceedings against her husband on the ground of that cruelty either for a judicial separation or for divorce. In those proceedings she would be entitled to claim alimony *pendente lite*, and, in the event of her succeeding in those proceedings, she is entitled to claim a permanent provision for herself whether by way of alimony or by way of maintenance. In the event of divorce, she is entitled to claim maintenance to be secured to her for her life as opposed to the period of joint lives, which appears to be the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949.

In my judgment, the wife's application fails on the ground that she has not shown that the husband has been guilty of the wilful neglect to provide reasonable maintenance which it is necessary for her to prove. There is no specific evidence directed to circumstances which make any particular sum necessary to support either the wife or either of the daughters. I am not told, for instance, that the wife is living in any particular circumstances or that her rent is higher than it would be in circumstances applicable to a normal wife. The same thing applies to the two children. There is no evidence as to the elder child, who is sixteen, being at school or as to any special expenses which are attributable to her maintenance. What I have said does not in any way bind the court as to what it would order in the event of this particular set of figures falling to be considered in other circumstances. Wilful neglect is not automatically established when it is found that the amount paid is less than the court might order in the case of a guilty husband and an innocent wife in proceedings brought, say, on the ground of cruelty or adultery or desertion for three years. In my judgment, this summons must be dismissed.

Summons dismissed.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Bellyse & Eric Smith*, Nantwich (for the wife); *Robinson & Bradley*, agents for *A. E. Whittingham & Son*, Nantwich (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

REGOR ESTATES, LTD. v. WRIGHT.

[COURT OF APPEAL (Cohen and Denning, L.JJ., and Danckwerts, J.), December 8, 1950.]

Rent Control—Premium—Requirement of payment as condition of continuance of lease—Proviso for re-entry on breach of any of tenant's covenants—Agreement in 1948 to pay premium for grant of fourteen years' lease—Premium payable by instalments over ten years—First annual instalment of premium falling due after June 2, 1949—Demand for payment of instalment—Instalments of premium not additional rent—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 2 (1).

In October, 1948, the owners of a flat within the Rent Restrictions Acts, of which the recoverable rent was £59 per annum, offered a prospective tenant a fourteen years' lease thereof at an annual rent of £59 and further required a payment of £270 as a consideration for their granting an option on the lease. At that time, by virtue of s. 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, it was not unlawful for the landlords to demand a premium in respect of a lease for fourteen years. After negotiation it was agreed that in addition to the rent a premium of £360 should be paid, as to £60 on execution of the lease and as to £300 by ten equal annual instalments of £30. On Dec. 15, 1948, a lease was executed whereby "in consideration of" the premium, the rent, and the tenant's covenants the premises were demised to the tenant for a term of fourteen years. The covenant as to the payment of the premium provided that the tenant should pay to the landlords the ten annual instalments, but that, in the event of the tenant desiring to assign, underlet, or part with possession of the demised premises, it should be a condition of the granting of consent by the landlords that all remaining instalments of premium were paid by the tenant to the landlords. The lease contained a proviso for re-entry on breach of any of the tenant's covenants. On Nov. 18, 1948, the first payment of £60 was made by the tenant. On June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, came into force, and s. 2 (1) made it illegal to require the payment of a premium "as a condition of the grant, renewal or continuance of a tenancy" of a dwelling-house to which the Rent Restrictions Acts applied. On Nov. 11, 1949, the first annual instalment of the premium, amounting to £30, became due, but the tenant refused to pay it on the ground, first, that the instalments alleged to be instalments of a premium in fact were demands for increased rent, and, therefore, illegal, and, secondly, that to require payment of the sum in question was, in effect, because of the proviso for re-entry in default, to require payment of a premium for the continuance of the lease. On Feb. 1, 1950, the landlords by letter demanded from the tenant payment of the instalment of the premium, and on Feb. 14, 1950, entered a plaint in the county court for the recovery of the instalment.

Held: (i) on the true construction of the lease, the provision as regards payment of a premium imposed a personal obligation on the original tenant which would not run with the land, and, therefore, the instalment did not constitute an illegal additional rent.

(ii) the landlords stipulated for the payment of a premium as a condition of the grant of the lease at a time when it was lawful to do so; the mere existence of the proviso for re-entry, which the landlords had not threatened to enforce, did not give the demand for an instalment of premium the character of a requirement for the payment of a premium as a condition of the "continuance" of the tenancy within s. 2 (1) of the Act of 1949; and, therefore, the landlords were entitled to recover.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 2 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1097.]

Cases referred to:

- (1) *Hill v. Booth*, [1930] 1 K.B. 381; 99 L.J.K.B. 49; 142 L.T. 80; Digest Supp.
- (2) *Samuel v. Salmon & Gluckstein, Ltd.*, [1945] 2 All E.R. 520; [1946] Ch. 8; 115 L.J.Ch. 103; 173 L.T. 358; 2nd Digest Supp.
- (3) *Rush v. Matthews*, [1926] 1 K.B. 492; 95 L.J.K.B. 409; 134 L.T. 571; 31 Digest 573, 7201.
- (4) *Colton v. Becollda Property Investments, Ltd.*, [1950] 1 K.B. 216; 2nd Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE HODGSON, made at Kingston-on-Thames County Court on Oct. 20, 1950, allowing the landlords' claim for £30 payable under a lease for fourteen years, dated Dec. 15, 1948, as an annual instalment of a premium. The facts appear in the judgment of COHEN, L.J.

Pearl and J. W. Wellwood for the tenant.
Avgherinos for the landlords.

COHEN, L.J.: This is an appeal from a judgment of His Honour JUDGE HODGSON given on Oct. 20, 1950, allowing a claim for the sum of £30 payable under a lease dated Dec. 15, 1948, as an instalment of premium. The premises comprised in the lease were 3, Bushey Court, Upper Teddington Road, Hampton Wick. The recoverable rent payable under the lease was £59 per annum, and the term was fourteen years.

The landlords claim £30 as an annual instalment of a premium alleged to be due in consideration of the granting by the landlords to the tenant of a fourteen years' lease of the flat at Bushey Court. The defence originally was that the claim was barred by s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, but before the hearing the tenant amended her defence, alleging in the alternative that the said instalment constituted an illegal increase in rent. The facts were not in dispute, and were largely to be found in an agreed bundle of correspondence and the actual lease. By letter dated Oct. 21, 1948, the landlords offered the tenant a fourteen years' tenancy of the premises at the annual rent of £59, and required payment of £270 as a consideration for their granting an option on the lease. In reply, the tenant, by letter dated Oct. 26, 1948, said that she thought the sum of £270 too much, but she offered to pay extra rent in lieu thereof. By letter of Oct. 27, 1948, the landlords pointed out that this was not possible under the existing legislation, but offered to accept an increased consideration of £360 payable as to £60 on execution of the lease and as to £300 payable by ten equal annual instalments of £30. On Nov. 1, 1948, these terms were accepted orally by the tenant, and on Nov. 2, 1948, they were confirmed by the landlords by letter. The tenant entered pursuant to the agreement shortly before Nov. 18, 1948, on which date the first £60 was paid by her to the landlords. The lease was executed on Dec. 15, 1948. The relevant clauses of this document are as follows:

"1. In consideration of the premium of £360 payable as to £60 on the signing hereof (the receipt whereof the landlords hereby acknowledge) and subject as hereinafter provided payable as to the balance thereof by ten annual instalments of £30 to be paid on Nov. 11 in every year the first of such annual payments to be made on Nov. 11, 1949, and in consideration of the rent hereinafter reserved and of the lessee's covenants hereinafter contained the landlords hereby demise unto the lessee [the premises] to hold the premises hereby demised (hereinafter referred to as 'the demised premises') unto the lessee for the term of fourteen years from Nov. 11, 1948, yielding and paying during the said term yearly and so in proportion for any fraction of a year the rent of £59."

Clause 2 contains the lessee's covenants. Sub-clause (a) is a covenant for the payment of rent. Then it is provided:

A “(b) To pay to the landlords the ten annual instalments of premium on the days hereinbefore provided but in the event of the lessee desiring to assign underlet or part with possession of the demised premises in accordance with the provisions herein contained it shall be a condition of the granting of such consent that all remaining instalments of premium are paid by the lessee to the landlords . . . (j) Not to assign underlet or part with possession of the demised premises or any part thereof without the previous written consent of the landlords and subject to the provisions of cl. 2 (b) hereof such consent not to be unreasonably withheld and within one month of the execution of any assignment or underlease of the demised premises to produce the same to the landlords' solicitors for registration.”

B Then come the landlords' covenants, and it is only the opening words of (a) which may have any relevance:

C “The landlords covenant with the lessee as follows: (a) That the lessee duly paying the said rent and observing and performing the agreements herein contained may peaceably and quietly hold and enjoy the demised premises without any interruption by the landlords or any person lawfully claiming under or in trust for them.”

There is a proviso for re-entry, which is the most important clause from the point of view of the tenant in this appeal. It reads as follows:

D “Provided always and this lease is upon the express conditions following that is to say: (1) If any rent shall be in arrear for fourteen days or upwards whether legally demanded or not or if there shall be a breach of any of the lessee's covenants herein contained or if the lessee or other person in whom the term hereby granted shall be vested shall become bankrupt or enter into any arrangement with his or her creditors or shall suffer execution to be levied on the demised premises the landlords may re-enter upon any part of the demised premises in the name of the whole without giving notice to quit to the lessee and thereupon the term created by these presents shall be determined but without prejudice to any rights or remedies of the landlords in respect of any antecedent breach of the covenants on the part of the lessee and conditions hereinbefore contained.”

E On Nov. 11, 1949, the first annual instalment of £30 became due under the terms of the agreement and lease, but the tenant refused to pay it, because on June 2, 1949, the Landlord and Tenant (Rent Control) Act, 1949, had come into operation with retrospective effect as from Mar. 25, 1949. The tenant alleged that to require payment of this £30 was, in effect, to require payment of a premium for the continuance of the lease because of the proviso for re-entry in default. Later she contended further that it was a demand for increased rent and accordingly illegal. By letter, dated Feb. 1, 1950, the landlords demanded from the tenant payment of the instalment of the premium, and on Feb. 14 entered the plaint in the county court for its recovery.

G Section 2 of the Landlord and Tenant (Rent Control) Act, 1949, is headed: “Prohibition of premiums on grant or assignment of tenancy,” and s. 2 (1) provides:

H “A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent . . .”

Sub-section (5) contains a provision giving a certain retrospective effect to an agreement made after Mar. 25, 1949. In the operative part it contains a provision enabling a tenant who has paid a premium under such an agreement to recover

" . . . the amount of the premium, or so much thereof as could not lawfully be required or have been required, as the case may be . . ."

The sub-section contains a proviso enabling either party who is dissatisfied with the position created by the first part of the sub-section "without prejudice to the operation of this section" to avoid the agreement if he thinks fit. Sub-section (6) imposes a penalty on any person requiring a premium in contravention of the section, and both counsel agree that the effect of that provision is that the section must be construed strictly. Sub-section (7) provides:

A

"Section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, is hereby repealed; but, without prejudice to the operation of s. 38 of the Interpretation Act, 1889, nothing in this section shall be construed as affecting the operation of the said s. 8 as respects anything done before the commencement of this Act."

B

Section 8 (1) of the Act of 1920 contained provisions restricting the right of landlords to demand fines, premiums, or other like sums, and it provides in sub-s. (3):

"This section shall not apply to the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy."

C

The importance of that is that the lease now in question, being granted when s. 8 of the Act of 1920 was, and s. 2 of the Act of 1949 was not, in force, and being a lease for a term of fourteen years, was not within the mischief of sub-s. (1) of s. 8, and, therefore, it was not illegal for the landlords to demand and receive a premium.

Dealing first with the tenant's contention that the alleged instalment constituted an illegal increase of rent, I feel no doubt that on the true construction of the lease the provision as regards payment of a premium imposes a personal obligation on the original lessee and would not run with the land. True, that the definition of "lessee" includes not only the original lessee, but also persons deriving title under him, but the premium is clearly expressed to be in consideration of the grant of the demise. It is plainly distinguished both from the rent and from the lessee's other covenants by cl. 1. Counsel for the tenant points out that cl. 2 contains covenants by the lessee, and, generally speaking, "lessee" is to include successors in title of the original lessee, but when we come to cl. 2 (b) (and it is important in this connection to remember that the provisions for payment of instalments are expressly made by cl. 1 subject to the provisions in cl. 2 (b)) we find it provides that

D

E

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"in the event of the lessee desiring to assign underlet or part with possession of the demised premises . . . it shall be a condition of the granting of such consent that all remaining instalments of premiums are paid by the lessee to the landlords."

Where "the lessee" appears for the second time in that sub-clause it must, I think, as a matter of construction, mean "the lessee desiring to assign, underlet or part with possession," and, therefore, could only apply to the original lessee, since it must be he who first desires to assign, underlet, etc. The effect of the sub-clause, therefore, is to enable the landlords to insist, as a condition of granting their consent to an assignment, that the remaining instalments of premium be paid by the original lessee to the landlords before that consent is given. I see nothing in sub-cl. (j) which is in any way inconsistent with that construction of sub-cl. (b)—indeed, it seems to me on the whole that it supports the conclusion which I have indicated because it provides that it shall not be considered to be an unreasonable withholding of the consent that the landlords require the provisions of sub-cl. (b) to be carried out.

G

H

The difficulty is caused only by the proviso for re-entry. Counsel for the tenant relied on the proviso for re-entry, which, he said, applied to the breaches

of any covenant, in support of his argument on both branches of his case. He said that this is a breach of one of the lessee's covenants, and there is nothing in the proviso for re-entry to indicate that cl. 2 (b) is excluded from its operation. That, I think, is true. Counsel for the landlords in order to reserve the point, though he did not argue it fully before us, was prepared to submit that (a) the covenant, being a purely personal covenant on the part of the lessee, does not run with the land, and, therefore, (b) it is not within the meaning of "the lessee's covenants" where that phrase occurs in cl. 4, the proviso for re-entry. There is a great deal of force in that argument, but I propose to proceed, for the purposes of my judgment, on the view that the proviso for re-entry does apply to the clause binding the lessee to pay the premium by instalments. Even so, I think it remains a personal obligation which would not bind assignees from the lessee and does not affect the view I have already formed that the premium is a premium and nothing but a premium.

I derive some support for the view I have formed on the construction of the document from the decision of this court in *Hill v. Booth* (1). In that case the lease provided that £800, part of a premium of £1,000, reserved by the terms of the document, should be payable by instalments, but there was an express provision (which there is not here) that, in the event of the term being determined by re-entry, all the premium unpaid would forthwith become payable. Here the only express provision to that effect is in the event of consent to an assignment. There was in that case a proviso for re-entry, among other things, in the event of default in payment of an instalment, but the court had no hesitation in coming to the conclusion that the premium was what it was expressed to be—a premium. GREER, L.J., having said that he thought it was a premium, said ([1930] 1 K.B. 390):

"The only doubt in my mind has arisen upon the proviso for re-entry which provides for re-entry not merely on non-payment of the rent but on non-payment of any instalment of the premium. That seems to make the right of re-entry in respect of the premium an incumbrance on the land. The right of forfeiture and the right of re-entry are rightly described as incumbrances on the land, and I think under the [Law of Property] Act of 1925 that right of re-entry has gone. The non-payment of the premium would not justify the lessor in entering upon the land the freehold of which had become vested in the lessee. But that does not affect the separate obligation to pay the £1,000 premium."

SLESSER, L.J., said (*ibid.*, 391):

"That view that the premium is a consideration for which the lease itself is granted, as appears clear on the face of the lease itself, is made even more clear by the fact that in the event of re-entry for non-payment of rent or premium, while only a proportionate part of the rent has to be paid up to the date of re-entry, it is expressly provided in cl. 1 of the lease that all the premium unpaid up to the date of re-entry shall become immediately due and payable. Other provisions make it equally clear that the premium of £1,000 which is to be paid by instalments is not rent or anything like rent."

I take SLESSER, L.J., as meaning that he does not decide the case on the basis of the express provision making the whole amount payable, but as saying that, even apart from that, he would have come to the same conclusion.

Looking at the lease in the present case purely by itself, for the reasons I have given, I should come to the conclusion that it was an agreement for the payment of a premium so far as the £360 was concerned and not an agreement for the payment of additional rent. In dealing, however, with a matter of this class and the effect of a document relating to the Rent Restrictions Acts, we are not confined to the terms of the document, and we are bound to look

at the transaction as a whole and consider whether it is within the prohibition of the Acts. In a different connection UTHWATT, J., made some observations in *Samuel v. Salmon & Gluckstein, Ltd.* (2), in which he makes it clear that we are not bound by the vocabulary the parties have chosen to use. In that case he held that the premium was rent. The facts are obviously so far from the present case that we cannot gain anything by referring to them, but UTHWATT, J., said ([1945] 2 All E.R. 522):

"Land may be leased for a consideration which is not a rent in law or for a consideration which consists of or includes a rent. The parties may write the agreement in such terms as they please and, if so minded, may attach any label they wish to the payments agreed to be made by the lease. But, when all that is done, it is for the law to decide on the effect of the document what payments are rent reserved and what not. No label can create a fact: a label may accurately describe a fact or it may mis-describe it, or may help to the solution of a doubtful question of interpretation."

Counsel for the tenant referred us to the decision in *Rush v. Matthews* (3), where the parties had plainly attempted to evade the Rent Restrictions Acts by providing for weekly payments and calling them premiums in a separate document. On the facts of that case the court had no hesitation in coming to the conclusion that there was a pure evasion of the Acts, within the mischief of the Acts, and, therefore, the premium could not be enforced.

There is, however, every difference between evasion and avoidance, and I think that, if we look at the lease before us as a whole, the learned county court judge arrived at the right conclusion about it. He said:

"I think the correspondence clearly shows that there was an intention to take premium for a grant. There was no intention to evade the Acts. I think the tenant, when she suggested more rent, was in all probability acting quite *bona fide*, but the landlords knew the relevant statutes. They said at once 'We cannot take more rent.' They asked for a premium, and, as the term was for fourteen years, they were fully entitled so to do. I hold that the parties intended that the lease for fourteen years should be granted in consideration of this premium and that the rent reserved should be £59. The instalments of premium were payable not on the usual quarter days when the rent was due, but on Nov. 11. They were not payable during the whole term, but for the first ten years only; the rent went on for the whole term of fourteen years. Finally, as I have held, the liability to pay these annual instalments would not have ceased if the proviso for re-entry had been enforced; the personal promise remained. I cannot hold that these payments were rent or that they were masquerading merely as premiums to evade the statute."

I agree so entirely with the judge's conclusion and with his reasons that I will say no more about that part of the case.

The more difficult question is whether the demand made by the landlords, first, by letter of Feb. 1, 1950, and, secondly, by issuing the plaint in this matter, was, or was not, an infringement of the provision of s. 2 (1) of the Act of 1949 that

"A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent."

Counsel for the tenant says it is plainly an infringement of this section. He accepted this from me, I think, as a fair statement of his argument: Whenever, but only when, the landlord has a power to determine can there be a question of continuance, and if the landlord demands money for not exercising the power

it infringes the section whether the power arises under contract or under the general law. He had in mind by "the general law" a case which was put to him by DENNING, L.J., where a weekly tenancy would be determinable by notice and the landlord took a consideration for not exercising the right to give that notice. In the latter case, I should have thought it was plain that it was within the mischief of the section, but I do not think it necessarily follows that the position is the same where the landlord has a pre-existing right to effect a forfeiture and demands money which he is entitled to obtain under a personal covenant, in no way threatening to exercise the right if the demand is not satisfied.

In the present case there has been a demand for payment of £30 payable under the provisions of the clause as an instalment of a premium. There is no threat that can be proved in the correspondence, nor any demand in the action for possession, and in those circumstances counsel for the landlords argues that it cannot be said that there has been such a demand. He says that the requirement of a premium was made long before the Act of 1949 came into force. That seems to me reasonably clear from the fact that a claim or requirement of a premium was made in the correspondence which led up to the lease of Dec. 15, 1948, and the payment of the premium was expressed to be the consideration for the grant of the lease. He says that the demand by action of an instalment of a premium contracted in December, 1948, to be paid is not the requirement of a premium within the mischief of the Act since it is not a requirement within the section. Finally, he says the premium was required as a condition of the granting of the lease and not as a condition of its continuance.

I think that the Act is dealing with one of three things—a grant of a lease, a renewal of a lease, or a continuance of a lease, and I find it impossible to visualise conditions in which something can be said to be both requiring the payment of a premium as a condition of the grant of a lease and a requirement of the payment of a premium as a condition of its continuance. In the present case it seems to me to be plain that there was the requirement of the payment of a premium as a condition of the grant of the lease.

That that is so, I think, appears plainly from the decision of this court in *Colton v. Becollda Property Investments, Ltd.* (4). That case was dealing with a state of affairs prior to the coming into force of the Act of 1949. It does not in any way decide the question with which we are now concerned. There the respondent company agreed orally to the offer of X., a statutory tenant of the flat, to take it for a term of fourteen years from Sept. 29, 1948, on terms which included the payment of a premium of £700, which was required by the landlords, subject to confirmation by the board of directors. On Oct. 5, 1948, the chairman wrote to X. that, after consultation with his board, they had decided to accept his offer, and, on Jan. 7, 1949, the parties executed a lease containing the terms agreed, including the payment of a premium, the *habendum* of which was: "To hold unto the tenant from Sept. 29, 1948, for the term of fourteen years." It was held that since the premium was required by the landlords before Sept. 29, 1948, as a condition of granting the lease, there was a grant for a term of fourteen years of a tenancy within the meaning of s. 8 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 3 of, and sched. I to, the Rent and Mortgage Interest Restrictions Act, 1939, with regard to a new control dwelling-house. The condition in the lease, requiring the premium, related back to the original requirement for that premium made by the landlords before Sept. 29, 1948. The only importance of that case here is that it shows that the premium may properly be regarded as "required" at a stated date, notwithstanding that it was made payable, as it was in that case, by instalments payable at dates subsequent to the stated date. JENKINS, L.J., said ([1950] 1 K.B. 227):

"The question . . . is whether the parties had, before Sept. 29, 1948, reached such a measure of agreement that it can fairly be said that the premium in question was required by the defendants as a condition of their granting a lease to him of the premises for fourteen years from Sept. 29, 1948, being a then future date. In my judgment, if the facts fairly support that conclusion, the section has not been infringed. I think, on the language of the section, one must look at the facts and see when the premium alleged to be an illegal premium was required, and what it was required for; and if one finds a preliminary agreement for a lease for fourteen years from a future date, one of the terms of which is that the intending lessee shall pay a premium, then it seems to me that within the meaning of the section the premium has been required in respect of a lease of the exempted character, namely, a lease for a period of fourteen years."

DENNING, L.J., said (*ibid.*, 231):

"In such a case the condition in the lease requiring the premium, would relate back, in my opinion, to the original requirement made in the negotiations before the tenant went in. There would be no breach of the Act because the effective requirement was made before the fourteen years started."

That case seems to me to show that, in dealing with matters of this kind, one must look at what was the effective requirement, and I find it difficult to think that, since there was an effective requirement at the time of the original lease in December, 1948, it can fairly be said that either the letter of Feb. 1, 1950, or the issue of the plaintiff by the landlords amounts to requiring the payment of a premium in addition to rent "as a condition of the grant, renewal or continuance of a tenancy to which this section applies." There is no condition imposed. There is no proved threat to discontinue the lease. There is merely an attempt to enforce a personal covenant which was valid when it was imposed and as to which there is nothing expressed in this section to invalidate it.

I am further led to this conclusion by the provisions of s. 2 (5). It seems to me that it would be strange indeed if a section which gives limited retrospective effect to agreements made after Mar. 25, 1949, but before the coming into force of the Act were to have an even more drastic effect on agreements made before Mar. 25, 1949, than it had on those expressly dealt with by sub-s. (5). For, be it observed, if a landlord under an agreement made after Mar. 25, but before the coming into force of the Act is exposed to attack under the Act, he has, so to speak, a *locus poenitentiae*, but, if counsel for the tenant is right, the landlord under an agreement made before that date would be in an equally disadvantageous position, yet would have no *locus poenitentiae*. That, I think, is a reason for leaning against the construction which counsel has asked us to adopt. I think also (though I do not base my judgment on it) that sub-s. (7) may affect the matter. It seems to me that counsel's argument will hardly be consistent with the direction in that sub-section that the operation of s. 8 of the Act of 1920 "as respects anything done before the commencement of this Act" is not to be affected. Before the commencement of this Act his client entered into this covenant. That, in my view, was something done before the commencement of this Act; and it seems to me that if we were to accept counsel's argument, we should be saying in effect that sub-s. (1) was to affect that covenant which was something done "before the commencement of this Act."

For the reasons I have stated I entirely agree with the conclusion of the learned judge which he expressed in these words:

"The request for the £30 was, in my judgment, not a requiring of a payment for the continuance of the lease or tenancy. It was rather a request for the performance of the promise already given by the defendant and subject to an agreed sanction. There seems to me to be no reason

why the parties should not agree this mode of payment for the grant, nor why their agreement should not be given efficacy by an adequate sanction."

I would dismiss this appeal.

DENNING, L.J.: I agree, and I only wish to add a word on the second point. This lease was granted in December, 1948, for fourteen years in consideration of a premium of £360 payable by instalments of £30 a year. It is said that since the Act of 1949 the instalments of premium are irrecoverable. The only ground is because the lease contained a proviso for re-entry.

Under the Act of 1949 a landlord must not require a payment of a premium under an agreement made after the coming into force of the Act—first, on a "grant of a tenancy" (which means an agreement to grant an initial tenancy); secondly, on a "renewal of a tenancy" (which means an agreement for a fresh tenancy following on the termination of the earlier one); and, thirdly, on a "continuance of a tenancy" (which means, I think, an agreement to continue an existing tenancy, as, for instance, by agreeing not to give notice to determine or to re-enter under a provision in that behalf). If the landlord should stipulate for a premium as a condition of any such agreement, his act is unlawful and the stipulation is void, no matter whether it is a part of the agreement or collateral to it. Here, however, no agreement has been made since the Act of 1949. The only agreement was made before the Act, namely, in December, 1948. A premium was stipulated for the grant of the lease, but that was lawful because it was before the Act. Since the Act the tenancy has continued, but there has never been any agreement for its continuance. The agreement continued of its own force, and none the less so because there was a proviso for re-entry.

In my judgment, the section does not invalidate contracts for a premium made in respect of a fourteen year lease granted before Mar. 25, 1949. If the tenant's contention in this case were right, she could hold all the benefits of the agreement and reject the burdens. She need only pay the rent of £59 and pay none of the premiums, with the result that she would be better off under this agreement than if she had made a similar agreement after Mar. 25, 1949. Under s. 2 (5) of the Act in the case of an agreement made between Mar. 25, 1949, and June 2, 1949, the landlord has an option to avoid the agreement, but if the tenant is right, in the case of an agreement made before Mar. 25, 1949, the landlord loses his premium and has no such option. I cannot believe that the Act has that result. I agree, therefore, that the appeal should be dismissed.

DANCKWERTS, J.: I agree. Section 2 (1) of the Act of 1949 contains a prohibition in these terms:

"A person shall not, as a condition of the grant, renewal or continuance of a tenancy to which this section applies, require the payment of any premium in addition to the rent."

"Grant" means obviously a grant of a new lease, and "renewal" is again a term which is easy to understand. "Continuance" appears to refer to the continuance of an existing tenancy which will go on unless something is done. One can easily understand the position where one has an undetermined tenancy like a tenancy from year to year or from month to month or from week to week. It is forbidden in such a case to demand a premium as a condition of not giving notice to determine the tenancy. These words, however, are similar to those in s. 8 (3) of the Act of 1920, which provides:

"This section shall not apply to the grant, renewal or continuance for a term of fourteen years or upwards of any tenancy . . ."

so there is some reference there to a term of fourteen years. It is a little difficult to understand how it could apply in the same way to a lease for a term of fourteen

years. It may be that if, a condition of re-entry having become exercisable, the landlord demands a premium not otherwise provided for by the terms of the lease or makes some demand of that kind as a condition of not enforcing his right of re-entry, the section would be infringed. It seems to me, however, that that does not apply to a case where there is merely a demand for payment of a sum which is already provided for by the terms of the original lease. In this case the premium, or the sum of £30, was payable by reason of the agreement between the parties contained in the original lease. The demand which was made by the letter of Feb. 1, 1950, or by the commencement of these proceedings in no way gave rise to the right to recover the sum. It was not recoverable by reason of that demand; it was recoverable by reason of the original agreement, which was entered into before Mar. 25, 1949. A

It seems clear, therefore, that this is not a case which is covered by the prohibition contained in s. 2 (1) of the Act. It is also quite clear to me that it is not a case where there is a provision for payment of additional rent, and I agree with the view which has been expressed by my Lord that the covenant for the payment of the £30 on Nov. 11 is a personal covenant. It is clear that that was intended to be made good by the provision for the whole sum being payable at once on the occasion of a desire to assign. It appears also to be quite clear that it is not a covenant which would run with the land in the hands of an assignee. For those reasons it cannot be rent, but is what it says—an instalment of a premium. I agree, accordingly, that this appeal should be dismissed. B

Appeal dismissed.

Solicitors: *Partridge, Moss & Co.*, Twickenham (for the tenant); *Theodore Goddard & Co.* (for the landlords). D

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

PERCY G. MOORE, LTD. v. STRETCH.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), December 7, 1950.] E

Rent Restriction—Dwelling-house owned by local authority—Protection of sub-tenant—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (2) (c). F

In 1935 a local authority, who were owners of a combined shop and dwelling-house the rateable value of which was within the limits prescribed by the Rent Restrictions Acts, let the premises to one M. In 1950 M., who carried on his business in the shop, sub-let the dwelling-house to the sub-tenant. Later, he transferred his business to a limited company, and assigned to them his interest under the lease. The company, requiring the dwelling-house for one of their employees, gave the sub-tenant notice to quit. The dwelling-house, being one to which s. 128 of the Housing Act, 1936, applied, was, by virtue of s. 3 (2) (c) of the Rent and Mortgage Interest Restrictions Act, 1939, *prima facie* outside the Rent Restrictions Acts, but the tenant claimed that s. 3 (2) (c) was only intended to enable a local authority to gain possession of premises owned by them and was not available to a tenant from a local authority as against his sub-tenant. G

HELD: the Rent Acts applied *in rem* to property and not *in personam* to a tenant or a sub-tenant, and, therefore, the house fell within s. 3 (2) (c) and the Rent Acts did not apply to protect the sub-tenant. H

[FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (2) (c), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078.]

Cases referred to:

- (1) *Rudler v. Franks*, [1947] K.B. 530; [1947] L.J.R. 658; 176 L.T. 326; 111 J.P. 190; 2nd Digest Supp.
- (2) *Clark v. Downes*, *Clark v. Mawby*, (1931), 145 L.T. 20; Digest Supp.
- (3) *Wirral Estates, Ltd. v. Shaw*, [1932] 2 K.B. 247; 101 L.J.K.B. 370; 147 L.T. 87; 96 J.P. 143; Digest Supp.

APPEAL by the tenant from an order of His Honour JUDGE CROSTHWAITE, sitting at Liverpool County Court, dated Oct. 9, 1950, whereby he held that a dwelling-house, the property of the Liverpool Corporation, was, by virtue of s. 3 (2) (c) of the Rent and Mortgage Interest Restrictions Act, 1939, outside the Rent Acts, and that the sub-tenant in possession was not entitled to protection.

F. G. Paterson for the tenant.

Heathcote-Williams, K.C., and *G. Newman* for the landlords.

SOMERVELL, L.J.: It is agreed that the house, a part of which is in question, is within s. 3 (2) (c) of the Rent and Mortgage Interest Restrictions Act, 1939. Section 3 (2) provides:

"The principal Acts shall not, by virtue of this section, apply . . . (c) to any dwelling-house being, or forming part of, a house or dwelling in respect of which a local authority for the purposes of Part V of the Housing Act, 1936, are required by s. 128 of that Act to keep a housing revenue account other than a house or dwelling to which s. 129 (3) of that Act applies."

The premises in question come within s. 128 of the Act of 1936. Section 129 (3) refers to houses which have been sold or otherwise disposed of, though, presumably, still within the opening words.

In 1935 the Liverpool Corporation let these premises to a Mr. Moore. They consisted of a lock-up shop with a dwelling-house over it. With the consent of the corporation, Mr. Moore sub-let the dwelling-house to the present tenant, who has lived there and paid rent since June 5, 1950. Mr. Moore, who had a business which was carried on in the lock-up shop, transferred his business to the present landlords, a limited company, and assigned to them his interest under the lease. The company now wants the dwelling-house for someone employed in their business.

This dwelling-house *prima facie* being outside the Rent Restrictions Acts, the submission made by counsel for the tenant is that we should treat s. 3 (2) (c) of the Act of 1939 as intended for the protection of the corporation, so that if and when they want vacant possession they can get it, but it should not be available for a lessee from the corporation as against a sub-lessee. This sort of point has been considered in cases relating to the position of Crown property to which, under well-known principles, the Rent Restrictions Acts have been held not to apply, there being no express provision subjecting Crown property to their application. Having regard to what is said in those cases and other cases, the Rent Acts, speaking generally, operate *in rem*, i.e., they operate on property. One example of this is the wording of the enactment with which we are concerned. Its form is not to give some special right to a corporation, but merely to provide that the Rent Acts are not to apply to any dwelling-house which comes within its words. It exempts the dwelling-house, but it does not in terms confer a privileged position on local authorities. Having that in mind, it seems to me impossible to accept the submission of counsel for the tenant. The sub-section exempts from the Acts "any dwelling-house being, or forming part of, a house or dwelling in respect of which a local

authority . . ." Those words seem to me precisely to cover the premises which are in question in this case. They say expressly that the Rent Restrictions Acts shall not apply to them.

That is enough to decide this case, but I think it right that I should shortly mention the line of cases to which the learned judge referred. He rightly regarded himself as bound by *Rudler v. Franks* (1), and, being so bound, he regarded that case as deciding the present issue. In that case a tenant held a farm, on lease from the Crown, and there was a cottage on the farm which the tenant let to a sub-tenant. Subsequently, the tenant sought to recover possession of the cottage by a warrant under the Small Tenements Recovery Act, 1838. The justices refused to grant the warrant, holding that, as between the landlord and the tenant of the cottage, the Rent Acts applied. It was held by the Divisional Court that the Rent Acts did not apply as the cottage was Crown property, and the Crown was not affected by the Rent Restrictions Acts since they applied *in rem* and not *in personam*; the fact that the landlord of the cottage was a lessee from the Crown of the farm including the cottage did not make any difference; and, therefore, he was entitled to a warrant under the Small Tenements Recovery Act, 1838, for the recovery of possession of the cottage. In coming to that conclusion the Divisional Court relied on a decision of that court in *Clark v. Downes* (2) which was approved in this court in *Wirral Estates, Ltd. v. Shaw* (3). I do not propose to refer to those cases because I think the present case falls to be decided on the wording of s. 3 (2) (c) of the Act of 1939, but it seems to me that the *ratio* in those cases, namely, that the Acts operate *in rem*, confirms the construction which I put on this sub-section and the way in which I apply it to the present circumstances. Therefore, I think this appeal fails and should be dismissed.

JENKINS, L.J.: I agree. Whether or not the full result of s. 3 (2) (c), in view of the terms in which it appears in the Act of 1939, was foreseen when it was drafted, I find the words of the sub-section as it stands an insurmountable obstacle to the contention of counsel for the tenant. Section 3 (2) (c) contains nothing to confine its application to claims for possession by local authorities. The exclusion operates if the dwelling-house in respect of which protection of the Rent Acts is claimed is, or forms part of, a house or dwelling in respect of which a local authority is required by s. 128 of the Act of 1936 to keep a housing revenue account. Once that fact is established, it follows that the dwelling-house is outside the Acts, and it does not matter whether the tenancy in relation to which protection is claimed is held directly from the local authority or from a lessee of the local authority. I agree both that the language of the sub-section makes this plain, and also that the conclusion to which its language points is borne out by the cases to which my Lord has referred.

BIRKETT, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the tenant); *Playne & Co.*, agents for *Edward Lloyd & Co.*, Liverpool (for the landlords).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

R. v. VALLETT.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 18, 1950.]

*Quarter Sessions—Committal to, for sentence by court of summary jurisdiction—
“Character and antecedents”—Not confined to previous convictions—Criminal
Justice Act, 1948 (c. 58), s. 29 (1).*

A The appellant, who had not been previously convicted, pleaded Guilty before a court of summary jurisdiction to four charges of larceny as a servant and asked for ninety-six other cases to be taken into consideration. The justices committed her to quarter sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1).

B HELD: the “character and antecedents” of the offender mentioned in s. 29 (1) were not limited to previous convictions, and, therefore, the justices had power to commit the appellant for sentence.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29, see HALSBURY’S STATUTES, 2nd Edn., Vol. 14, p. 1013.]

Cases referred to:

- C (1) *R. v. Sheridan*, [1936] 2 All E.R. 883; [1937] 1 K.B. 223; 106 L.J.K.B. 6; 155 L.T. 207; 100 J.P. 319; Digest Supp.
(2) *R. v. Grant*, [1936] 2 All E.R. 1156; 106 L.J.K.B. 9; 155 L.T. 209; 100 J.P. 324; Digest Supp.

APPEAL against sentence.

D The appellant, Catherine Vallett, pleaded Guilty before a court of summary jurisdiction to four charges of larceny as a servant. She then asked for ninety-six other cases to be taken into consideration. The justices committed her for sentence to quarter sessions where she was sentenced to two years’ imprisonment. The ground of appeal was that the justices had no power to commit for sentence as she had no previous convictions.

E *M. C. Parker* for the appellant.

The Crown was not represented.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant, a woman aged thirty-four years, was charged before a court of summary jurisdiction with four cases of larceny from her employers. At that time nothing was known against her. She had been employed for some three years at a laundry, and for the last year she had been appointed a supervisor to stop thefts by employees. She had to attend meetings with her employers to devise ways of preventing theft and so knew all the arrangements that had been made with that object, and she profited by her knowledge to such an extent that on at least a hundred occasions she stole other people’s property. Before the court of summary jurisdiction she pleaded Guilty to the four charges, and she then stated that she wished ninety-six other charges to be taken into account. Thereupon the justices exercised their power under s. 29 (1) of the Criminal Justice Act, 1948, and, having convicted her, they committed her for sentence to quarter sessions, because, in their opinion, greater punishment should be inflicted than they had power to inflict.

H Counsel for the appellant argued that the justices had no jurisdiction to act under s. 29 (1) because the appellant had no previous convictions, but the words of s. 29 (1) are that the justices may commit for sentence

“if, on obtaining information as to [the offender’s] character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted . . .”

It is not necessary to enter into a discussion whether “character” means general reputation. It certainly, in my opinion, relates to something more

than the fact that a person has been previously convicted, and the word "antecedents" is as wide as can be conceived. On considering the appellant's antecedents it was found that she was a married woman living with a man who was not her husband, that she had been put in a position of trust, and that she had used the information she had so obtained to carry out persistent and wholesale thefts.

It seems to the court that, having those antecedents before them, the justices were entitled to use their powers under s. 29 (1). If the legislature had intended to limit the powers given by s. 29 (1) to cases where the defendant had been previously convicted, I think the words would have been: "If, on obtaining information as to his previous convictions . . ." Parliament, however, has used wider words—"character and antecedents." The character and antecedents of the appellant show that she has been a shameless thief for a long period of time and in these circumstances we consider that the justices had power to commit her to quarter sessions. It cannot be said that a sentence of two years for the offences committed is excessive, and the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant).

[Reported by H. McL. MORRISON, Esq., *Barrister-at-Law.*]

R. v. LONDON SESSIONS APPEAL COMMITTEE.

Ex parte BEAUMONT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.), December 15, 20, 1950.]

Quarter Sessions—Appeal from justices—Sentence—"Order made on conviction"—Order that defendant should enter into recognisance—Criminal Justice Act, 1948 (c. 58), s. 36 (2).

The applicant was convicted before a metropolitan magistrate for that he did wilfully obstruct the free passage of the highway by means of a costermonger's barrow, contrary to s. 54 (6) of the Metropolitan Police Act, 1839, and was fined 40s. In addition to the penalty imposed, the applicant was ordered to enter into his own recognisance and to find two sureties to be of good behaviour for six months.

HELD: the order to find sureties for good behaviour was not an "order made on conviction" within the definition of "sentence" in s. 36 (2) of the Criminal Justice Act, 1948, and, therefore, there was no right of appeal to quarter sessions against that order under s. 36 (1).

[AS TO RECOGNISANCES TO KEEP THE PEACE, see HALSBURY, Hailsham Edn., Vol. 21, pp. 633-637, paras. 1091-1096; and FOR CASES, see DIGEST, Vol. 33, pp. 365-369, Nos. 743-780.]

Case referred to:

(1) *R. v. County of London Quarter Sessions, Ex p. Metropolitan Police Comr.*, [1948] 1 All E.R. 72; [1948] 1 K.B. 670; [1948] L.J.R. 472; 112 J.P. 118; 2nd Digest Supp.

MOTION for an order of *mandamus*.

On Aug. 1, 1950, the applicant was charged before a metropolitan magistrate for that he on July 31, 1950, did wilfully obstruct the free passage of the highway by means of a costermonger's barrow, contrary to s. 54 (6) of the Metropolitan Police Act, 1839. The applicant pleaded Guilty to the charge and was ordered to pay a fine of 40s. By reason of his previous record he was ordered,

in addition to the penalty imposed, to enter into his own recognisance in the sum of £25, and to find two sureties, each in the sum of £25, to be of good behaviour for the next six months. The applicant appealed to quarter sessions against the order to find sureties, but that court held that, as the order did not involve a conviction, there was no right of appeal therefrom. Counsel for the applicant contended that such an order was an order made "on conviction" within the meaning of s. 36 (2) of the Criminal Justice Act, 1948, and that quarter sessions had jurisdiction to hear the appeal.

Power for the applicant.

Vernon Gattie for the respondents.

Cur. adv. vult.

Dec. 20. The following judgments were read.

LORD GODDARD, C.J.: Counsel for the applicant moves in this matter for an order of *mandamus* to the appeal committee of London Sessions to hear and determine an appeal against an order of Miss CAMPBELL, a metropolitan magistrate, that the applicant, Thomas Beaumont, should enter into his own recognisance of £25 and find two sureties in a like sum to be of good behaviour for six months and in default to be imprisoned for two months. The applicant desired to appeal only against so much of the order as required him to find sureties, but nothing turns on that point. He was convicted before the learned magistrate for that he did wilfully obstruct the free passage of the highway by means of a costermonger's barrow, contrary to s. 54 (6) of the Metropolitan Police Act, 1839. The conviction then goes on to state that it is adjudged that the applicant for his said offence do forfeit and pay a fine of 40s., and it continues:

"And whereas by reason of the [applicant's] previous record of convictions there is a strong ground to suspect him of future misbehaviour, it is hereby ordered, in addition to the penalty imposed, that the [applicant] do find sufficient surety for his good behaviour, that is to say, that he do enter into his own recognisance in the sum of £25 and do find two sureties, each in the sum of £25, to be of good behaviour during the period of six months now next ensuing. And in default of compliance with the said order, it is ordered that the [applicant] be imprisoned . . . for . . . eight weeks."

The appeal committee held they had no jurisdiction to entertain the appeal, hence this motion.

This court has so recently dealt with the question whether an appeal lies against an order of a justice requiring a person brought before him to be of good behaviour, which, to use the words of BLACKSTONE in dealing with this subject in his COMMENTARIES, 8th ed., vol. IV, chap. 18, p. 256, includes security for the peace and somewhat more, that we need not repeat what was said in *R. v. County of London Quarter Sessions, Ex p. Metropolitan Police Comr.* (1), where the matter was dealt with fully. Counsel for the applicant, however, argued that the law had now been changed by s. 36 (2) of the Criminal Justice Act, 1948, which was not in force when that case was heard. Sub-section (1) of that section gives a person convicted by a court of summary jurisdiction a right of appeal, if he pleaded Guilty, against his sentence, and sub-s. (2) provides that the expression "sentence" includes any order made on conviction with certain exceptions, one of which is an order for costs and another an order for the destruction of an animal under the Protection of Animals Act, 1911. In my opinion, this sub-section did not, and was not intended to, alter the law with regard to the order of a justice requiring sureties of the peace or for good behaviour, even when made at a time when the justice was convicting the offender of a substantive offence. The words "any order made on conviction" mean, in my opinion, an order

made as a consequence of a conviction, and the case to which I have just referred laid down in the clearest terms that an order for sureties was not a conviction and that there did not have to be a conviction for any offence to enable a justice to make such an order. As has been pointed out not only by BLACKSTONE, but in many cases, the order is in the nature of preventive justice. It is not a penalty for the offence for which the applicant was brought before the justice. The penalty for the offence in the present case was the fine, but, the applicant being before the justice, and she being satisfied that there was a likelihood of his repeating the offence, she called on him to provide sureties against the repetition. She could have required sureties although he was not charged with any offence or had him brought up on another occasion for this purpose. In my opinion, the orders against which the section contemplates an appeal may be brought are those which a statute allows to be imposed as a consequence of conviction, such as orders disqualifying a person for holding a driving licence or a firearm, or forfeiting goods which have been seized. This view is supported by the two exceptions that I have mentioned. An order for costs is made not only on, but in consequence of, a conviction, and so is an order for the destruction of an animal, and they cannot be made unless there is a conviction.

The only difficulty that can present itself here is that the order for sureties is contained in the formal conviction which has been drawn up as there was a notice of appeal. It would have been more regular, in my opinion, if a separate order had been drawn with regard to the finding of sureties, but this conviction is not before us on *certiorari* and I say no more on this subject. We are asked to order the sessions to hear an appeal against the order to find sureties, but, in my opinion, they were right in holding that they had no jurisdiction to do so. The motion is dismissed with costs.

HILBERY, J.: I am of the same opinion. The contention here is that the appeal committee should be ordered by this court to hear and determine the appeal because the order made by the magistrate was said to be made appealable by s. 36 of the Criminal Justice Act, 1948. That section reads as follows:

"(1) A person convicted by a court of summary jurisdiction shall have a right of appeal—(a) if he pleaded Guilty or admitted the truth of the information, against his sentence; (b) in any other case, against the conviction or sentence, to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts . . . (2) For the purpose of the last foregoing sub-section, the expression 'sentence' includes any order made on conviction by a court of summary jurisdiction, not being—(a) a probation order or an order for conditional discharge; (b) an order for the payment of costs; (c) an order under s. 2 of the Protection of Animals Act, 1911 (which enables the court to order the destruction of an animal); (d) an order made in pursuance of any enactment under which the court has no discretion as to the making of the order or the terms thereof."

The question, therefore, which has to be answered is whether the order in this case is an order made "on conviction" within the meaning of that expression as used in that section of the Act of 1948. It is true to say that it is an order made on the occasion of a conviction, and if that is all that is meant by the expression "made on conviction" as used in the statute, then this is such an order. It must be remembered, however, that, apart from this definition of sentence created by this statute, no order made by the court in addition to the sentence it passed has, hitherto, been any part of the sentence. After verdict, or confession by the accused on arraignment, the court gave judgment. That was the regular completion of the record. Any order made by the court at the time when judgment was given was not part of the sentence and judgment.

It was an order of the court added to the record. For the purposes of appeal, the section of the statute which I have just quoted makes all such orders, save those which it expressly excepts, part of the sentence.

The definitive characteristic of orders made "on conviction" was that they were orders made as a consequence of the conviction of the particular offence of which the accused stood convicted. For example, an order might be made for the restitution of the stolen goods, for the stealing of which the thief had then just been sentenced, or on a conviction of dangerous driving an order might be made that the convicted person's driving licence should be endorsed, or suspended for a specified period, or, again, on a conviction of an offence against the customs laws, an order might be made for the forfeiture of the goods. If this is correct, as I think it is, then it is to such orders that the words in the definition section which I have read must be intended to refer.

The order in question was not an order which could be made in the exercise by the magistrate of the jurisdiction to hear and determine the charge which was before her under s. 54 (6) of the Metropolitan Police Act, 1839. In respect of that charge she exhausted her jurisdiction by awarding the maximum fine of 40s. That conviction alone did not give her the power to make the order now in question. To make the order which she did make and express to make as an addition to the imposition of the maximum penalty for the offence which had been charged and admitted, she had necessarily to invoke powers of what has been called "preventive justice" given to her by the Justices of the Peace Act, 1361. Except for the powers given to magistrates by that statute she had no power to make the order which she did make. The conviction of the applicant of the offence charged against him did not give the magistrate the power to make the order in question, nor did the magistrate make this order because of this conviction. In other words, the conviction in this case for the offence against the Act of 1839 only provided an occasion, which the magistrate took, to consider something different from the offence for which she had sentenced the applicant, that is, the question whether she should not exercise the powers given her by the Act of 1361. In acting as she did she initiated a proceeding against the applicant under the Act of 1361 and decided in that proceeding to make the order which she did make.

In my opinion, such an order, so made, cannot properly be said to be an order made on the conviction in question. Support for this view is, I think, to be derived from a consideration of the orders which the Act of 1948 says shall be exceptions from those which are to be deemed for the purpose of appeal to be part of the sentence. Each one of the exceptions is such an order as the court would normally have power to make as a result of the conviction because of power given to the court to make such an order on that conviction. Unless excepted, they would be made appealable by the section, because they are orders which are made "on conviction." The order in this case could not have been made part of the penalty for the offence of obstructing the highway. For that offence the magistrate was sentencing the accused to the maximum penalty of 40s. Nor could it have been added to the conviction for that offence in the exercise of the powers of the magistrate when dealing with that offence alone. In my view, therefore, the order was not an order made "on conviction" so as to come within the definition of "sentence" given in s. 36 (2) of the Criminal Justice Act, 1948, and no appeal did, therefore, lie to the County of London Sessions and this motion should be dismissed.

PARKER, J.: I agree with both the judgments which have just been delivered and have nothing to add.

Application dismissed. No order as to costs.

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant); *The Solicitor, Metropolitan Police* (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

Re ROGERS' SETTLEMENT.ARNOTT AND ANOTHER *v.* ROGERS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), December 15, 1950.]

Settlement—After-acquired property—Covenant to settle on trusts of a will—Covenantor acquiring absolute interest (i) under the settlement and (ii) under the will—Application of covenant.

In 1902 a settlement was made on the marriage of A.'s daughter, B., with C., whereby a fund was settled on C. for life and on his death to B. for life, and after the death of the survivor of C. and B. to such issue of the marriage as C. should appoint, and in default in trust for the children of the marriage being male at the age of twenty-one years or being female on attaining that age or marrying. By cl. 17 of the settlement, B. covenanted with the trustees "that if at any time during the same coverture she shall become entitled in any manner and for any estate or interest to any real or personal property of the value of £500 or upwards at one time and from one and the same source (. . . except personal chattels) . . . then she and all other necessary parties will at the cost of the trust estate as soon as may be and to the satisfaction of the trustees convey such real or personal property to the trustees upon trust to stand seized or possessed of the same as personal property on trusts precisely similar to those declared concerning the said legacy and share of the residue in the [thereinbefore] recited will of [A.] deceased." Two children of the marriage were born. In 1927 the daughter of the marriage died a spinster intestate having attained the age of twenty-one years. After the death of his daughter, C. made a revocable appointment of the fund, subject to the life interests of himself and B., to the remaining child, a son. In 1934 the son died, an infant and intestate. On Jan. 1, 1950, C. died without having revoked the appointment. It was now argued that the moiety of the remainder appointed to the son expectant on B.'s death (which passed to B. under the son's intestacy) was caught by cl. 17 of the settlement.

HELD: as it was not the purpose of cl. 17 to cause to be re-settled on the trusts of the settlement property which had already devolved by virtue of those trusts, the interest in remainder was not caught by the clause.

Dictum of LORD MACNAGHTEN in Mackenzie v. Allardes ([1905] A.C. 292), *applied*.

By his will (which was recited in the settlement of 1902) A. settled a fund on B. for life and after her death for her issue as she should appoint and in default of appointment in trust for her children who attained the age of twenty-one years or being female attained that age or married, with a power to B. to appoint a life interest to her husband. B. appointed a life interest to C. and after the death (in 1927) of her daughter, appointed the fund, subject to her and C.'s life interests, to her remaining child, the son absolutely. Under the son's intestacy, B. became absolutely entitled to a moiety of the fund. On the question of the application of cl. 17 of the settlement of 1902,

HELD: the moiety of the fund had never before been the subject-matter of the settlement of 1902 and was, therefore, caught by cl. 17, and B. was bound to settle it in accordance therewith.

Re Bennett-Stanford Settlement Trusts ([1947] 1 All E.R. 888), *distinguished*.

[AS TO COVENANTS TO SETTLE AFTER-ACQUIRED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 29, pp. 571-583, paras. 833-850; and FOR CASES, see DIGEST, Vol. 40, pp. 493-517, Nos. 422-618.]

Cases referred to:

(1) *Mackenzie v. Allardes*, [1905] A.C. 285; 40 Digest 498, 462.

- (2) *Re Benett-Stanford Settlement Trusts*, [1947] 1 All E.R. 888; [1947] L.J.R. 1073; 177 L.T. 301; 2nd Digest Supp.
- (3) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 2 H. & Tw. 115; 15 L.T.O.S. 557; 41 E.R. 1379; 43 Digest 643, 790.

ADJOURNED SUMMONS to determine the application of a covenant to settle after-acquired property contained in a marriage settlement to funds devolving on the covenantor absolutely (a) under the trusts of the marriage settlement itself, and (b) under a will, on the relevant trusts of which the covenantor had by the said covenant agreed to settle the after-acquired property.

By a settlement dated Aug. 11, 1902, made between Arthur Edward Rogers (hereinafter called "Mr. Rogers"), of the first part, the defendant, Lily Eleanor Rogers (hereinafter called "Mrs. Rogers"), of the second part, and the trustees, of the third part, it was recited that a marriage was intended between Mr. Rogers and Mrs. Rogers and that Mr. Rogers had transferred to the trustees certain investments (hereinafter called "the husband's fund") to be held on the trusts thereafter declared. The trusts of the will of Sir John Arnott, deceased (the father of Mrs. Rogers), were then recited in full so far as they related to a legacy of £40,000 and a share of the testator's residuary estate settled by the will on Mrs. Rogers and her issue. The usual trusts of a husband's fund were then declared of the husband's fund, and by cl. 17 of the settlement Mrs. Rogers covenanted to settle her after-acquired property on the trusts of the thereinbefore recited will of Sir John Arnott. In the events which happened, Mrs. Rogers became entitled absolutely (apart from the operation of cl. 17) to (a) a share of the husband's fund, and (b) a share of the corpus of the legacy and residuary estate settled by the will of Sir John Arnott on herself and her issue. The relevant words of cl. 17, and the facts are stated in the judgment.

F. B. Marsh for the plaintiffs, the trustees of the settlement.

J. Brightman for the first defendant, Lily Eleanor Rogers.

Templeman for the second defendant, Williams Deacon's Bank, Ltd., the executor of the will of Arthur Edward Rogers.

HARMAN, J.: This is a case where in the upshot an absurd result has been produced. It arises out of a settlement made in 1902 on the marriage of the first defendant (whom I will call Mrs. Rogers) to her husband, Mr. Rogers, who died on Jan. 1, 1950, and is represented by the second defendant, Williams Deacon's Bank. There were two children of the marriage, a daughter who attained the age of twenty-one years and died intestate and a spinster in 1927, and a son, who died an infant and intestate in 1934. The sole next of kin both of the daughter and of the son were Mr. and Mrs. Rogers in equal shares. By the settlement, a fund, details of which were set out in a schedule, was settled on the usual trusts of a husband's fund, i.e., to pay the income to Mr. Rogers for his life and after his death to Mrs. Rogers, if surviving, for life without power of anticipation, and after the death of the survivor to such issue of the marriage as Mr. Rogers should appoint and in default in trust for the children at twenty-one or on marriage if female. This fund was duly enjoyed by Mr. Rogers during his life and passed to Mrs. Rogers on his death on Jan. 1, 1950. The question is: What happens to the remainder?

When the daughter died, Mr. Rogers made a revocable appointment, which became irrevocable on his death, whereby he appointed the fund after the death of the survivor of himself and Mrs. Rogers, in favour of the son absolutely. Therefore, on the death of Mrs. Rogers this fund passed to the son absolutely, and that interest in the fund was an interest immediately vesting when the appointment was made, but subject, of course, to the power of revocation and to the prior life interests. When the son died in 1934 his interest in half the fund went to Mr. Rogers (and as to that no question is here raised) and the other

half went to Mrs. Rogers. She became entitled to that interest in 1934, it being then a vested interest in remainder expectant on Mr. Rogers' death. So far we have got the interest back to Mrs. Rogers, but she entered into a covenant in the settlement of 1902 whereby, under cl. 17, she covenanted with the trustees:

"that if at any time during the same coverture she shall become entitled in any manner and for any estate or interest to any real or personal property of the value of £500 or upwards at one time and from one and the same source (. . . except personal chattels) . . . then she and all other necessary parties will at the cost of the trust estate as soon as may be and to the satisfaction of the trustees convey such real or personal property to the trustees upon trust to stand seized or possessed of the same as personal property on trusts precisely similar to those declared concerning the said legacy and share of the residue in the said recited will of the said Sir John Arnott deceased."

It is said that Mrs. Rogers became bound under that covenant to convey to the trustees the moiety of the son's reversionary interest in the fund, because it is caught by the after-acquired property clause in the events which have happened.

In my judgment, the after-acquired property clause in the settlement was never intended to catch property which was already in the settlement and on which the settlement had operated. It would be ridiculous that property already in the settlement should come into the settlement again and go on the limitations of the settlement, and so on, in an everlasting succession. I cannot think that is what the after-acquired property clause was intended to do. Although Mrs. Rogers acquired this interest afterwards, because her son did not die until 1934, this was the very property in which, under the settlement itself, she had a life interest already, and it is ridiculous to suppose that she would have to re-settle to give herself another life interest in the same property. Therefore, in my judgment, that property is not within the mischief of the after-acquired property clause.

I find some support for that view in LORD MACNAGHTEN'S speech in *Mackenzie v. Allardes* (1). That case was concerned with Scottish law. LORD MACNAGHTEN makes these general observations ([1905] A.C. 292):

"As regards clauses in marriage contracts providing for the settlement of after-acquired property, I quite agree that effect must be given to the intention of the parties apparent on the face of the contract construed fairly, although the result may seem to be whimsical or even unreasonable. But still there are some considerations which it is as well to bear in mind as aids to the construction of such clauses. These considerations may, of course, be excluded either designedly or accidentally by the language used, but unless they are so excluded they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not 'acquisition' within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect. In the present case I cannot find in the marriage contract of 1848 any indication that money, which under or in accordance with the trust would come to the hands of Mrs. Dunbar—money which was to be hers to hoard or spend, to waste or save, just as she pleased—was under any circumstances or in any event to be brought back under the operation of the trust and pass through the mill again. Such a result seems inconsistent with provisions

carefully made to safeguard her separate use and enjoyment of the income which was originally her own. It is, I think, opposed to the whole scope of the instrument."

Of course, there the facts were very different. LORD MACNAGHTEN was dealing, as I understand it, with an accumulated fund which represented the savings of a lifetime out of income, but he said that after-acquired property clauses of this kind are not meant to catch property settled by the settlement. I, therefore, hold that, so far as the husband's fund is concerned, it is not caught by the after-acquired property clause.

Mrs. Rogers was the daughter of Sir John Arnott, who made a will (which was recited in the settlement of 1902) in her favour. By that will he gave her a legacy and a share of his residue absolutely, with a proviso creating a trust to pay the income to her for life, and after her death on trust for her issue as she should appoint and in default of appointment on trust for her children who attained the age of twenty-one years or (being female) married. There was a power for her to give a life interest to her husband. Mrs. Rogers enjoyed the first interest and she exercised her power to appoint a life interest to her husband, which never came into effect because he predeceased her. When her daughter died she made a revocable appointment, shortly after her husband appointed his fund, directing the trustees of the will of Sir John Arnott, after the death of herself and subject to her husband's interest, to stand possessed of the legacy and the residuary share in Sir John's estate in trust for the son absolutely. This fund too, on the son's death intestate, goes half to his mother and half to his father, and, clearly, the father keeps the half that goes to him. It is suggested here again that the mother's half is caught by the after-acquired property clause in the settlement.

Now, the argument which has been advanced with respect to the husband's fund does not apply here, because this has never been the subject-matter of the settlement. It is property coming from the outside to this lady, being settled on the trusts declared by Sir John's will for herself for life, and so on. On the son's death intestate, half the fund reverts to her, but, if caught by the after-acquired property clause, it goes back again to him and so on. It is urged that I may avoid this result if I follow a case before JENKINS, J., *Re Bennett-Stanford Settlement Trusts* (2). There was a marriage settlement with remainder to the children of the marriage and an after-acquired property clause on the part of the wife. There was only one child who attained a vested interest. He died a bachelor and left a will leaving everything he possessed to the wife, that is to say, to his mother. He was entitled under another settlement, at his death, to an absolute interest in the remainder of the settled property, and this interest, it was said, was caught by the after-acquired property clause. The interest was given in terms such as to be subject to the after-acquired property clause. The question, states the headnote of the report, was whether, under the provisions of that clause, the interest should be held on trust, subject to the life interests of the husband and wife, for the son, who had attained a vested interest under the original trusts of the marriage settlement, or whether, since it did not become subject to the after-acquired property clause until after the son's death, it should be held on the ultimate trusts of the settlement. I do not think that quite accurately states the question. The question, as I see it, was: Should it be left in the son's estate by reason of some modification of the trusts of the settlement so as to bring in an ultimate trust by which he was to be a beneficiary, or should it go to the mother on the footing that the after-acquired property clause had to be disregarded in the circumstances? It was also argued that there was an intestacy as to the son's estate and that his disposition was ineffective because it brought it back to himself. On that JENKINS, J., says ([1947] 1 All E.R. 891):

"In this case there was an effective disposition of the whole of the son's interest in favour of his mother absolutely. If, therefore, the effect of applying to the absolute interest so given the trusts engrafted on it by the after-acquired property clause was to bring some residual interest back to the son's estate, that would be a case in which, in my judgment, the principle of *Lassence v. Tierney* (3) would apply, that is to say, there would be an absolute gift with a trust engrafted on it which did not exhaust the whole beneficial interest, with the result that the original absolute gift would remain."

I do not think I can take that view here. There was no will on the part of the son in the present case and I do not think that point arises. What happens is that the property goes from the son to the mother, never having been in the settlement before, and is subject to her after-acquired property clause. I would gladly follow *Re Bennett-Stanford Settlement Trusts* (2) if I thought it really applied here, but I do not, on the whole, think it does. It follows from the earlier part of this judgment that, once Mrs. Rogers's share of the son's interest in remainder in the will fund has been brought into the settlement by the operation of the after-acquired property clause, the operation of the clause will be exhausted and the process will not be repeated.

Order accordingly. Costs to be paid out of the fund in the hands of the trustee. Solicitors: Carleton-Holmes & Co. (for all parties).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

Reversed in part. C.A. [1951] 2 All E.R. 543.

Re D'AVIGDOR-GOLDSMID'S LIFE POLICY. *D'AVIGDOR-GOLDSMID v. INLAND REVENUE* COMMISSIONERS.

[CHANCERY DIVISION (Vaisey, J.), November 13, 14, 15, December 20, 1950.]

Estate Duty—Property deemed to pass—Money received under policy of assurance—Policy kept up for donee—"Donee"—Interest accruing or arising—Accruing or arising on death of assured—Contemporaneous assignment of policy and other property—Subsequent premiums paid by assignee—Whether policy indirectly purchased or provided by assignor—Finance Act, 1894 (c. 30), s. 2 (1) (c), s. 2 (1) (d)—Finance Act, 1939 (c. 41), s. 30 (1).

In 1904 the deceased took out a policy of assurance on his own life and for his own benefit for £30,000 with profits. On Oct. 22, 1907, the deceased made an ante-nuptial settlement whereby he settled certain freehold estates, certain investments, and the policy, and directed that the trustees should receive the moneys payable under the policy at maturity and invest them in freehold land to be held on the same trusts as might then be subsisting in relation to the freehold estates thereby settled. Under the settlement the deceased took a protected life interest in the freehold estates, which after his death were directed to be held in tail male for the first and other sons of the marriage, subject to a jointure rentcharge. The deceased covenanted in the settlement to pay the premiums on the policy. In 1930, by virtue of powers conferred by a private Act of Parliament, the existing trusts were brought to an end, and by a deed of re-settlement, dated June 10, 1930, the freehold estates were settled on such trusts as the deceased and the plaintiff (the deceased's eldest son) should by deed jointly appoint (provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly) and in default

of and until and subject to any appointment (as regards part thereof) on trusts under which there was a discretionary trust of which the plaintiff was the principal object, and (as regards the remainder) on trusts under which the deceased took a determinable protected life interest in restoration of his former life interest under the settlement. The deceased covenanted in the re-settlement to pay the premiums on the policy, and it was provided that the proceeds of the policy should become subject to the same trusts as that part of the realty in which the deceased had a protected life interest. On Nov. 10, 1934, the deceased and the plaintiff appointed that the policy (and also certain real property (the "Wood Street property")) should be held in trust for the plaintiff absolutely, and the deceased was released from his covenant to pay the premiums. The deceased paid all the premiums falling due prior to Nov. 10, 1934, but thereafter until the maturity of the policy the premiums were paid by the plaintiff. On Apr. 14, 1940, the deceased died, and the Crown claimed estate duty under the Finance Act, 1894, s. 2 (1) (c) or s. 2 (1) (d) in respect of the proceeds (or part thereof). Of the thirty-seven premiums which had been paid, the deceased had paid four prior to the date of the original settlement, and a further twenty-three prior to the disentailment in 1930. He paid a further four before the appointment of 1934, and the plaintiff paid the last six premiums.

HELD: (i) although until 1934 the policy was kept up by the deceased, it was not kept up for the plaintiff, who, as the ultimate donee, was the "donee" for the purposes of the Customs and Inland Revenue Act, 1889, s. 11 (1), it being irrelevant that he was one of the beneficiaries under the settlement and re-settlement, and, therefore, s. 2 (1) (c) of the Act of 1894, did not apply.

Lord Advocate v. Fleming ([1897] A.C. 145), *applied*.

(ii) the property assigned to the plaintiff in 1934 was the policy, *i.e.*, the benefit of the contract of insurance with the insurance company, and no new benefit accrued or arose in connection therewith on the deceased's death, and, therefore, s. 2 (1) (d) of the Act of 1894 was inapplicable.

Lord Advocate v. Hamilton's Trustees (1942 S.C. 426), *applied*.

(iii) the contemporaneous appointment of the Wood Street property did not give rise to a claim in respect of the policy moneys under s. 2 (1) (d) of the Act of 1894 by virtue of the Finance Act, 1939, s. 30 (1), the plaintiff being free to pay the premiums in any manner and out of any resources as he wished.

[AS TO POLICIES KEPT UP FOR A DONEE, see HALSBURY, Hailsham Edn., Vol. 13, p. 241, para. 232; and FOR CASES, see DIGEST Supp.]

Cases referred to:

- (1) *Lord Advocate v. Fleming*, [1897] A.C. 145; 66 L.J.P.C. 41; 61 J.P. 692; *sub nom. Lord Advocate v. Robertson*, 76 L.T. 125; 21 Digest 87, 632.
- (2) *Lord Advocate v. Inzievar Estates*, [1938] 2 All E.R. 424; [1938] A.C. 402; 107 L.J.P.C. 65; 159 L.T. 97; Digest Supp.
- (3) *Parr v. A.-G.*, [1926] A.C. 239; 95 L.J.K.B. 417; 134 L.T. 321; Digest Supp.
- (4) *A.-G. v. Murray*, [1904] 1 K.B. 165; 73 L.J.K.B. 66; 89 L.T. 710; 68 J.P. 89; 21 Digest 16, 79.
- (5) *Tennant v. Lord Advocate*, [1939] 1 All E.R. 672; [1939] A.C. 207; 108 L.J.P.C. 65; 160 L.T. 441; Digest Supp.
- (6) *Re Albert Life Assurance Co.*, (1870), L.R. 9 Eq. 703; 39 L.J.Ch. 257; 22 L.T. 92; 29 Digest 362, 2927.
- (7) *Lord Advocate v. Hamilton's Trustees*, 1942 S.C. 426; 2nd Digest Supp.
- (8) *Re Hartland*, [1911] 1 Ch. 459; *sub nom. Re Dixon Hartland*, 80 L.J.Ch. 305; 104 L.T. 490; 21 Digest 38, 247.

- (9) *Brooks v. Inland Revenue Comrs.*, [1913] 3 K.B. 398; 82 L.J.K.B. 1086; 109 L.T. 363; 42 Digest 670, 815.
- (10) *Inland Revenue Comrs. v. Scott's Trustees*, 1918 S.C. 720; 55 S.L.R. 654; [1918] 2 S.L.T. 97; 21 Digest 15, 73i.
- (11) *A.-G. v. Dobree*, [1900] 1 Q.B. 442; 69 L.J.Q.B. 223; 81 L.T. 607; 64 J.P. 24; 21 Digest 17, 97.
- (12) *A.-G. v. Robinson*, [1901] 2 I.R. 67; 21 Digest 15, 73, q.

ADJOURNED SUMMONS under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, to determine a question of liability to estate duty.

The Crown claimed estate duty on moneys payable under a policy of assurance on the life of the deceased, either under s. 2 (1) (c) of the Finance Act, 1894, or under s. 2 (1) (d) of that Act, as extended by the Finance Act, 1939, s. 30 (1). The plaintiff, the son of the deceased, claimed either that no duty was payable, or that duty was payable on twenty-seven thirty-thirds (the proportion of premiums paid by the deceased after the policy was first settled), or on two-fifths (the proportion of premiums paid by the deceased after the policy was re-settled) of the policy moneys.

Tucker, K.C., *Cyril King, K.C.*, and *Wilfrid Hunt* for the plaintiff.
Upjohn, K.C., and *J. H. Stamp* for the Crown.

Cur. adv. vult.

Dec. 20. **VAISEY, J.**, read the following judgment. The question which arises on the present summons is whether, on the true construction of the Finance Act, 1894, and amending Acts and in the events which have happened, estate duty became payable as claimed by the Inland Revenue Commissioners, who are the defendants, on the death, which happened on Apr. 14, 1940, of Sir Osmond Elim d'Avigdor-Goldsmid (whom I will call "the deceased") in respect of a policy of assurance on his life, dated May 3, 1904, and effected with the Royal Insurance Co., or of the sum of £48,765 which became payable under such policy on maturity. The plaintiff, Sir Henry Joseph d'Avigdor-Goldsmid, alleges that no duty became payable on such death either in respect of the said policy or in respect of the said policy moneys. Alternatively, he says that the duty was payable only on twenty-seven thirty-third parts of such moneys or only on two-fifths parts thereof. The defendants' claim is based alternatively either on s. 2 (1) (c) of the said Act or on s. 2 (1) (d) of the said Act as extended by s. 30 (1) of the Finance Act, 1939.

The history of the matter is as follows. The policy bears date May 3, 1904. The annual premium was £695 payable on Jan. 20, 1905, and on each succeeding anniversary of that date during the life of the deceased. On the issue of the policy a first premium of £510 6s. was paid in respect of the initial period of "cover," viz., 268 days from Apr. 27, 1904, to Jan. 20, 1905. From first to last thirty-seven premiums were paid. The deceased was married on Oct. 23, 1907, to Miss Rose Anne Alice Landau, and the plaintiff is the eldest son of the marriage, having been born on June 10, 1909. On his said marriage the deceased made a settlement dated Oct. 22, 1907, of (i) certain freehold estates, (ii) certain investments, and (iii) the above-mentioned policy, which was originally for a sum of £30,000 with profits. The interest which the deceased took under the settlement was, *inter alia*, a protected life interest in the settled freeholds, out of which, after his death, a jointure rentcharge was limited to his wife with power for him to apportion it among the various settled properties, and, subject as aforesaid, as to the estates specified in the first and second parts of sched. I to the settlement, there was a limitation to the first and other sons of the marriage in tail male. The policy with all bonuses and additions was assigned to the trustees on trust to receive the moneys to become payable thereunder at maturity and to invest the same in the purchase of freehold hereditaments to be settled on and subject to the uses, trusts, powers and provisions therein

declared and contained concerning the beforementioned freeholds, or such of them as should be subsisting or capable of taking effect, and in the meantime to invest or apply it in any other mode in which capital moneys under the Settled Land Acts, 1882 to 1890, were authorised to be invested or applied. The deceased covenanted to pay the premiums on the policy, and he was given an option (which he never exercised) to apply bonuses in reduction of premiums.

- A A private Act of Parliament entitled the Goldsmid Estate Act, 1928, was passed on Aug. 3, 1928, and by s. 3 (1) of the said Act the deceased was empowered by deed effectually to assure his life interest in all or any parts of the settled property to the person who at the date of such assurance was next entitled in remainder or reversion expectant on his death to the property to which the assurance related, and in particular it was provided that that section should
- B extend to a disentailing deed affecting the said property or any part thereof whereby the property was assured to a grantee on trusts conferring a general power of appointment having priority over the life interest, and it was provided by s. 3 (2) of the Act that any assurance thereby authorised should operate as if the settlement had not contained any provision to determine the deceased's life interest and as if, in place thereof, an absolute life interest had been limited
- C to him, and any such assurance of part of the settled property should not operate to effect a determination of the said life interest as respects any other part of the settled property.

By a deed of appointment dated June 10, 1930, the deceased under a power of appointment conferred on him by the settlement over certain properties and funds thereby settled for the benefit of his younger children, appointed that

D the same should be held in trust for the plaintiff in tail male, subject to the prior limitations and powers in such appointment referred to, and by cl. 1 of a disentailing deed also dated June 10, 1930, the plaintiff, with the consent of the deceased as protector of the settlement, assured, and the deceased, in exercise of the powers conferred on him by the said Act as to his life interest in the property (but not so as to transfer any legal estate), assured, released

E and confirmed to the trustees all the hereditaments of which the plaintiff was then tenant in tail under the settlement or the said appointment, to hold the same in fee simple or absolutely freed from the life estate or interest of the deceased and from the plaintiff's interests in tail male and all subsequent estates or interests on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint and in default of and until and

F subject to any such appointment on the precedent subsisting trusts and so as to restore the same, and by cl. 2 of the disentailing deed a similar assurance was made of *inter alia* the said life policy on and subject to similar trusts and powers.

Following on the two last-mentioned deeds a re-settlement was, on the same June 10, 1930, made by the deceased and the plaintiff under their said joint

G powers of appointment of, *inter alia*, the said policy. By cl. 3 of the re-settlement, some of the family real estate was settled on such trusts and in such manner generally as the deceased and the plaintiff should by deed jointly appoint, provided that this power should not be capable of being exercised so as to benefit the deceased directly or indirectly and in default of and until and subject to any appointment on trusts under which during the life of the plaintiff

H there is a discretionary trust of which the plaintiff is the principal object. By cl. 4 of the re-settlement other parts of the family real estate were settled on trusts under which the deceased and the plaintiff had a joint power of appointment corresponding to the power conferred on them by cl. 3 of the deed and subject thereto and to certain charges the deceased took a determinable protected life interest in restoration of his interest in those parts of the real estate under the settlement with remainder on the trusts and subject to the powers and provisions affecting the estates comprised in cl. 3 of the re-settlement.

By cl. 10 (1) of the re-settlement, the deceased, so long as the said life policy should remain subject to the trusts thereof, covenanted with the trustees that he would duly pay all money payable and do all things necessary for keeping it on foot. By cl. 22 of the re-settlement, in exercise of the said power conferred by the disentailing deed, the deceased and the plaintiff appointed *inter alia* the said policy to be held on trust to get in all moneys to become payable thereunder and to stand possessed of the net money received on the trusts and subject to the powers and provisions on and subject to which capital money arising under the Settled Land Act, 1925, from the estates settled by cl. 4 of the re-settlement or investments representing the same would be held, and, as to the said money and investments mentioned in sched. II to the re-settlement, on the trusts and subject to the powers and provisions on and subject to which capital money arising under the said Act from the estate settled by cl. 3 of the re-settlement would be held. A B

Prior to the appointment hereinafter referred to, the freehold property known as No. 27, Wood Street, in the city of London, was acquired out of capital moneys representing part of the estates settled by cl. 4 of the re-settlement. By a deed of appointment dated Nov. 10, 1934, under the hands and seals of the deceased and the plaintiff they, in exercise of their said joint powers of appointment conferred by the re-settlement, appointed that, first, the said life policy, and, secondly, the said premises No. 27, Wood Street, should be thenceforth held by the trustees and the deceased respectively in trust for the plaintiff absolutely and in fee simple for the plaintiff's own use and benefit discharged from the trusts, powers and provisions declared by the re-settlement, and the plaintiff thereby released and discharged the deceased from all his covenants contained in the re-settlement for the payment of premiums on and otherwise relating to the said policy and that a term of ninety-nine years limited by the re-settlement should as regards the premises affected by such appointment cease and be extinguished. C D

The effect of the last-mentioned deed of appointment was that the plaintiff became absolute beneficial owner of the said life policy and of the said premises, 27, Wood Street. The insurance company hold the original policy. The legal estate in the said premises, 27, Wood Street, was vested in the plaintiff after the said appointment. The plaintiff could have at any time surrendered or sold the said policy had he so desired, but he preferred to keep it up. The premium under the policy was payable annually, as I have said, on every Jan. 20. In all, thirty-seven premiums were paid on the policy, of which thirty-three in all were paid subsequently to the said marriage settlement. Subsequently to the re-settlement, ten premiums were paid, of which four were paid prior to the said appointment of 1934, and six were paid subsequently. The plaintiff paid out of his own moneys the six premiums paid after the said appointment, but the deceased paid all the premiums paid before the appointment of 1934. When the policy matured, *i.e.*, on the death of the deceased, on Apr. 14, 1940, the plaintiff received a sum of £48,765 thereunder, being the original sum of £30,000 plus bonuses. E F G

Thirty-seven premiums were paid in respect of the policy from its issue until maturity, and it would appear to follow (a) that the deceased had paid for his own benefit four premiums, that is to say, the first premium of £510 6s., and three premiums of £695 each payable in 1905, 1906, and 1907; (b) that the deceased had paid for the benefit of the persons interested under the marriage settlement twenty-three further premiums payable in the years 1908 to 1930 inclusive; (c) that the deceased had paid for the benefit of the persons interested under the re-settlement four premiums payable in the years 1931 to 1934 inclusive; and (d) that the plaintiff for his own benefit has paid six premiums payable in the years 1935 to 1940 inclusive, he having since Nov. 10, 1934, been the absolute owner of the policy and exclusively entitled to the benefit H

thereof. On Apr. 14, 1940, when the policy matured, he alone could have given the insurance company a good discharge for the policy moneys. It is to be noted that more than five years had elapsed between Nov. 10, 1934, and Apr. 14, 1940.

The claim to the duty rests either on s. 2 (1) (c) or on s. 2 (1) (d) of the Finance Act, 1894, which specify two of the items of property which are deemed to be included in property passing on a death, although they do not, in fact, so pass. I will deal with the alternatives separately, taking head (c) first. The words are:

"Property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom . . ."

I will now read the relevant part of s. 38 of the Act of 1881 with the modifications indicated. It reads thus:

"(b) Any property which a person dying . . . having been absolutely entitled thereto, has . . . caused or may . . . cause to be transferred to or vested in himself, and any other person jointly whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to such other person."

and s. 11 of the Act of 1889 provides (so far as material):

"The charge under the said section [s. 38 of the Act of 1881] shall extend to money received under a policy of assurance effected by any person dying on or after June 1, 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit."

The Crown's claim under head (c) is for duty on a proportion of the policy moneys, and a question may arise as to what the proportion is.

Now, it is quite clear that in 1930 the original settlement was destroyed, and a new settlement came into operation under which a class of beneficiaries different from the class interested under the original settlement came into existence, and it also is quite clear that after Nov. 10, 1934, the plaintiff became sole owner of the policy, and it certainly seems a strange result if duty should become payable by reason of the death of the deceased more than five years afterwards. The authorities which were cited to me are numerous and difficult to reconcile, but it seems to me that on this part of the case I ought to follow the decision of the House of Lords in *Lord Advocate v. Fleming* (1). The facts there are simple and, I should have thought, on all fours with the facts in the present case. My attention was called to the passage in LORD HERSCHELL's speech ([1897] A.C. 154), where he points out that it is an abuse of language to suggest that the policy had ever been wholly or even partially kept up for the benefit of the daughter to whom it was assigned merely because of the premiums having been paid prior to the assignment when the daughter was in no sense a "donee." There is also the passage in the speech of LORD HALSBURY, L.C. (*ibid.*, 153), where he points out the fallacy in the suggestion that the moment a policy of insurance is taken out the person who takes out the policy keeps it up not only for his own benefit but for the benefit of some person becoming a donee at a future time. So far as the claim under head (c) is concerned, I think that the Crown have not established their case. I have been somewhat puzzled by *Lord Advocate v. Inzievar Estates* (2), but there it was pointed out by LORD MAUGHAM, L.C., that where the donee had paid

all the premiums subsequent to the assignment no duty would be payable, but where, as in that case, the assignor had paid some of the premiums subsequent to the assignment, a proportionate claim to the duty could be established. On the whole, I think that that case, no less than the earlier one, supports the conclusion which I have reached, that no duty is payable under head (c).

I have come to the conclusion that the donee referred to in s. 11 of the Act of 1889 is the ultimate donee, and that the reference to donee is not properly applicable to a series of donees, and that the word only properly signifies the final beneficiary and owner of the policy in question. I have considered *Parr v. A.-G.* (3), which was, of course, a decision on a different point, but it seems to establish the proposition that where a settlement is put an end to, as by an absolute assignment, the old estates cease to exist. For any purpose they are, indeed, merely past history. It seems to me that the Crown's case is that one must look at the whole life of the policy from start to finish, and that is a proposition which I cannot accept. I do not think that the deceased can be considered for the present purpose as having kept up the policy for the benefit of the plaintiff as donee. He could never, prior to 1934, have been understood to be doing so, except prophetically. The only person who kept up the policy for the benefit of the plaintiff was the plaintiff himself. I reject the argument that the fact that the plaintiff was one of a number of beneficiaries under the previous settlements has any bearing on the present question. I do not think that the policy was kept up by the deceased for the benefit of the plaintiff. It is not denied that it was kept up by the deceased until Nov. 10, 1934, but it was not kept up, in my judgment, for the plaintiff's benefit. I have come to the conclusion that neither on the whole nor on four-tenths (or two-fifths) or twenty-seven thirty-thirds of the policy moneys is any duty leviable, *i.e.*, under head (c).

I turn to head (d), which is as follows:

"Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

Under head (d) it seems to me that where a life policy is sold or given away by the life assured to another person, there can be no other interest in it or in the moneys assured thereby. That, in my view, is so, at any rate, in a case in which the life assured has ceased to be concerned with the policy, in any way, as, for instance, by having covenanted to pay the premiums: see *A.-G. v. Murray* (4).

I was invited to consider whether the property assigned was the policy of insurance or the moneys payable thereunder. I am of opinion that it was the policy, *i.e.*, the contract or the benefit of the contract with the insurance company. On this footing, the plaintiff was the sole and absolute owner of the assigned property at the death of the deceased, and, he having been so for more than five years from the date of the assignment, no duty could attach to it, or to any of its fruits, on the death of the deceased. Admittedly, I think, the plaintiff might have surrendered or sold the policy or the benefit of the policy before its maturity, in which case, so far as I can see, no duty could possibly have attached to the proceeds. I think that no beneficial interest accrued or arose on the death. The point whether it was the policy or the policy moneys which were provided by the deceased was apparently left open in *Tennant v. Lord Advocate* (5), but see the observations of LORD RUSSELL of KILLOWEN ([1939] 1 All E.R. 675). If the view which I have expressed is right, the claim under (d) cannot, I think, be sustained. The nature of a policy of assurance is thus expressed by SIR WILLIAM JAMES, V.-C., in *Re Albert Life Assurance Co.* (6) (L.R. 9 Eq. 705):

"The contract on the part of the company was, that if he should, on or before a certain day in every year, pay a certain sum, their assets should

be liable to pay his representatives a certain sum on his death. He was under no contract with the company; it was simply this, that he had to perform a condition the performance of which entitled him to certain benefits."

That seems to me to be accurate, with appropriate additions of references to the assured's assigns.

- A I was urged to consider *Lord Advocate v. Hamilton's Trustees* (7), as concluding the matter so far as I am concerned in the plaintiff's favour. I accept that view, and hold that the claim under head (d) is precluded by that authority. *Re Hartland* (8) and *Brooks v. Inland Revenue Comrs.* (9) are to the effect that it is my duty as a court of first instance in England to follow a unanimous decision of the Court of Session on a statute equally applicable to both countries.
- B I propose to follow *Lord Advocate v. Hamilton's Trustees* (7) and to treat it as concluding the issue in this action, so far as the Crown rests the claim under head (d). It is not necessary, I think, for me to enter at length into the facts on which the case to which I have referred arose. LORD WARK, in his judgment, after observing that the claim in that case was made under head (d) and not under head (c), observed that while it was not disputed that head (d) might render subject to duty insurance policies and policy moneys which escape under head (c), and that the words "other interest" in (d) are sufficiently wide to include the right to a policy or policy moneys, he found it difficult to understand how it could catch the very case with which head (c) deals, viz., the case of an out and out transfer of a policy by way of gift and make the interest in such policy liable to duty whether the policy be kept up by a donor for the benefit of the donee or not. He added that if that were a sound view it seemed to him that head (c) was otiose. He expressed the view that the Crown's claim failed because it was not shown that any beneficial interest accrued or arose on the death of the deceased, and he pointed out (1942 S.C. 443) that the whole interest in the policies and the policy moneys had passed to the beneficiaries twenty-four years before the deceased's death. Their interest then was fully vested, and was neither altered nor increased by the deceased's death. The nature of the interest was the same although the value of it was increasing during the lifetime of the assured, and reached its maximum at his death. An earlier passage in the same judgment puts the case in a manner which seems to me most convincing. He says (*ibid.*, 440):
- E "Coming to consider the language of s. 2 (1) (d), it is apparent that,
- F in order to succeed, the Crown must establish two things: first, that the property sought to be charged has been provided or purchased by the deceased, either by himself alone or in concert or by arrangement with any other person; and, second, that to some extent there has been a beneficial interest arising or accruing by survivorship or otherwise on the death of the deceased. If either of these is not established, the claim fails.
- G And it is well to keep in view the elementary principle of construction of taxing statutes that it is for the Crown to show that the subject is within the ambit of the statute and not for the subject to show that he is outside it. Having regard to what I have said as to s. 2 (1) (c), I think there is soundness in the argument for the respondents that, where you are dealing with policy moneys, it is not sufficient to bring them within the expression 'purchased or provided by the deceased' that the policy was originally
- I taken out by him, or even that certain premiums were paid by him upon it, if it has been assigned to a donee and the assured has thereafter paid no further premiums. And, in my opinion, this is true, even when the gift is made through the medium of a trust, so long as it is not one of the purposes of the trust to make payment of the premiums out of funds provided by the truster. The argument for the Crown amounted to this, that the deceased had in effect provided the premiums after the date of

the declaration of trust by creating a trust and empowering the trustees to borrow upon the trust property, which was of sufficient value to afford security for the further premiums required. Alternatively, it was said that the trustees were his mandataries to pay the premiums. I do not think this argument is sound in either alternative. The trustees were trustees, not for the deceased, but for the beneficiaries. They were answerable to them alone, and, when they borrowed, it was in their interest and on their behalf. They were not directed to borrow, but only empowered to do so. They might have surrendered the policies, or some of them, at any time. Accordingly, the further premiums required were paid truly by the beneficiaries entirely, and not by the deceased. The case of *Scott's Trustees* (10), on which the Crown relied, has thus no application. Moreover, in *Scott* (10) there was no vested right in the beneficiaries until the death of the assured."

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The latter part of this passage seems to me to dispose of any claim that might have been based on the Finance Act, 1939, s. 30 (1), in reference to the Wood Street property as affecting the policy and policy moneys in question. It may well be that *Lord Advocate v. Hamilton's Trustees* (7) is inconsistent with *A.-G. v. Dobree* (11), *A.-G. v. Robinson* (12), and *Inland Revenue Comrs. v. Scott's Trustees* (10), but I think, as I have said, that I am bound to follow it.

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The authorities are, in my view, difficult to reconcile. I am aware that a taxing statute must be taken as meaning exactly what it says, irrespective of any capricious or surprising consequences that may flow from such a construction of it, but, in truth, it surprises me that so simple and so ordinary a situation as is found in the present case should fall to be dealt with in the manner which the Crown suggests. The property which the plaintiff acquired on Nov. 10, 1934, viz., the policy, was essentially the same in character as any other property which is capable of absolute and unfettered ownership. The plaintiff could have sold it, mortgaged it, given it away, destroyed it, settled it, or (being a policy on his father's life) he could have surrendered it at the moment when his father was *in extremis*, at the point of death. In the case of none of these possible dealings on the plaintiff's part could the present claims have been established so far as I see. I will declare that no estate duty became payable on the deceased's death on the insurance policy or on the value of it or on any part of such value or on the sum of £48,765 which became payable thereunder or on any part of such sum. The defendants must pay the plaintiff's costs.

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Order accordingly.

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Solicitors: *Frere, Cholmeley & Nicholsons* (for the plaintiff); *Solicitor of Inland Revenue*.

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

TINKHAM v. PERRY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Lord Radcliffe and Singleton, L.J.), December 18, 1950.]

Rent Restriction—Death of tenant—“Where tenant leaves no widow”—Implication of residence with tenant at time of his death—“Member of tenant’s family”—Woman living in adultery with tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17); s. 12 (1) (g).

The tenant of a dwelling-house to which the Rent Restrictions Acts applied occupied the premises with his wife until in or about September, 1948, when the wife left the house and the defendant came to live with the tenant and had two children by him. In August, 1950, the tenant died, and the defendant remained in the house after his death. In an action by the landlord for possession, the defendant claimed the protection of the Rent Restrictions Acts on the ground that she was a “member of the tenant’s family” within the meaning of s. 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides that the expression “tenant” includes “the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow . . . such member of the tenant’s family so residing as aforesaid . . .”

HELD: on the true construction of s. 12 (1) (g) it was not possible to limit the words “where a tenant leaves no widow” by the added qualification “residing with him as aforesaid”, and, since the tenant’s wife was still alive, the section did not apply and the defendant was not entitled to protection.

Re Bidie ([1948] 2 All E.R. 995), distinguished.

Per SIR RAYMOND EVERSHERD, M.R.: “I must not be taken in any way to be suggesting that [the defendant] could succeed in showing that a woman living with a tenant in these circumstances could be held to be a member of the tenant’s family.”

[AS TO STATUTORY TENANTS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 334, 335, paras. 400, 401, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 31, pp. 575, 576, Nos. 7226-7255, and Supplements.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12 (1) (g), see HALSBURY’S STATUTES, Second Edn., Vol. 13, p. 999.]

Case referred to:

(1) *Re Bidie, Bidie v. General Accident Fire & Life Assurance Corpn., Ltd.*, [1948] 2 All E.R. 995; [1949] Ch. 121; [1949] L.J.R. 386; 113 J.P. 22; 2nd Digest Supp.

APPEAL by the defendant from an order of His Honour JUDGE PRATT, made at Newton Abbot County Court, and dated Oct. 19, 1950, granting the landlord possession of a dwelling-house to which the Rent Restrictions Acts applied.

The county court judge held that the defendant, a woman who had been living with the statutory tenant of the premises up to the date of his death, his wife having left him, was not a member of the tenant’s family within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (1) (g).

L. A. Blundell for the defendant.
Kisch for the landlord.

SIR RAYMOND EVERSHERD, M.R.: This is an appeal from a decision of His Honour JUDGE PRATT sitting at Newton Abbot County Court. The action was brought by Mrs. Tinkham, as landlord, for possession of certain premises, 11 Sea Lawn Terrace, Dawlish, against the defendant, Miss Perry, who at the time the proceedings were brought was living there with her two children of

which the father was the former tenant of the premises, a Mr. Latter. Mr. Latter and his wife had lived at these premises for some time prior to September, 1948, but about that time Mrs. Latter left her husband, and the defendant then moved in and lived with Mr. Latter. As a result of their cohabitation the two children that I have mentioned were born. On Aug. 24, 1950, Mr. Latter died.

The claim of the defendant is that in the circumstances she falls within the ambit of para. (g) of s. 12 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, either as Mr. Latter's "widow" or as a member of his family. In each case she says with truth that she was residing with the tenant at the date of his death. The language of para. (g) so far as relevant, is as follows:

"... the expression 'tenant' includes the widow of a tenant . . . who was residing with him at the time of his death, or, where a tenant . . . leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court."

Counsel for the defendant has felt unable to argue that his client falls within the first part of that definition. He cannot say that the defendant was *the* widow of Mr. Latter in any ordinary acceptance of those words, and certainly not within their use in this paragraph. He has, however, put forward an alternative argument, namely, that the second part of the definition can be made to apply to this case, and as a premise to that part of his case he says that the words "where a tenant leaves no widow" means "leaves no widow such as mentioned before," *viz.*, a widow residing with him at the time of his death. If that is right, counsel was prepared to contend that the defendant, in the circumstances of the case, could fairly be described as a member of Mr. Latter's family. In my judgment, it is impossible as a matter of fair construction of the language to limit the phrase "where a tenant leaves no widow" by the added qualification "residing with him as aforesaid." Plainly, words should not be added by implication to the language of a statute unless it is necessary to do so to give the enactment sense and meaning in its context, and in this case I cannot see any need to read these words in any other than their ordinary sense. They apply, therefore, only to the case where, in fact, a tenant dies leaving no widow. Since Mr. Latter did not so die (for Mrs. Latter is still alive) it follows that the rest of the paragraph cannot apply.

The chief ground on which counsel urged us to add the qualification I have indicated was this. He said that unless some such qualification were added we should introduce anomalies that Parliament cannot be thought to have intended. Thus, in the simple, and not infrequent, case where a man's wife has parted from him and he lives in a rent controlled house with children of his own, those children could not on his death claim the benefit of the Act because there was then living, elsewhere and separated from the husband, his widow. That, says counsel, is a harsh result which Parliament could not have intended. Further, it is said, in the other case introduced by this part of the paragraph, the case where the tenant is a woman, there is no such requisite that she should leave no widower. Putting those two considerations together, it makes, according to the argument, a more probable result to say that the words "where a tenant leaves no widow" mean "where the tenant leaves no widow residing as aforesaid." I fully accept the force of those considerations, and, indeed, it looks as though Parliament may not have chosen its language with all its customary care, but the fact is that sense can perfectly well be given to this paragraph by reading the words as they are written and according to their ordinary context.

Re Bidie (1), to which counsel alluded, was a wholly different case. The question there was whether the words in s. 2 (1) of the Inheritance (Family Provision) Act, 1938, "representation in regard to the testator's estate for

general purposes is first taken out " meant representation of any kind, whether on an intestacy or by probate of a will. If they meant the former, which might be said *prima facie* to be what the words say, then in the case of a man dying apparently intestate, but whose will was discovered some time later, the widow would be liable to be barred altogether from claiming the benefit of that Act. The whole purpose of the Act of 1938, however, was to give relief in certain circumstances to a woman who was inadequately provided for by the testator's will, that is to say, the statute only operates in the case of persons dying testate. That being so, it was held by this court to be not only the natural, but also the necessary, consequence that the word "representation" must have been intended to refer to representation in the sense of probate being granted of the will under which the widow was claiming or could claim.

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B No such consideration applies to the present case, and, therefore, I agree with the learned judge that we cannot introduce into this paragraph the words which counsel asks should be inserted.

In the circumstances it is unnecessary to consider the rest of counsel's argument, though I must not be taken in any way to be suggesting that he could succeed in showing that a woman living with a tenant in these circumstances could be held to be a member of the tenant's family. On that I say nothing, having heard no argument, but I wish to avoid any suggestion that I should, apart from this point, have decided this case in the defendant's favour on that ground. For these reasons, I think the appeal should be dismissed.

C

LORD RADCLIFFE: I agree with all that has been said by the learned Master of the Rolls. The circumstances of the case are sad, but, in my view, there would be no chance of the appeal succeeding unless the court was entitled to construe these words in s. 12 (1) (g) "leaves no widow" as if they meant "leaves no widow so residing as aforesaid." It seems to me impossible to find in the context of that section or of the Act of 1920 as a whole any material which would entitle a court to introduce that qualification. Indeed, the fact that in the succeeding sentence appear the words "such member of the tenant's family so residing as aforesaid," referring to a member of the tenant's family, make it very difficult to suppose that, if the legislature had intended the same qualification to apply to the word "widow", it would not have expressly introduced the words there also. For these reasons I agree that the appeal must fail.

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SINGLETON, L.J.: I agree.

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Appeal dismissed. No order as to costs.

Solicitors: *Baileys, Shaw & Gillett*, agents for *Tozers*, Dawlish (for the defendant); *Taylor, Jelf & Co.*, agents for *J. & S. P. Pope*, Exeter (for the landlord).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

TINSLEY v. DUDLEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins, L.J., and Danckwerts, J.), December 11, 12, 1950.]

Bailment—Delivery to bailee—Goods on bailee's premises—Irrelevance of whether bailor invitee or licensee—Licensee of public house—Motor bicycle left in covered yard, marked "garage," adjoining and forming part of premises.

Before going into a public house for refreshment the plaintiff left his motor bicycle in a closed yard adjoining and forming part of the premises. On the gates of the yard was the name of the public house followed by the words: "Covered yard and garage." There was no attendant to look after vehicles which might be brought into the yard, and the plaintiff did not tell the defendant, the licensee of the public house, that he had left the bicycle there. When the plaintiff left the public house, he found that the bicycle had been stolen. In an action against the defendant claiming damages for its loss,

HELD: (i) assuming that the defendant was not an innkeeper at common law and that he would not be liable for the loss of the motor bicycle unless the inference could be drawn from the circumstances that the plaintiff had actually or constructively delivered the bicycle into his safe keeping, it was irrelevant to consider whether the plaintiff was an invitee or a licensee at the material time because the validity of the distinction between invitee and licensee bore only on matters relating to dangers arising from defects in the physical condition of the invitor's or licensor's premises and personal injury resulting therefrom, and not on those relating to the existence of some form of bailment of goods with the invitor or licensor, and, even if the plaintiff were an invitee, it did not follow that there was a delivery of possession of the bicycle by him to the defendant.

(ii) on the facts there was a general invitation to customers, if so minded, to leave their vehicles in the yard and this invitation was accepted by the plaintiff, but there was no delivery of possession, either actual or constructive, of the bicycle to the defendant, and, therefore, the defendant was not liable for its loss.

Ashby v. Tolhurst ([1937] 2 All E.R. 837), *applied*.

[EDITORIAL NOTE. This case should be compared with *Williams v. Linnitt*, *post*, p. 278.

AS TO NATURE OF CONTRACT OF BAILMENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 747, 748, para. 1231; and FOR CASES, see DIGEST, Vol. 3, pp. 53-57, Nos. 1-32.]

Cases referred to:

- (1) *R. v. Rymer*, (1877), 2 Q.B.D. 136; 46 L.J.M.C. 108; 35 L.T. 774; 41 J.P. 199; 29 Digest 9, 103.
- (2) *Sealey v. Tandy*, [1902] 1 K.B. 296; 71 L.J.K.B. 41; 85 L.T. 459; 66 J.P. 19; 29 Digest 3, 11.
- (3) *R. v. Armagh JJ.*, [1897] 2 I.R. 57; 30 I.L.T. 47; 30 Digest 68, c.
- (4) *Scarborough v. Cosgrove*, [1905] 2 K.B. 805; 74 L.J.K.B. 892; 93 L.T. 530; 3 Digest 83, 187.
- (5) *Indermaur v. Dames*, (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; *affd.*, (1867), L.R. 2 C.P. 311; 36 L.J. C.P. 181; 16 L.T. 293; 31 J.P. 390; 36 Digest 35, 208.
- (6) *Ashby v. Tolhurst*, [1937] 2 All E.R. 837; [1937] 2 K.B. 242; 106 L.J.K.B. 783; 156 L.T. 518; Digest Supp.
- (7) *Ulzen v. Nicols*, [1894] 1 Q.B. 92; 63 L.J.Q.B. 289; 70 L.T. 140; 58 J.P. 103; 3 Digest 57, 32.

(8) *Robins & Co. v. Gray*, [1895] 2 Q.B. 501; 65 L.J.Q.B. 44; 73 L.T. 252; 59 J.P. 741; 29 Digest 19, 240.

(9) *Deyong v. Shenburn*, [1946] 1 All E.R. 226; [1946] K.B. 227; 115 L.J.K.B. 262; 174 L.T. 129; 2nd Digest Supp.

APPEAL by the defendant, the licensee of a public house, from an order of His Honour JUDGE SAMUEL, K.C., made at Whitechurch County Court on Oct. 25, 1950, whereby he held the defendant liable in damages to the plaintiff for the loss of the plaintiff's motor bicycle, which had been left by the plaintiff in a covered yard adjoining the public house while the plaintiff took refreshment on the premises. The name of the public house, followed by the words "Covered yard and garage," appeared on the door of the yard. The learned county court judge held that the relationship between the parties at the material time was that of invitee and invitor, and by virtue of that relationship the defendant was under a duty to take all reasonable precautions to keep the motor bicycle safe against theft. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R.

Stephen Chapman for the defendant.

N. C. Bridge for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: The case presented by this appeal is not free from difficulty and not without public interest. I shall have to refer presently in some detail to the evidence of the plaintiff, but, shortly expressed, the facts in question are these. On Aug. 20, 1949, the plaintiff arrived on his motor bicycle at a public house, called the Wheatsheaf, at Green End, Whitechurch, the time being 8.35 p.m. He placed his motor bicycle on an area or space, a part of the premises, went into the public house, and had a drink. A little later he left the public house to call on a friend, returning at 10 p.m. According to the plaintiff's evidence, the motor bicycle was then still at the place where he had left it. After some further refreshment he left the public house at 10.23 p.m. and found his motor bicycle missing. It had been stolen and has not since been recovered. The plaintiff sued the defendant, who is the licensee and tenant of the Wheatsheaf, for damages, the figure claimed being £130, on which figure there is no dispute. In his pleadings and at the trial before the learned county court judge, the plaintiff put his case on two alternative grounds. The plaintiff first alleged that the defendant was an innkeeper within the meaning of the Innkeepers' Liability Act, 1863, that, as such, he owed a duty to the plaintiff to look after the motor bicycle while on his premises, and that he failed to perform that duty. It is said that the duty was owed to the plaintiff either as a traveller or otherwise. Secondly, and alternatively, the plaintiff alleged that in the circumstances of this case there came into existence between the plaintiff and the defendant a contract whereby the defendant undertook to use reasonable care to look after the plaintiff's motor bicycle, that he failed to perform that duty, and is liable, accordingly, in negligence for the sum claimed.

In this court we have had the advantage of most careful and lucid arguments from counsel for the parties. In that regard I do not doubt that we have had a substantial advantage over the learned county court judge. As a result, certain points have dropped out for the purposes of this decision. Thus, counsel for the defendant conceded that, if in truth his client was an innkeeper, he would be liable to the plaintiff, whether because he was a traveller or otherwise, under the first head of the plaintiff's claim. He has, however, drawn our attention to such authority as there is on the question of the true characteristics of an innkeeper. Counsel for the plaintiff has not felt able to address to us contrary arguments, and in those circumstances I shall deal briefly with the reasoning which (as counsel for the defendant suggests) concludes the case as to innkeeper in his favour.

Counsel for the defendant read, as part of his argument, certain passages from JELF AND HURST ON THE LAW OF INNKEEPERS, pp. 2 and 5, according to which it is of the essence of an innkeeper's functions that he should afford relief and lodging to people travelling from place to place. Counsel for the defendant also referred to one or two authorities, such as *R. v. Rymer* (1), *Sealey v. Tandy* (2), and *R. v. Armagh JJ.* (3), an Irish case. Those cases, he contended, support the view that no one can be said to be an innkeeper unless he offers accommodation in the sense of lodging to persons who want to stay at his house. A
It is beyond dispute that the Wheatsheaf offered no such accommodation. There was, I understand, one spare bedroom, but it was not furnished, and, therefore, there was absent the characteristic which counsel for the defendant has contended is essential, namely, that there should be lodging available to persons who require to avail themselves of it. As I have said, counsel for the plaintiff has not felt able to cite authority or prefer an argument contrary to that view. B
In case, on any future occasion, it is necessary further to pursue the matter, it is desirable that I should say no more about it than that, on the arguments as presented and in view of the concession of counsel for the plaintiff, I proceed by assuming and holding that in this case the defendant was not an innkeeper, and, therefore, that the first head on which the plaintiff seeks to found himself cannot be sustained. C

The result is that the determination of this appeal must depend on the second argument put forward by the plaintiff, namely: Was there a contract of the kind I have indicated? Again we are assisted by the concession of counsel for the plaintiff, which is to the effect that, if there be a contract giving rise to liability on the defendant's part, there must have been some delivery to the defendant of the possession or custody of the motor bicycle. The argument D
of counsel for the plaintiff is that such a giving of possession or custody was found as a fact by the learned judge and that there is some evidence to support it.

Before I further develop that matter, which is the main point in the case, I will first dispose of a subsidiary argument of counsel for the plaintiff, founded on *Scarborough v. Cosgrove* (4). Counsel for the plaintiff contended that that case (which was a case of a boarding-house keeper and not of an innkeeper) E
affords an analogy which can be applied in this case to impose similar liability on the defendant. I say at once that I do not accept that argument. I think, if I may venture to say so, that it is confusing the special circumstances of a particular case with a matter of principle, and that there does not emerge from the case any valid ground or basis for supporting a claim for liability different from that to which I shall later refer. In *Scarborough v. Cosgrove* (4), the two F
plaintiffs, a husband and wife, were lodgers at a boarding-house kept by the defendant. On the occasion of their visit, the female plaintiff pointed out to the defendant's manager that she had with her some jewellery, and she made inquiries in regard to the locking up of the bedroom which they were occupying or of some receptacle in the bedroom, so that the jewels could be safely stored. The defendant's manager, aware, therefore, of the existence of the valuables, G
explained that no separate key could be given, but assured the plaintiff that, if they were left in the room in the ordinary way, they would be quite safe. From those facts it is not, indeed, altogether surprising that the court held that there was a duty on the defendant, the boarding-house keeper, to take reasonable care for the safety of the jewels, and that there was evidence of a breach of that duty. It is to be observed that (unlike the present case) H
the subject-matter was personal belongings of the person staying in the boarding-house, and (still more significant) that their existence was disclosed to the defendant in the action, or her agent, who in turn made representations to the plaintiff in regard to them. In his judgment SIR ROBERT ROMER, L.J., stated his view on the liability of a boarding-house keeper to a paying guest in respect of the latter's luggage. After referring to two cases, the learned lord justice said ([1905] 2 K.B. 814):

"I think it right, therefore, to state my opinion on the subject. One thing is clear—namely, that the liability of the landlord of the boarding-house in respect of the luggage is not co-extensive with the liability of an ordinary innkeeper, but what the extent of the liability is remains to be considered. It appears to me that, before that can be ascertained, it is necessary, at any rate to a certain extent, to inquire into the particular circumstances of each case. It may be that some of the luggage has been committed temporarily, or during the stay of the lodger, into the sole custody of the landlord. In that case, clearly, there would be a duty on the part of the landlord to take reasonable care of it. On the other hand, there may be cases where, by arrangement between the parties, the guest has taken upon himself solely the care of his luggage, and in those cases, whatever may be the duties of the landlord towards his guest, they could not be treated as based on the footing that in any sense he had the custody or partial custody of the luggage. The difficulty as to the law arises in cases like the present, which are intermediate between the two I have just mentioned, and where the luggage cannot be said to be in the sole custody of either the landlord or the guest."

C I have read that passage because it emphasises the important point which I think is vital in this case, *viz.*, that the decision must depend on discovering in whose hands was the custody of the article in question.

I now refer to the judgment of the learned judge in this case. He said:

D "I came to the conclusion that on the night in question the relationship between the parties was that of invitee and invitor. It was admitted by the defendant's advocate that, as far as the plaintiff personally was concerned, he was an invitee whilst purchasing and consuming alcoholic liquor on the premises, but he was only a licensee for the purpose of taking and leaving his motor cycle in the defendant's yard. I cannot draw that distinction. The yard in question forms part of the whole premises. On the door of the yard, as is shown by the photograph, is painted in big letters 'Covered yard and garage.' In my view, the said words constitute at least an implied invitation to those who have business at the defendant's inn that they may leave any vehicle therein whilst on the said premises. Whilst the said motor cycle was there on Aug. 20, 1949, and whilst the plaintiff was on the premises consuming his liquor, the said motor cycle was taken away by some unauthorised person and it has not been recovered by the plaintiff. In my view, the defendant failed to exercise reasonable care of the said motor cycle whilst it was in his keeping as aforesaid."

G It is on those last few words that counsel for the plaintiff has fastened, for he says (as I have already indicated) that there is here a finding that the relationship which existed in the circumstances of the case on the evening of Aug. 20 was such that the bicycle was in the keeping of the defendant. I am unable to accept that submission. I cannot resist or escape the conclusion that the foundation of that particular finding or conclusion on the part of the county court judge lay in this, that the relationship between the plaintiff and the defendant was that of invitee and invitor as distinct from licensee and H licenser. In so far as he based himself on that distinction, I think, with all respect to him, that the learned judge fell into error and misdirected himself. I think he wrongly assumed that if, as might well have been the proper inference, the plaintiff was an invitee, it followed that there was a delivery of custody or possession of the motor bicycle to the defendant as invitor. Therein, to my mind, lies the fallacy in the judgment. It has been many times considered by the courts whether the relationship of one person to another on, or in respect of, certain premises, is that of licensee or invitee, but the validity of

the distinction bears only, I think, on matters of personal injury or, at most, material injury which is incidental or ancillary to personal injury. The basis of liability in the case of an invitee is too well known to require any long citation. In *Indermaur v. Dames* (5), WILLES, J., states (L.R. 1 C.P. 288) that such a person

“ . . . is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know . . . ”

On examination of the cases, however, the damage which there is referred to is injury to the person rather than damage to the goods of the invitee, save to the extent that such material damage may, as I have said, be purely ancillary to personal injury. There is no authority for the view that an invitee *quoad* his belongings, such as a motor car or motor bicycle, has some higher right as against the invitor than has a licensee against a licensor. Indeed, such a view could not rest on any intelligible principle, for, as counsel for the plaintiff has rightly conceded, the liability of the defendant depends on possession or custody, and I cannot see that the distinction between a licensee, on the one hand, and an invitee, on the other, can of itself bear on or be relevant to the question of the existence of some sort of bailment.

Counsel for the defendant made *Ashby v. Tolhurst* (6) the foundation of his argument. Having regard again to the concession which counsel for the plaintiff has properly made, I do not propose to go at length into the facts and judgments in that case. The plaintiff in that case had left his motor car in a car park belonging to the defendants, and the action raised the general question: What is the position of one who parks his car (to use the modern phrase) in a car park? On the occasion in question the plaintiff was given a ticket, and much turned in the course of the arguments and judgments on the effect of the ticket. Apart from that, however, it seems to me plain that the decision in this court proceeded on the view that one who parks his car in a car park does not thereby deliver over the possession or custody of the motor car to the keeper of the park—at any rate, in the absence of some unusual or special circumstances which did not exist in that case and were not to be imported by the giving or the terms of the ticket. Counsel for the defendant in the case now before us particularly relied on a passage in the judgment of SIR WILFRID GREENE, M.R., where he said ([1937] 2 All E.R. 840):

“ It seems to me that reading the document as a whole, including its own description of itself, namely, ‘car park ticket,’ it really means no more than this: the holder of this ticket is entitled to park his car in the Sea Way Car Park, but . . . this does not mean that the proprietors are going to be responsible for it. If that be the true construction of the document, and I think it is, the argument that the presence of these exempting conditions points to the view that they are inserted in order to remove a contractual liability which would otherwise be there disappears and, in my opinion, the argument, when applied to a document of this kind, is not one of any real weight. If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there.”

It is true that in the present case no suggestion was made, and no part of the argument or judgment was addressed, to the possibility of the relationship between the plaintiff and the defendant being that of invitee and invitor. I think that that was because it would have been beside the point. If it were relevant to determine in which character the plaintiff was clothed,

it may, indeed, be that he was an invitee rather than a licensee. The point, however, is whether or not there was a contract whereby custody or possession of the car was handed over to the car park owner. The distinction, therefore, must, I think, be between licensee or invitee, on the one hand, and bailor, on the other. *Ashby v. Tolhurst* (6) is of some importance, because it laid down clearly that one who leaves his motor car in a car park cannot assume or assert against the car park proprietor any obligation to use reasonable care to look after the car. If, therefore, on the true view of the facts in the case now before us, this yard, which was part of the Wheatsheaf premises, was really no more than a car park, the case is governed by *Ashby v. Tolhurst* (6). On the other hand, it is conceded that, if I take my motor car to a garage, in the ordinary acceptation of that term, and leave it in the garage, *prima facie* there would be a delivery over of possession or custody to the garage proprietor. Common experience is that in such a case there is inevitably some attendant there, and, if it is permissible to have regard to the meaning of words, "garage," according to the SHORTER OXFORD ENGLISH DICTIONARY, is a place "for the storage or re-fitting of motor vehicles."

I must now examine the evidence in the present case. First, I will refer to the photograph with which we have been supplied, as counsel for the plaintiff has concentrated his case on what the photograph discloses. On the left of the entrance to the public house appears an archway or entrance to the place or yard in question. Dividing the archway from the public highway appear to be double doors. As the learned judge pointed out, they bear, in large characters, the legend: "Wheatsheaf: covered yard and garage." From the photograph it appears that the doors are capable of being locked against entry by means of a padlock—and, when the photograph was taken, they possibly were—and it further appears, though I have not myself been able to attach great significance to the fact, that along the top of the doors there is a series of spikes. I shall return to the true view of the invitation imported by the words on the doors, but first let me refer to the other evidence of the nature of this yard and what occurred on the relevant evening. The plaintiff said that he went to the hotel with his motor bicycle. He identified the photograph. Then he said:

"I put the motor cycle in the hotel yard, and went in to get a drink. I went out of hotel to see friends. I returned to hotel at 10 p.m. when motor cycle was there. I went into hotel and had some more drinks, and went out at 10.23 p.m. and found the motor cycle had gone. I did not know whether an attendant was kept to look after contents of yard. I did not immobilise the motor cycle. I did not tell defendant I had left motor cycle there. There was no charge for leaving it there."

The plaintiff's evidence was supported by that of a friend, who merely stated that the plaintiff left the motor bicycle in the defendant's yard. The defendant gave evidence as to the nature of his business. So far as this point is concerned, he said, in his evidence-in-chief, only that he did not see the motor bicycle, that the plaintiff did not tell him that he had left it there, nor did he pay for so doing. The defendant was not cross-examined on that part of his evidence. It seems to me clear, therefore, that, if the evidence which I have read stood alone, there would be no basis whatever in this case for saying that there was any delivery over to the defendant or to any agent of the defendant of possession or custody of the motor bicycle. As the plaintiff frankly said, he never told anyone that he was putting it there. It is clear that there was no one about. He said that he did not know whether there ever was an attendant. He certainly did not see one, and, whatever may have been the reason for the shutting, and, perhaps, the locking, of the gates when this photograph was taken, there is no sort of suggestion that access to the yard was not open and available to any who liked to walk in. Can, therefore, the ordinary conclusion

or inference which, I think, inevitably flows from the evidence given at the trial be in any way affected by the nature of the invitation on the door, particularly by the use of the word "garage"? I have come to a clear conclusion that in this case it cannot. I think that the learned judge was right to say that the wording on the door was an invitation. I should be content for my part to accept further the nature of the invitation as the judge stated it, namely, an invitation to those who had business on the premises that they could leave any vehicle there while in the premises. That seems to me to be no more than saying: "Here is a car park for the use of those who want to go into the public house." I am bound to say that on this evidence the use of the word "garage," to my mind, is more eulogistic than accurate, and I do not, therefore, think that it can be asserted in this case that the wording on the door, together with the rest of the evidence, involved the result that there was here symbolically a delivery over of possession to the defendant, or, put the other way round, that, there being an invitation by the defendant which the plaintiff accepted, the defendant could not be heard to say that he had not accepted custody of the motor bicycle.

I think, if that is right, that the facts and the basis of the decision in such a case as *Ulsen v. Nicols* (7) cannot apply here. There the question was: Had there been a bailment in the case of a coat? In the Westminster County Court, the jury had found as a fact that there had. It is plain from the judgments in the Divisional Court that both judges felt grave doubt about the propriety of the finding. CHARLES, J., thought that there was evidence to support it, and, therefore, that the Divisional Court could not interfere. WRIGHT, J., dealt with it more briefly by saying that the point that there was no bailment had not been taken in the county court and was not, therefore, available, so that the finding as to bailment must be assumed to be correct. When one examines the facts, however, it seems clear that there was some evidence to support it, for there was a physical delivery of the coat to a servant of the restaurateur, a waiter, who took it and hung it on a peg. Nothing like that delivery over of possession, actual or symbolical, occurred in this case, and I think, therefore, that there was no evidence here which can be said to support the view that there had been a transfer of possession. If that is so, of course, the defendant must succeed and the judgment cannot stand.

Since the judge never has, I think, really applied his mind to the true question, I have thought anxiously whether it would be right to send the case back for a new trial, but I have come to the conclusion that it would merely involve the parties in unnecessary expense. The judge's note is brief, but there has been no suggestion by counsel for the plaintiff that it is in any way inadequate or that any facts were stated or sworn to by the plaintiff which are not recorded in the note. As ROMER, L.J., said in the *Scarborough* case (4), all these cases must depend on their own facts, and it should not, therefore, be assumed that in every case in which a place adjoining a public house is provided for the leaving or storage of motor cars by patrons of the house, it will follow that the publican is under no liability. It would depend on whether, in the particular case, such a contract of bailment comes into existence or not. In this case, it is quite clear on the evidence that no such contract was made. It was for the plaintiff in the action to prove his case, and I think that he failed to do so. One cannot help feeling sympathy for the plaintiff, who, being quite innocent, loses the possession of his motor cycle, but there is, after all, something to be said for the view that, if, as is the fact in the present case, the question is on which of two quite innocent persons a loss should fall, the loss may be left where it has fallen. However that may be, I am clear, on an examination of this case, that there was no evidence which would support a delivery of possession or custody and, therefore, that there was no basis in fact for the judge's finding, on which counsel for the plaintiff has relied. that the motor

bicycle was in the defendant's keeping. That being so, in my opinion, the action should be dismissed and the appeal must succeed.

JENKINS, L.J.: I agree. As SIR RAYMOND EVERSHED, M.R., has said, this appeal falls to be determined on the footing that the Wheatsheaf was not an inn and the defendant was not an innkeeper in the common law sense. In *Robins & Co. v. Gray* (8) there is a well-known passage in the judgment of LORD ESHER, M.R. ([1895] 2 Q.B. 503), which begins:

“The duties, liabilities, and rights of innkeepers with respect to goods brought to inns by guests are founded, not upon bailment, or pledge, or contract, but upon the custom of the realm with regard to innkeepers.”

This case falling to be determined on the footing that the Wheatsheaf is not an inn, I think the contrast drawn in that passage is, perhaps, instructive. An innkeeper is under a special liability by virtue of the custom of the realm. In other cases, the liability, if any, must be found in some bailment or pledge or contract. In this case, I think the relevant ground of liability would be bailment or contract, and I think it can, in effect, be further narrowed down to bailment, as the contract must be one which amounts to a bailment in that there must be actual or constructive delivery of the chattel into the hands of the person who is said to be responsible for its safe custody.

The question, therefore, is whether, in the circumstances in which the plaintiff came to leave his motor bicycle in the yard of the Wheatsheaf in the present case, the defendant, as proprietor and occupier of the Wheatsheaf, is fixed with liability for the theft of the bicycle. [HIS LORDSHIP stated the facts.] The learned county court judge held—in my view, rightly—that the plaintiff was an invitee at the Wheatsheaf. He held further—and, I think, rightly—that, having regard to the notice written on the doors of the covered yard and garage, the invitation extended not only to the plaintiff himself, but also to his motor bicycle. In fact, the position was that the defendant, as the proprietor of the Wheatsheaf, extended a general invitation to customers to come to the Wheatsheaf and consume the liquor provided, and, if they chose, while they were so doing, to leave any vehicle or bicycle, in or on which they came, in the yard. From that, however, the learned county court judge reached the conclusion that the bicycle passed into the keeping of the defendant and he became under a duty to use reasonable care to see that it was not stolen. In my view, that conclusion was not supported by the finding that the relationship of invitor and invitee existed between the defendant and the plaintiff. Counsel for the plaintiff ingeniously argued that in the judgment there is something amounting to a finding that, on the facts, a contract of bailment was to be inferred, and he said that there was some evidence to support that finding and it ought not to be disturbed. The effect of the whole of the evidence, however, supports a case of invitor and invitee and nothing more. Therefore, the judgment comes, as I think, to this. The learned judge, having found that the relationship of invitor and invitee existed, held that by virtue of that relationship the defendant became responsible for keeping the motor bicycle safe against theft and taking all reasonable precautions to that end.

In my judgment, that liability cannot, as a matter of law, be inferred from the relationship of invitor and invitee. As is well known, a distinction is drawn in the cases for certain purposes between mere licensees and invitees, invitees being a class of licensees who are not merely authorised to come on premises, but are expressly or by implication invited to do so. The purpose, however, for which that distinction has been drawn has been that of measuring the liability of the occupier of premises to persons coming on them with respect to the safety of the premises in point of physical condition, and an invitor has been placed under a more stringent liability in that respect to his invitees than a mere licensor to his licensees. The distinction is one which, owing to the

unsatisfactory results produced in certain cases and the difficulty in many instances of distinguishing or drawing the line between invitees and mere licensees, has not escaped criticism from time to time, but it is a well-established distinction in the field to which it applies, and the field to which it applies is the physical safety of the premises. There is no warrant at all on the authorities, so far as I know, for holding that an invitor, where the invitation extends to the goods as well as the person of the invitee, thereby by implication of law assumes a liability to protect the invitee and his goods, not merely from physical dangers arising from defects in the premises, but from the risk of the goods being stolen by some third party. That implied liability, so far as I know, is one unknown to the law. It would be a liability of a most sweeping and comprehensive character and would have entered into a very great number of cases if it existed. It would by now be well-established by the authorities. For example, in *Deyong v. Shenburn* (9), in which an actor's property was stolen from the theatre in which he was rehearsing, a decision could have been reached on the very short ground that the actor was an invitee, that the invitation extended to the necessary properties he had to bring with him for the purpose of his performance, and, accordingly, that the proprietor or occupier of the theatre was responsible to him for the safe custody of his goods. It was not even sought to argue the case on that ground, but an analogous course was taken, in that it was sought to extend the liability of an employer to his employee for the safety of the premises on which the employee is required to work to the safety from theft of the property brought by the employee into the place of employment. *DU PARCQ, L.J.*, dismissed that contention on the ground that there was no warrant whatever for extending the liability of the master for the physical safety of his servant to the safety of the goods of the servant from theft. I venture to think that, if the case had been argued, as it might have been, on the basis of invitor and invitee, an attempt to extend the liability of the invitor from the physical safety of the invitee to the safety of the invitee's goods from theft would have been equally shortly dismissed.

Therefore, I agree that, as *SIR RAYMOND EVERSLED, M.R.*, has said, the defendant can only be fixed with liability if the inference can properly be drawn from the circumstances that there was an actual or constructive delivery of the bicycle into his safe keeping. On the facts, it seems to me that clearly there was no such delivery, actual or constructive. There was no attendant in the yard to whom the motor bicycle could be handed over. The plaintiff never even told the defendant that he had left the bicycle in the yard. The yard was one to which access could readily be had from the street by anyone. There was nothing beyond the general invitation to customers, if so minded, to leave their vehicles or bicycles in the yard—an invitation accepted by the plaintiff. In my judgment, those facts fall far short of what is required to show an actual or constructive delivery of the machine into the charge of the defendant. The onus which it is sought to place on persons in the situation of the defendant, and which would be placed on them, as it seems to me, if the learned county court judge's judgment was correct, would be an enormously heavy and quite unreasonable onus in the circumstances of the case. It would place them under an obligation, in effect, to keep a yard such as the defendant's yard under constant watch by some attendant appointed for the purpose, and, probably, owing to the hours of duty involved, it would be necessary to have more than one of these people in order that the watch might be constantly kept. Nothing short of that, so far as I can see, would protect the proprietor of premises such as these. Where the special and peculiarly stringent liability imposed on innkeepers, in the common law sense, is not in question, an obligation of that onerous character is not lightly to be inferred, and, in my judgment, it would be quite wrong to infer it from a mere general invitation to customers of an hotel, if so minded, to leave their vehicles in the yard of

the hotel, with nothing over and above that amounting either to a delivery of the vehicle or bicycle into the charge of the proprietor of the premises, or, at least, to some representation by such proprietor that, in the event of vehicles or bicycles being left there, they would be safely kept. For the reasons which I have endeavoured to state, in addition to those already stated by SIR RAYMOND EVERSHERD, M.R., I agree that this appeal should be allowed.

DANCKWERTS, J.: I, also, am of the same opinion. The learned county court judge based his judgment on the finding that the plaintiff was an invitee rather than a licensee. Such a distinction is relevant to a claim in tort for injury to the person, but, as it seems to me, is not relevant to a claim for loss of goods. As regards his motor bicycle, it seems to me that the only invitation, if any, which the plaintiff received was to accept a licence to leave it in the yard. He never brought the presence of the motor bicycle there to the notice of the defendant or placed it in the care of the defendant or his servants. All the cases in which the owner of premises other than an innkeeper has been held to be liable for loss of property belonging to persons resorting to the premises appear to depend on a contractual acceptance of liability to take care of such property by virtue of a bailment or deposit with the knowledge of the owner of the premises or his servants. That contractual element did not exist in the present case. In my view, therefore, the defendant was under no liability to the plaintiff for the loss of the motor bicycle, and, accordingly, this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Nash, Field & Co.*, agents for *Garnett & Culey*, Crewe (for the defendant); *Jaques & Co.*, agents for *Cyril Jones, Son & Williams*, Wrexham (for the plaintiff).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

BROCK v. RICHARDS.

[COURT OF APPEAL (Sir Raymond Eversherd, M.R., Singleton, L.J., and Vaisey, J.), November 30, December 1, 19, 1950.]

Animal—Straying—Propensity to stray—Horse straying on to highway—Duty of owner.

The plaintiff was riding his motor bicycle along the highway when a mare jumped over a hedge bordering the highway, descended on the motor bicycle, and injured the plaintiff. The animal was unbroken, over five years old, and had a propensity to stray, but the county court judge found that she had not a dangerous nature. On appeal,

HELD: the occupier of land bordering the highway was under no duty to prevent his animals from straying on the highway unless they were dangerous (as, e.g., owing to their frolicsome behaviour) or mischievous; the fact that the mare in the present case had a special proclivity towards straying did not impose such a duty on the defendant; and, therefore, he was under no liability to the plaintiff.

Searle v. Wallbank ([1947] 1 All E.R. 12), *applied*.

Per SIR RAYMOND EVERSHERD, M.R.: (i) Apart from the case of special propensities, liability is not imposed on the owner of an animal by reason of special circumstances affecting the nature of the *locus in quo*, that is, is not imposed because the animal when straying goes over or through a hedge or down a bank and thereby creates the accident.

(ii) it must be treated as clear that an animal, though not savage, which is dangerous because of its frolicsome behaviour, must be taken to have propensities against which (if he knows of them) the owner has a duty to guard. If the horse had a propensity for leaping over hedges on passers-by, and that were known to the owner, he might well be under a duty to keep the horse tethered.

[AS TO INJURIES BY HARMLESS AND DOMESTIC ANIMALS, see HALSBURY, A Hailsham Edn., Vol. 1, pp. 539-542, paras. 929-932; and FOR CASES, see DIGEST, Vol. 2, pp. 229-235, Nos. 198-230.]

Cases referred to:

- (1) *Searle v. Wallbank*, [1947] 1 All E.R. 12; [1947] A.C. 341; [1947] L.J.R. 258; 176 L.T. 104; 2nd Digest Supp.
- (2) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; B Digest Supp.
- (3) *Mason v. Keeling*, (1699), 1 Ld. Raym. 606; 91 E.R. 1305; 2 Digest 243, 274.
- (4) *Smith v. Cook*, (1875), 1 Q.B.D. 79; 45 L.J.Q.B. 122; 33 L.T. 1722; 40 J.P. 247; 2 Digest 253, 345.
- (5) *Fardon v. Harcourt-Rivington*, (1932), 146 L.T. 391; Digest Supp. C

APPEAL by the defendant against an order of His Honour JUDGE RAWLINS, made at Newquay County Court, and dated Oct. 4, 1950. The learned judge held that the defendant who owned a horse which had to his knowledge a propensity to stray, was liable for damage sustained by the plaintiff when the horse jumped over a hedge and collided with the plaintiff who was passing on his motor bicycle. D

John Thompson and Gazdar for the defendant.

C. Lawson for the plaintiff.

Cur. adv. vult.

Dec. 19. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: This appeal relates to a remarkable, E but happily not a serious, accident suffered by the plaintiff on Jan. 13, 1950. When riding on his motor bicycle in the evening of that day along the main road from St. Austell to Newquay, he was passing a field owned or occupied by the defendant. At this point a black mare belonging to the defendant leapt over or through the hedge bordering the highway and (according to the plaintiff's evidence) landed on his petrol tank. By the present action he sued F the defendant for damages for negligence in failing to keep the mare under proper control. The learned county court judge gave judgment for the plaintiff for £28 11s. 8d., and that figure has been agreed in this court as a fair sum for compensation to the plaintiff for his personal injuries and the damage done to his motor bicycle and clothing.

I propose to deal briefly with the evidence given at the trial, for I shall read G in full that part of the learned judge's judgment which covers his findings of fact. The plaintiff was supported by two other witnesses, a farmer and a farm labourer. There was in the testimony of these two latter witnesses enough, beyond doubt, to support a finding that the mare (which, though over five years old, had never been broken) was at least of a "mischievous" nature. Thus, although it did not appear ever to have bitten or injured anyone, it was H nevertheless said to possess the curious and alarming habit of dashing towards a human being "with mouth abroad," and then stopping some two or three yards short, and the farmer stated that it would try to bite or kick anyone who tried to catch it when straying on the road. On the other side was the evidence of the defendant, his wife, a stableman and a veterinary surgeon. All these witnesses gave the mare a good character, free from vice and bad temper, though Mrs. Richards, the defendant's wife, who plainly regarded

the animal with affection, conceded, in answering a question put to her by the judge, that the mare was different from other horses and was "rather temperamental."

A I have not had the great advantage of seeing or hearing the witnesses, but I am bound to say that, if I were to judge from the judge's notes of the evidence, I should feel strongly disposed to conclude that the mare, though not vicious or savage, was, being unbroken, of a sufficiently mettlesome character to be fairly described as mischievous, but, as will presently appear, the learned judge clearly, to my mind, negatived that view. By finding as a fact—and I think it impossible to say that there was no evidence to support the finding—that the mare had a sweet nature and was in no way dangerous and that her only unusual characteristic was her propensity to stray, he must necessarily have rejected the evidence of other qualities. The question then is: Will such a finding of fact support in law the judgment for the plaintiff?

B The learned judge posed the question for his decision thus:

C "To succeed in this action the plaintiff must show either that the animal was vicious or dangerous, or, alternatively, that special circumstances existed which take the case out of the ordinary rule of law that domestic animals can wander at large without liability being incurred by their owner."

I will read the material part of his judgment in full.

D "This horse was unbroken and by that I mean it had never been used for any form of work. It was specially, looked after by the defendant's wife. It was fed specially, grazed specially, and housed specially. The defendant's wife says that it has a sweet nature and is not in any way dangerous. I entirely accept that evidence. It has been suggested that the mare was different from other mares, but, in my opinion, it is not uncommon that different mares should have different temperaments. This mare liked to be free and get about on its own. The defendant's wife knew that it would get out of any field in which it was put, and that nothing would stop it. On one or two previous occasions it had got out on to the highway. Mrs. Richards knew that nothing could prevent this, and I am satisfied that the defendant knew it also. On one occasion the mare strayed into the garden of a house occupied by the witness Mr. Giles. On another occasion the mare was seen on the highway and difficulty was experienced in catching her. The defendant knew that special precautions were necessary or it would get out on to the high road. On the day of the plaintiff's accident the field near the highway was not the field in which the mare was grazing. The mare had been put in one of two or three intercommunicating meadows and there left to graze. She got through the hedge or gate of these meadows by some means into the ploughed field. Counsel for the defendant says that nobody should have anticipated that it could do this. He says, therefore, that special circumstances do not exist in this case. In my view, it does not matter what field the mare came from. Once it is established that it was likely to get on the highway, precautions should have been taken to stop it getting out. Counsel further says that before the defendant could be found negligent you must find that he owed a duty to the plaintiff. I am of the opinion that in certain circumstances the owner of land adjoining the highway may owe a duty to users of the highway. The question arises whether the possibility of damage should have been contemplated by the parties in this case. Counsel says that the damage is so remote that it could not be in the reasonable contemplation of the parties. He cites *Searle v. Wallbank* (1), and particularly the judgment of VISCOUNT MAUGHAM. In the present case when the defendant knew the volume of traffic passing on the highway it is ridiculous to say that no danger would have resulted if the horse were to stray. The

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possibility of damage must, therefore, have been present in the owner's mind. It is, therefore, impossible to say that the damage was too remote. The next question arising is whether the defendant is negligent. He knew the animal's propensity to stray because it had done so on previous occasions. He knew that, if left in the field, it would display that propensity again. His failure to prevent the animal getting on the highway amounts to negligence. I find therefore that in this case there are special circumstances which take it out of the general rule as laid down in *Searle v. Wallbank* (1). I find that the plaintiff has established negligence on the part of the defendant and that there was no contributory negligence on the part of the plaintiff. The plaintiff is, therefore, entitled to succeed."

It follows from what I have read that the learned judge was of opinion that a special propensity to stray and knowledge of that fact by the defendant was a sufficient special circumstance (having regard to the nature of the highway adjoining the defendant's land and the extent of the traffic on it) to take the case out of the general rule stated in *Searle v. Wallbank* (1), and to impose on the defendant the duty of taking reasonable care to prevent the mare indulging its propensity and leaping or otherwise escaping into the road. If the premise is correct, it is not, I think, in dispute that the defendant failed to take the steps which his duty imposed on him, and that the plaintiff is entitled to maintain his judgment. I have felt no little anxiety on the matter, and I confess to a reluctance in an action for damages assessed at £28 11s. 8d. to interfere with the judgment of the court below, but I have felt compelled to conclude that the learned judge's award was based on an erroneous premise, and, accordingly, that it cannot stand.

In *Searle v. Wallbank* (1) the House of Lords had been invited to consider, in the light of modern conditions and of certain critical doubts which had been expressed by members of this court, the law as it affected persons who keep animals on fields adjacent to the highway. On that occasion all the cases were referred to which have been cited to us. The House had no difficulty in affirming the law as it had previously been understood. It must now be taken to be clearly established that there is no obligation on the owner or occupier of a field adjacent to a highway to maintain a fence on the border of the highway. It is clear, in my judgment, that the law is founded on our ancient social conditions and is in no way related to, or liable to be qualified by, such matters as the relative level of fields and highway, the nature of the highway, or the amount of traffic on it. Secondly, it is equally established that, save in cases concerning animals of peculiar characteristics, to which I will later refer, there is no general duty founded on the principle formulated in *Donoghue v. Stevenson* (2) on the owner of domestic animals to take steps to prevent them straying on the highway and so causing risk of accidents to users of the highway. Both propositions are clearly stated by VISCOUNT MAUGHAM in *Searle v. Wallbank* (1): see, for example ([1947] 1 All E.R. 14); and it follows, in my judgment, no less clearly from the speeches in the House that, there being no liability to have a fence at all, liability does not arise because there is a fence which is not properly maintained. The point is stated by LORD DU PARCQ (*ibid.*, 21):

"My Lords, I should have thought that, on principle, where there is no duty to maintain a fence at all, it cannot be a breach of duty to maintain one which is imperfect . . ."

A contrary view would, indeed, lead to strange results. For since the maximum danger to passers-by on the road might be said to be incurred where an animal leaps over or breaks through a fence at the point where it just fails to offer sufficient obstruction, it would appear to follow that the occupier's liability would vary inversely with the condition of his fence, up to the point where

the fence was just insufficient to prevent a strong animal leaping over it and at that point it would be at its maximum.

There remains, however, the exceptional class of case where the animal in question is known to have such characteristics as to impose on its owner a duty to take steps to prevent it from endangering the public by getting on the highway and there exhibiting its characteristics to the danger of users of the highway. In so stating the nature of the exceptional class of case I have, I believe, formulated it correctly. But before passing to consider the facts in the present case as found, and to determine whether they are such as to have imposed liability on the defendant, I draw attention to one important matter of fact in *Searle v. Wallbank* (1) which has, in my judgment, an important bearing on this case. In *Searle v. Wallbank* (1) the cyclist had been injured as a result of a collision in the dark with a horse, the conditions being made more difficult by the then prevalent black-out regulations, but it is far from clear whether the accident was due to the fact that the cyclist ran into the horse through being unable in the dimmed lighting conditions to see it, or whether (as in the present case) the horse dashed out of a gap in the hedge or leapt down on the cyclist so that the accident was, and would have been, inevitable whatever the lighting conditions and however alert the cyclist had been. Thus, LORD PORTER says (*ibid.*, 18):

“It is not clear from the evidence whether the horse dashed across the road and collided with the appellant or whether, because of the dimness of his lights, he failed to see it and ran into it. I do not think it material to determine which version is the true one, but, if it had to be decided, the former version appears the more likely . . . If, as may be the case, the horse came down from the bank on top of the cyclist, the accident was an unusual one . . .”

It is clear from the opinion of LORD PORTER, as it is also clear from the opinion of LORD DU PARCQ, that it mattered not which of the alternative hypotheses of fact was accepted. For it is, in my judgment, plain that (apart from questions of special propensities to be noted hereafter) the owner of the animal is not rendered liable because the animal leaps over or through the hedge or otherwise down on the user of the highway. This conclusion also emerges, I think, from the *dictum* of HOLT, C.J., and TURTON, J., in *Mason v. Keeling* (3) (1 Ld. Raym. 608), quoted with approval by LORD DU PARCQ ([1947] 1 All E.R. 20):

“If the owner puts a horse or an ox to graze in his field, which is adjoining to the highway, and the horse or the ox breaks the hedge . . .”

Again LORD DU PARCQ says (*ibid.*, 21):

“Moreover, the suggested duty could only be to take reasonable care to maintain a reasonably secure fence, and it must be a very high fence which a horse cannot jump.”

From all this it follows, in my opinion, that (apart always from the case of special propensities) liability is not imposed on the owner of the animal by reason of special circumstances affecting the nature of the *locus in quo*, that is, is not imposed because the animal when straying goes over or through a hedge or down a bank into the road and thereby creates the accident.

Turning to the question of special propensities, it must first be noted that, in my judgment, a special proclivity towards straying cannot be regarded (if known to the owner) as such a special characteristic of itself as imposes liability on him. Such a conclusion appears to me to be logically impossible. For, if the occupier of the field is under no obligation whatever to prevent animals from straying on the high road (unless they are dangerous or mischievous), the duty cannot be imposed on him in respect of a particular animal which is more prone than its fellows to take advantage of the liberty afforded to them. I cannot treat the reference to “disposition to wander” in LORD DU PARCQ’S

speech in *Searle v. Wallbank* (1) (*ibid.*, 20) as indicating any contrary view. Indeed, I think the authorities are clear that in order to impose liability the characteristics must be those of viciousness or mischievousness. It is, no doubt, impossible to apply to an animal an epithet which imports any kind of ethical standard, but the word "vicious" as applied to animals is well understood and indicates a savage disposition, a propensity to attack people. I think it must also be treated as clear that an animal, though not savage, which is dangerous because of its frolicsome behaviour, must equally be taken to have propensities against which (if he knows of them) the owner has a duty to guard. All the authorities, in my judgment, support this view, and I refer particularly to the citation from BLACKBURN, J., in *Smith v. Cook* (4) cited by LORD DU PARCQ (*ibid.*). The basis of the liability, in my judgment, is not that such a horse by its mere presence on the highway may cause an obstruction, but because such a horse, when on the highway, and, therefore, when likely to meet passers-by on the highway, is known to be likely to indulge its dangerous propensities. A

In the present case, the county court judge has found, quite clearly, that the horse in question had no such propensities. I have already acknowledged that I feel a serious doubt whether I should myself have been persuaded to accept the partiality of the defendant's wife for this unbroken mare, but Parliament has laid it down that there shall be no appeal on fact from a county court, and I have said that I think it impossible to say that there is no evidence on which the judge could find as he did. The only propensity which the judge has found the animal to possess was a propensity for wandering, and as regards this I have already given my reasons for thinking that such a propensity could not itself impose liability on the owner, but it is said that the horse had another propensity, *viz.*, a peculiar liking for leaping over hedges and, in particular, for leaping over hedges on passers-by in the road. If this were true and known to its owner, I should think that he might well be under a duty to keep the animal tethered, but, in my judgment, there is no evidence to support it. Evidence that on some one or more other occasions it was found in the road, and that on one of such occasions there was difficulty in catching it, is not evidence that the animal, when in the road, was dangerous or mischievous within the meaning of the law as I understand it to be, still less that it had a partiality for leaping over hedges on passers-by. Nor am I able to accept the view that because (and I will assume it) the horse was a peculiar one in some respects, you can, therefore, find here special circumstances, taking into account the nature of the road and the fences, which impose liability on the defendant. D
Reference has been made to LORD ATKIN's observation in *Fardon v. Harcourt-Rivington* (5) (146 L.T. 392), quoted by LORD DU PARCQ in *Searle v. Wallbank* (1) ([1947] 1 All E.R. 20), but LORD DU PARCQ makes it quite plain (*ibid.*, 21) that LORD ATKIN's general proposition must be read subject to qualifications, and those qualifications, as it seems to me, prevent the application of the observation to the present case. E
The animal being found to be of mild disposition, there is nothing whatever to show that its act on the night in question in leaping in the dark over the fence into the road was a peculiar characteristic of the horse, or alternatively, was not contrary to its ordinary nature, for it must be unusual in the extreme for a domestic animal to take such a leap out of a field in the night. F
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It is, no doubt, tempting to say that this was an animal of unusual characteristics; that, therefore, the owner must have been under a duty to hobble or tether it (for no other means would have been effective); and, therefore, again, that the accident was due to the breach of duty. But, in the first place, I think such a statement of the case involves a flying in the face of the judge's findings of fact, and, in the second, I think it involves far too imprecise a formulation of the appropriate principle of law and would inevitably introduce into

the law serious uncertainties and capriciousness. Put in its briefest form, my conclusion is that, as a general proposition, the owner of animals is under no liability to prevent them straying, even though the straying may take the form of leaping over or through hedges and down banks into a highway at a lower level. If any given case is shown to be an exception to the general rule it must be because the animal in question is known to have some peculiarity which renders it dangerous when on the highway, or because it must have a propensity, through vice or playfulness, of leaping from a field at or on persons on the highway. In the present case, in my judgment, if there is any evidence to support the fact that this animal had such peculiarities, the finding of the county court judge is wholly to the contrary effect. I have, therefore, come to the conclusion that the appeal must be allowed.

SINGLETON, L.J.: The mare which caused the damage was an animal of a most unusual type. She was a six and a half years old shire mare. She had never been broken in. She belonged to a farmer who said he had bought her for breeding and working when she was seven months old, but he had never had the time to break her in, nor had he bred from her. She had been shown on occasions, but not for the last two years. If a stranger tried to catch her she ran at him "mouth abroad." She was blindfolded if she was out at grass when in season. The learned judge might have found that she was vicious, but he did not do so. He accepted the evidence of Mrs. Richards that the mare "has a sweet nature and is not in any way dangerous." The judge found that the defendant, Mr. Richards, the owner of the horse, was liable in damages for negligence in that he knew

"... the animal's propensity to stray because it had done so on previous occasions . . . His failure to prevent the animal getting on the highway amounts to negligence."

This, taken by itself, cannot stand. So much is clear from the decision of the House of Lords in *Searle v. Wallbank* (1). Yet the evidence discloses another side of the character or habits of the defendant's mare. She was accustomed to jumping in a manner quite unbecoming to a shire mare. One wonders why a farmer kept her so long on his farm unbroken.

The plaintiff was riding towards Newquay on his motor bicycle on the evening of Jan. 13, 1950, and his description of the accident, taken from the judge's note, is "saw black horse jump over hedge on top of me, landed on my tank."

He was passing a field of the defendant's at the time. Fortunately, he was not much hurt. Mr. Giles farms land across the road from the defendant's farm. Some eighteen months earlier the same mare had damaged his porch. She had got across the road on to his farm. Mr. Giles said he had seen her loose on the road before that time. He had seen people trying to catch her. "Twice it tried to chase two of my men off the road when we tried to drive it back into the field," he said. The most striking evidence came from the defendant and his wife—and the judge preferred the evidence of the latter.

There was probably some sort of gap or low place in the hedge, but, so far as we know, the hedge was normally sufficient. This mare had been in another field, two or three fields below, and had got into the field from which she jumped on to the highway. There is no evidence to show how she accomplished the journey, though it must have been over the fences, as the farmer said the hedges were all right. No doubt, if she wished to get on to the road she would take the fence at the point which seemed best. She was not an ordinary animal—far from it. She was not kept on the farm for the purpose of work. She was an amazing jumper, and from time to time she went over the fence and on to the road. She was mischievous in this sense. No fence would stop her, it was said. The defendant knew this. It seems to me that, in those circumstances, he ought to have appreciated that there was risk of an accident unless

he took some care. One who keeps a mare of such an unusual type owes a duty to the public and to users of the highway in particular, and it was submitted to this court that the defendant had failed to take the care which a reasonable man would have taken in the circumstances. If the mare could not properly be tethered outside, she ought to have been put inside, at least at night time, it was said. A case on these lines might have been made in the county court, and I am inclined to think that there was evidence on which the judge could have found that there were special circumstances so as to bring the case within both limbs of that which LORD DU PARCQ said in *Searle v. Wallbank* (1) ([1947] 1 All E.R. 21). The difficulties in the way of the plaintiff are that (i) the judge decided the issue on grounds which cannot be supported; (ii) there are no findings of fact as to the propensity of the mare to jump, or to jump on to the highway—and though there is evidence of it I doubt whether it is sufficient to justify this court in basing conclusions on it, especially in view of the fact that (iii) the propensity to jump (or to jump on to the road) was not pleaded, nor does it appear to have been put forward as the case for the plaintiff.

In these circumstances, I feel, with some regret, that the appeal must be allowed and judgment be entered for the defendant. I have considered whether there should be a re-trial. That would involve more expense for the parties in a case in which the damages are small. On the whole, I do not think that it would be right to give the plaintiff an opportunity of setting up now a different case, one which was neither pleaded nor argued before the learned county court judge.

VAISEY, J.: I am not prepared to dissent from the conclusions reached by my Lords, or to express any disagreement with the views expressed in the judgments which have just been delivered. I, therefore, agree that this appeal must be allowed.

Appeal allowed with costs below. No order as to costs of appeal.

Solicitors: *Fred Hollis*, agent for *Thrall, Llewellyn & Spooner*, Truro (for the defendant); *Barlow, Lyde & Gilbert*, agents for *Stephens & Scown*, Wadebridge (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Affirmed. C.A. [1952] 1 All E.R. [redacted]

R. v. NORTHUMBERLAND COMPENSATION APPEAL TRIBUNAL. *Ex parte* SHAW.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 12, 13, 14, 1950.]

Certiorari—Statutory tribunal—Error of law on face of decision.

National Health Service—Compensation for loss of employment—Clerk to hospital board—Also clerk to local authority—Consideration of service with local authority—National Health Service (Transfer of Officers and Compensation) Regulations, 1948 (S.I. 1948, No. 1475), reg. 2.

From 1914 onwards the applicant was employed by the N. urban district council as clerk to the council. From October, 1936, in addition he was employed as clerk to a joint hospital board, which employment was terminated on Mar. 31, 1949, in consequence of the passing of the National Health Service Act, 1946. He applied to the compensating authority for compensation for loss of office under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, and the authority awarded

compensation the amount of which was based only on the length of time which the applicant had served with the hospital board, no regard being had to his service with the district council. The applicant appealed to the compensation appeal tribunal, and the tribunal, giving reasons for their decision, decided that the compensating authority was right and that the applicant was only entitled to the sum awarded to him. The applicant moved for an order of *certiorari* on the ground that there was error on the face of the decision and that the court had jurisdiction to set it aside as being erroneous in law.

HELD: (i) on the true construction of the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, reg. 2, the applicant's service with the local authority should have been taken into account.

(ii) as the tribunal had stated on the face of the order the grounds on which they had made it, and as it appeared that in law those grounds were not such as to warrant the decision to which they had come, *certiorari* would issue to remove the order into the High Court to be quashed.

Walsall Overseers v. London & North Western Ry. Co. ((1878) 4 App. Cas. 30) and *R. v. Nat Bell Liquors, Ltd.* ([1922] 2 A.C. 128), *applied*.

Racecourse Betting Control Board v. Secretary of State for Air ([1944] 1 All E.R. 60), *not applied*.

[AS TO THE GROUNDS FOR CERTIORARI GENERALLY, see HALSBURY, *Hailsham Edn.*, Vol. 9, pp. 880-889, paras. 1484-1493; and FOR CASES, see DIGEST, Vol. 16, pp. 417-431, Nos. 2763-2918, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Racecourse Betting Control Board v. Secretary of State for Air*, [1944] 1 All E.R. 60; [1944] Ch. 114; 113 L.J.Ch. 129; 170 L.T. 29; 2nd Digest Supp.
- (2) *Hodgkinson v. Fernie*, (1857), 3 C.B.N.S. 189; 27 L.J.C.P. 66; 140 E.R. 712; 2 Digest 527, 1645.
- (3) *Re Jones & Carter*, [1922] 2 Ch. 599; 91 L.J.Ch. 824; 127 L.T. 622; Digest Supp.
- (4) *Walsall Overseers v. London & North Western Ry. Co.*, (1878), 4 App. Cas. 30; 48 L.J.M.C. 65; 39 L.T. 453; 43 J.P. 108; 16 Digest 186, 920.
- (5) *R. v. Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; 91 L.J.P.C. 146; 127 L.T. 437; 16 Digest 419, 2795.
- (6) *R. v. Bolton*, (1841), 1 Q.B. 66; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest 418, 2775.
- (7) *Ricelip Parish v. Henden Parish*, (1698), 5 Mod. Rep. 416; 87 E.R. 739; 37 Digest 299, 995.
- (8) *Kent v. Elstob*, (1802), 3 East. 18; 102 E.R. 502; 2 Digest 522, 1601.
- (9) *Hogge v. Burgess*, (1858), 3 H. & N. 293; 27 L.J.Ex. 318; 31 L.T.O.S. 119; 157 E.R. 482; 2 Digest 529, 1658.
- (10) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.*, [1946] 1 All E.R. 98; [1946] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (11) *Noble v. Southern Ry. Co.*, [1940] 2 All E.R. 383; [1940] A.C. 583; 109 L.J.K.B. 509; 164 L.T. 1; 33 B.W.C.C. 176; 2nd Digest Supp.
- (12) *Clarke v. Southern Ry. Co.*, (1927), 96 L.J.K.B. 572; 137 L.T. 200; 20 B.W.C.C. 309; Digest Supp.

MOTION for an order of *certiorari* to remove into the High Court to be quashed a decision of the Northumberland Compensation Appeal Tribunal, dated June 14, 1950, made upon the appeal of the applicant against the award of compensation

for loss of his employment as clerk to the West Northumberland Joint Hospital Board by the Gosforth Urban District Council as compensating authority. The applicant contended that the decision was erroneous on the face thereof, in that the tribunal had disregarded the provisions of the relevant regulations as to the calculation of the amount of compensation. The facts appear in the judgment of LORD GODDARD, C.J.

M. L. Lyell for the applicant.

J. P. Ashworth for the tribunal.

Harold Williams, K.C., and *Mattar* for Gosforth Urban District Council.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of *certiorari* to bring up and quash a decision of the Northumberland Compensation Appeal Tribunal, appointed under the National Health Service (Transfer of Officers and Compensation) Regulations, 1948, which sits to determine the compensation payable to officers of hospital boards and other bodies who lose their employment by reason of the transfer of hospitals to the Minister of Health. The applicant duly applied to the tribunal, and the tribunal, on June 14, 1950, made a determination in which they awarded him £33 15s. per annum in respect of his accrued pension rights and £63 6s. 8d. per annum for the period between the date when he lost his office and the date of his normal retiring age. The decision of the tribunal is set out in a document in these terms:

"The tribunal determine that on Oct. 7, 1936, the applicant was appointed clerk to the West Northumberland Joint Hospital Board and continued to hold that appointment until Mar. 31, 1949, when the employment ceased in consequence of the passing of the National Health Service Act, 1946. The applicant was born on July 10, 1896. His salary on Mar. 31, 1949, was £200 per annum, less five per cent., or £10, superannuation contribution, making his net emoluments £190. The compensating authority contend that the compensation payable should be limited to the actual dates of service, *viz.*: Oct. 7, 1936, to Mar. 31, 1949, and that the compensation payable is . . ."

£63 6s. 8d. per annum payable until the normal retiring age, and from the age of sixty-five, which he would attain on July 10, 1961, on the basis of his average remuneration for the five years ended Mar. 31, 1949. Then there is the calculation making a total of £33 15s. The tribunal add:

"We agree with these figures and that the only service to be taken into account is between Oct. 7, 1936, and Mar. 31, 1949. Mr. Thomas Shaw is, therefore, entitled to be paid £63 6s. 8d. per annum until July 9, 1961, and £33 15s. per annum from July 10, 1961."

The matter for our consideration arises in this way. The applicant was not only clerk to this hospital board. He was also clerk to a local district council, and he contends that under the regulations he is entitled to have taken into consideration, not only the period of his service as clerk to the hospital board, but also that of his service in his capacity as clerk to the local district council. That contention the tribunal rejected on the construction of the regulations, and I can sympathise with them in thinking that as the only office which the applicant lost was an office relating to the hospital board, any compensation which they were to award him should be confined to his service with the hospital board. In our opinion, however, that view is seen to be incorrect when an examination is made of the provisions of the regulations under which compensation is payable. Indeed, counsel for the district council conceded that so far as the accrued pension rights are concerned the calculation I have mentioned must be wrong, because the compensation has to be calculated according to the provisions of the Local Government Superannuation Act, 1937, s. 40.

The other matter for compensation depends on the construction of the regulations. It is provided by reg. 10:

"Subject to the provisions of the next succeeding regulation, every person who was an existing officer and who suffers loss of employment or diminution of emoluments which is attributable to the passing of the [National Health Service Act, 1946] shall be entitled to have his case considered for the receipt of compensation under these regulations, such compensation to be determined in accordance with the provisions of the schedule hereto . . ."

Paragraph 8 of the schedule provides:

"For the purpose of determining whether any compensation, apart from any interim compensation paid under para. 4 and para. 5 of this schedule, is payable to any person for loss of employment, and if so the amount of the compensation to be paid, subject to the provisions of para. 11 of this schedule, until normal retiring age, the compensating authority shall have regard to—(a) the conditions upon which his appointment was made; (b) the nature of his office; (c) the extent to which he has sought suitable alternative employment; and (d) all the other circumstances of the case."

Paragraph 9 provides:

"(1) Compensation for loss of employment shall be an annual sum, calculated in accordance with the provisions of sub-para. (2) of this paragraph, and shall be payable, subject to the provisions of para. 11 of this schedule, until normal retiring age, as from the date of loss, if the claim was made within three months thereafter, and in any other case, as from the date on which the claim was made or from such earlier date, not being more than three months before the date on which the claim was made, as the compensating authority may in their discretion allow."

Then comes, perhaps, for this purpose, the most important provision:

"(2) The said annual sum shall, subject as hereinafter provided, be the aggregate of the following sums, namely—(a) for every completed year of the claimant's service, one-sixtieth of the net emoluments of the employment he has lost; and (b) in the case of a claimant over the age of forty-five years at the date of loss, a further one-sixtieth of the said net emoluments for every completed year of service since he attained the age of forty-five."

The difficulty which has arisen in this case is this. There is a definition of "existing officer" in reg. 2 of the regulations, as follows:

"'existing officer' means a person who immediately before the appointed day—(a) devoted the whole of his time to any of the following employments or to any combination of such employments, namely, employment in Great Britain by the governing body of a voluntary hospital, a local authority, an insurance committee, the Ophthalmic Benefit Approved Committee, the Dental Benefit Council, or by any other body for the purposes of the local government service or by the Crown."

The definition of "service" is:

"'service' in relation to a person means any period of whole-time or part-time employment in Great Britain, after attaining the age of eighteen years, under a Regional Hospital Board, a board of governors of a teaching hospital, an executive council, a joint committee of executive councils, or under any such authority or body as is mentioned in s. 67 (1) (c) (i) of the National Health Service (Scotland) Act, 1947, or under any authority or body functions of which cease or are transferred in consequence of the Act or the National Health Service (Scotland) Act, 1947, or under the

Crown or any other body for the purposes of the local government service . . .”

These are, to say the least of it, complicated provisions for a lay tribunal to interpret, but we have come to the conclusion, and, indeed, it was not very strenuously argued to the contrary, that there must be taken into account the service which an officer who is entitled to compensation has given to “any other body for the purposes of the local government service.” Therefore, as the applicant was, for a longer period than he was clerk to this hospital board, clerk to a local authority, he is entitled to have taken into account his length of service with the local authority as well as the time of his service with the joint hospital board. It follows that the calculation which the tribunal made was incorrect and the contention that the applicant put forward was correct and the one on which his compensation should be based.

That deals with the merits of the application, but a point of the very greatest importance has been argued which has necessitated the examination of a large number of cases and consideration of the principles which apply to the doctrine of *certiorari*. *Certiorari*, as has often been pointed out in this court, is a remedy of a very special character. In most cases it is moved and granted on the question whether or not an inferior court or tribunal has jurisdiction. It never goes to a superior court, but where it is shown that an inferior court either has no jurisdiction in a particular matter or has exceeded its jurisdiction, *certiorari* will be granted. The object of the old writ of *certiorari*, which has now been replaced by an order of *certiorari*—it is merely a procedural change—was to bring up into this court the proceeding and order which had been made in the lower court in order that it should be examined. It did not issue, or seldom issued, to a court of record. In former days the procedure was by writ of error, and where a writ of error was granted the whole record was brought up to this court—or, in former days, to the court of King’s Bench—and the court examined the record and only decided for the plaintiff in error if error appeared on the record. For that reason a writ of error was an unsatisfactory remedy in a criminal case. If a writ of error was granted the record was brought up, which consisted of the commission of assize, showing the appointment of the judges, the holding of the court, the precepts of the sheriffs, the names of the grand jurors, and the finding of the indictment. A record of the petty jurors and any other pleading that might have been put in, such as a plea in bar, and the verdict recorded and the judgment of the court were also brought up for examination. Nothing, however, was shown on the record as to the evidence which was admitted or the charge which was given to the jury, so that, if there had been a completely wrong charge given by the judge on a point of law—what we should now call misdirection—or if there had been a wrongful admission of evidence, that could not be examined on a writ of error, because it did not appear on the record.

With regard to the proceedings of courts not of record, as there was no record to be moved into the court the writ of *certiorari* brought up the proceedings in and the order of the lower court, and those orders differed from time to time by reason of various statutory provisions, more particularly, I suppose, in the case of proceedings before justices. Before the procedural changes wrought by the Summary Jurisdiction Act, 1848 (commonly called Jervis’s Act) all proceedings before justices had to be set out at great length, with their certificates or their convictions, and it was under the Summary Jurisdiction Acts that the simple forms of convictions which are now common were substituted. I am emphasising this point because it will be seen from cases which we have to examine that the question how far this court can inquire into the correctness of the decision, as distinct from the jurisdiction of the court which decided it, depends on the contents of the documents which are brought up under the writ and laid before the court. For instance, if an order of *certiorari* is now

granted to bring into this court a conviction by justices, we will say for some simple offence, there are brought up the charge, the conviction, the determination of the justices, and the order directing payment of a fine, and that is all. I think it very likely that in 1848, when SIR JOHN JERVIS introduced his bill into Parliament, one of the matters which moved him to do so, and moved Parliament to pass the Act, was that hitherto all sorts of objections could be taken on *certiorari* because of the very full statements which used to be brought up on convictions.

Many statutes have taken away *certiorari* in respect of the matters with which those statutes have dealt, but that never debarred the court from granting *certiorari* if it was a question of jurisdiction. If an inferior court had wrongly given itself jurisdiction, *certiorari* would lie to quash its order, because it had no jurisdiction to make it. The taking away of *certiorari* by statute no doubt prevented the court from inquiring into what I may call the merits of the determination, but it did not prevent the court from inquiring whether or not the inferior court had any jurisdiction to make the order. Many cases are found in the reports where *certiorari* had been taken away, the statute providing that the decision of the inferior court was not to be removed into any court by writ of *certiorari* or otherwise, and yet the courts granted *certiorari* in respect of those very matters on the ground of jurisdiction.

Counsel for the tribunal contended that the court has no power to examine this order on *certiorari* because, he said, *certiorari* went only to defect of jurisdiction, and he relied especially on a case which certainly creates difficulty in this court. I can deal with it frankly because I was one of the members of the Court of Appeal which decided it. It is *Racecourse Betting Control Board v. Secretary of State for Air* (1). That was the case of a motion in the Chancery Division to set aside an award of the General Claims Tribunal, and LORD GREENE, M.R., in giving judgment, said ([1944] 1 All E.R. 61):

“It was said that the jurisdiction to set aside the award of an arbitrator for error of law appearing on its face is one that exists at common law independently of the Arbitration Acts. It was also said that the jurisdiction is not confined to consensual arbitrations, but extends to arbitrations under statutes. Both these propositions are unquestionably correct: see as to the former, *Hodgkinson v. Fernie* (2), and as to the latter *Re Jones and Carter* (3). The next and vital proposition is, however, one which, in my opinion, cannot be supported either on principle or on authority. It was that the jurisdiction is not confined to the case of awards of arbitrators, but extends to the decisions of every form of inferior tribunal; and, accordingly, when the legislature establishes a special tribunal, whether or not it can be described as an arbitration tribunal, the court can set aside a decision given by it if an error of law appears on its face. This jurisdiction was said to exist quite independently of the old procedure by way of writ of error. No authority was quoted in support of this proposition and, in my opinion, it is wrong on principle. In the case of an inferior court, if it acts beyond its jurisdiction, the remedy is by *certiorari*. If, acting within its jurisdiction, it makes an error in law, the remedy is by appeal (if the decision is appealable), and that whether or not the error appears on the face of the decision. In the case of new tribunals set up under statute, no appeal will lie unless the right of appeal is conferred expressly or impliedly by statute, and accordingly where, as in the present case, no right of appeal is given, their decisions are not appealable.”

He then dealt with the case of arbitration and expressed the view that the undoubted right of the court to interfere where an error of law appeared on the face of an award was an exception to the general rule. MACKINNON, L.J., in giving judgment, said much the same thing and treated arbitration as an

exception. I did not deal with it quite in that way, but for present purposes I need not refer to my judgment.

We have to consider whether we are bound by that decision, but it is to be noticed that two cases, one in the House of Lords and one in the Judicial Committee of the Privy Council, were not cited to the court. In my opinion, if those cases had been cited the decision must have been contrary to what it was. In *Walsall Overseers v. London & North Western Ry. Co.* (4), EARL CAIRNS, L.C., reviewed the history of quarter sessions taking the opinion of the judges of assize, as they used to do under the terms of their commission. The commission addressed to magistrates ever since the reign of Edward III, when magistrates were first appointed and courts of quarter sessions were set up, gave them authority to hear and determine provided that in cases of difficulty they were to reserve their decision until the judge, with whom they could confer, had come into the county. That was not only part of the commission in those days, but is still to be found in the commission at the present day. LORD CAIRNS pointed out that that gradually fell into disuse and the practice grew up of consulting the court by means of a Special Case. Then he went on to say (4 App. Cas. 40):

“But supposing that the court of quarter sessions did not adopt that course, there was still another mode by which any question of law which appeared to the court of quarter sessions doubtful, might be left open for the exercise of the judgment of a higher tribunal. All that was necessary was that the court of quarter sessions, in making its order, should not make it an unspeaking or unintelligible order, but should, in some way state upon the face of the order, the elements which had led to the decision of the court of quarter sessions.”

Pausing there for a minute, when the Lord Chancellor is speaking of an “unspeaking or unintelligible” order, he obviously means an order which gives no reasons or does not explain in any way why the court made it. It may not be unintelligible in one sense, but it is unintelligible in that it does not tell the superior court why the court made that order. LORD CAIRNS continued (*ibid.*):

“If the court of quarter sessions stated upon the face of the order, by way of recital, that the facts were so and so, and the grounds of its decision were such as were so stated, then the order became upon the face of it, a speaking order; and if that which was stated upon the face of the order, in the opinion of any party, was not such as to warrant the order, then that party might go to the court of Queen’s Bench and point to the order as one which told its own story, and ask the court of Queen’s Bench to remove it by *certiorari*, and when so removed to pass judgment upon it, whether it should or should not be quashed. In that case, as I said just now, the jurisdiction of the court of Queen’s Bench was merely a jurisdiction to leave the order standing or to remove it out of the way. It was not a jurisdiction to substitute for it another or a different order; that would be making the court of Queen’s Bench, in the ordinary sense of the term, a court of re-hearing or of appeal.”

That passage seems to me to show that the court could look at the order and pronounce on it if it was a “speaking” order, that is to say, an order which set out the grounds of the decision. To the same effect is the speech of LORD PENZANCE.

That case was dealt with by LORD SUMNER in *R. v. Nat Bell Liquors, Ltd.* (5) in which he showed that the law of Canada with regard to *certiorari* was the same as the law of this country. He went most exhaustively into the whole law relating to *certiorari*. He pointed out that where *certiorari* is moved on the ground of lack of jurisdiction, in many cases the court must have evidence

before it to show the lack of jurisdiction. For instance, if a court of summary jurisdiction professed to have dealt with a case of burglary, the defect of jurisdiction would appear at once on the order and no evidence would be required, but if the defect of jurisdiction arose because of disqualification of a justice, either on the ground of bias or some other reason, the court could not know of it unless evidence was brought before it, and, therefore, the court would admit evidence by affidavit to show the defect of jurisdiction. LORD SUMNER pointed out that if the inferior court acted within its jurisdiction only the order could be examined and evidence could not be taken to show that the order was made as the result of some process of reasoning which was incorrect or of the admission of evidence that was not admissible, or even on the ground that there was no evidence to justify it, because all those were matters of appeal.

LORD SUMNER referred to the speech of EARL CAIRNS, L.C., in *Walsall Overseers v. London & North Western Ry. Co.* (4), and he quotes this passage ([1922] 2 A.C. 155):

"If there was upon the face of the order of the court of quarter sessions anything which showed that that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it."

He then turned to the kind of order under discussion, and, after stating how much, both of fact and of law, the sessions were bound to set out on the face of their order, he pointed out that the statement of what had led to the decision of the court made the order "not an unspeaking or unintelligible order," but a "speaking" one which on *certiorari* could be criticised as one which told its own story and for error could be quashed. He said (*ibid.*):

"It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the court, either by new affidavits or by producing anything that is not on or part of the record."

Observe that that is saying that evidence cannot be produced to supplement that which is on the record. The court is confined to that which is on the record. Later, he says (*ibid.*, 156):

"That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

He went on to deal with *R. v. Bolton* (6) and said (*ibid.*, 159):

"*R. v. Bolton* (6), undoubtedly, is a landmark in the history of *certiorari*, for it summarises in an impeccable form the principles of its application under the regime created by what are called Jervis's Acts . . ."

I do not quite understand that, because Jervis's Acts were not passed till 1848, and *R. v. Bolton* (6) was decided in 1841. He continued:

" . . . but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench, or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for

its detection. The face of the record 'spoke' no longer: it was the inscrutable face of a sphinx."

That was a characteristic observation of LORD SUMNER.

That shows exactly what was the position when the old procedure of drawing up convictions and orders by courts of summary jurisdiction was altered so that there was shown only the bare decision of the case. It disarmed the exercise of the jurisdiction by this court, because they could only look at that order and could not go behind it. They could not, for instance, do what LORD HOLT, C.J., had done early in the eighteenth century, in *Ricelip Parish v. Henden Parish* (7). That was a settlement case in which the whole matter was brought before the court of King's Bench. I need not read the whole rather complicated story, but this is what LORD HOLT, C.J., said (5 Mod. Rep. 417):

"Where the justices of the peace give a special reason for their settlement, and the conclusion which they make in point of law will not warrant the premises, there we will rectify their judgment; but if they had given no reason at all, then we would not have travelled into the fact."

Walsall Overseers v. London & North Western Ry. Co. (4) and *R. v. Nat Bell Liquors, Ltd.* (5) were not cited to the Court of Appeal in the *Racecourse Betting Control Board* case (1), and it seems to me that, in view of the very clear decision of EARL CAIRNS, L.C., in the first case and the equally clear and emphatic statement of the law by LORD SUMNER in the second, the decision of the Court of Appeal cannot stand. I am the more convinced of that because I think, after reading the passages to which I have referred and considering *Ricelip Parish v. Henden Parish* (7) in which LORD HOLT, C.J., stated the principle, the question before the Court of Appeal, namely, why the court interfered in the cases of arbitrators, becomes clear. The Court of Appeal treated the interference by the court with awards for error on their face as an exception to the general rule, but I think that that is wrong. In *Kent v. Elstob* (8), which was referred to in the judgment of LORD GREENE, M.R., the court had no doubt of its right to interfere where error appeared on the face of an award. They did so, I think, on exactly the same principles as LORD HOLT, C.J., applied in *Ricelip Parish v. Henden Parish* (7). An award is, of course, a speaking document. It sets out the reasons for the arbitrator's decision and, therefore, the court has before it, under the hand of the arbitrator, the reasons why he came to the decision he did, and if he has misapplied the law the court will correct him. It is true that WILLIAMS, J., in *Hodgkinson v. Fernie* (2), seems to have expressed regret that the court took that course in the case of arbitrations, and in *Hogge v. Burgess* (9), MARTIN, B., said (3 H. & N. 296):

"According to the old rule, the decision of an arbitrator, both upon the law and facts, was conclusive. That rule was broken into by the court of King's Bench in the case of *Kent v. Elstob* (8) . . ."

The Court of Appeal drew the inference that for some reason, the origin of which they could not ascertain, awards were in a class by themselves and formed an exception to the general rule. In my opinion, the reason why WILLIAMS, J., in *Hodgkinson v. Fernie* (2) expressed regret at the court being able to interfere in the case of awards was because he thought with others and, I think, with MARTIN, B., that where the parties have chosen to submit both law and fact to an arbitrator they have chosen their own tribunal and one party ought not to be allowed to say that the law which that tribunal has laid down is wrong. He regretted that the courts allowed, as they had certainly done ever since *Kent v. Elstob* (8), the law of the arbitrator to be attacked, because he thought that, if a person chose an arbitrator, he should be bound by the law which the arbitrator laid down. That is very much the same

as SCRUTTON, L.J., often used to say when cases under the Arbitration Act came before him. In giving his reasons why the court would not interfere he would say: "Business men choose to go before other business men, and they go there because they do not like the law that is administered in this court or the way we look at the admission of evidence, or something of that sort. They like to go before their own tribunal." I think that is the real reason why WILLIAMS, J., expressed the regret he did in *Hodgkinson v. Fernie* (2), and that he was not expressing a regret that an exception had been grafted on to the law. I think the law with regard to awards is exactly the same as that laid down by LORD HOLT, C.J., in *Ricelip Parish v. Henden Parish* (7).

The result of that clearly seems to me to be that a court before whom this order is brought can examine it. The tribunal has told us what they have taken into account, what they have disregarded, and the contentions which they accepted. They have told us their view of the law, and for the reasons which I gave at the beginning of my judgment this court is of opinion that the construction which they placed on this very complicated set of regulations was wrong. It is perfectly true, as counsel for the tribunal pointed out, that there have been several other cases, principally under the Furnished Houses (Rent Control) Act, 1946, in which the court has refused to grant *certiorari*, but in none of those cases were there speaking orders, or, if there were, the court has proceeded on the same error that the Court of Appeal fell into in the *Racecourse Betting Control Board* case (1). Are we at liberty to disregard that decision of the Court of Appeal? That, I think, depends on the application of *Young v. Bristol Aeroplane Co., Ltd.* (10). That case was one in which the Court of Appeal considered how far they were bound by their own decisions and laid down the principles on which they could depart from a previous decision. In giving the judgment of the court, LORD GREENE, M.R., who was dealing with cases where decisions had been given, as he put it, *per incuriam*, which the court was entitled to disregard, said ([1944] 2 All E.R. 300):

"Two classes of decisions *per incuriam* fall outside the scope of our inquiry, namely, (i) those where the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covers the case before it—in such a case a subsequent court must decide which of the two decisions it ought to follow; and (ii) those where it has acted in ignorance of a decision of the House of Lords which covers the point—in such a case a subsequent court is bound by the decision of the House of Lords."

I hope that I have shown that the decision in the *Racecourse Betting Control Board* case (1) is inconsistent with the decisions in *Walsall Overseers v. London & North Western Ry. Co.* (4) and *R. v. Nat Bell Liquors, Ltd.* (5). Of course, the last-mentioned case is not technically binding on the Court of Appeal because it was a decision of the Judicial Committee, but it was a case which obviously the Court of Appeal would treat with the utmost respect. Following, as it does, and reinforcing the decision of the House of Lords in the *Walsall* case (4), I have no doubt the court would have considered it binding on them. Decisions of the House of Lords are binding on this court, as are decisions of the Court of Appeal, and if we find that a decision of the Court of Appeal is inconsistent with a decision of the House of Lords, applying the principles which run through the decision in *Young v. Bristol Aeroplane Co., Ltd.* (10), we are bound to follow the decision of the House of Lords. I am confirmed in that view by what LORD WRIGHT said in *Noble v. Southern Ry. Co.* (11). That was a case in which the Court of Appeal, considering itself bound by *Clarke v. Southern Ry. Co.* (12), had given a decision in a workmen's compensation case, with which all the members of the court said they disagreed. I was a member of the Court of Appeal and we said we did not like the previous decision. We thought it was wrong, but we felt ourselves bound by it because it had never

been overruled. It was, to a great extent, inconsistent with some subsequent cases in the House of Lords, but not so inconsistent as to say it could be overruled, but LORD WRIGHT went further and said ([1940] 2 All E.R. 392):

"What a court should do, when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House, is a problem of some difficulty in the doctrine of precedent. I incline to think that it should apply the law laid down by this House, and refuse to follow the erroneous decision."

Where we have a case in the House of Lords deciding one thing and one in the Court of Appeal deciding another in which the decision of the House of Lords was not cited, our plain duty is to follow the decision of the House of Lords, and this court now proposes to act on this principle. I think that the decision to which we are now coming will be very beneficial because so many tribunals are now set up, all of whom, I am certain, desire to do their duty in the best possible way, but they are often given very difficult sets of regulations and statutes to construe. It must be for their benefit, and I have no doubt they will welcome it, that this court should be able to give them guidance. We can give guidance to them if they make their orders speaking orders, so that this court can then deal with them if they are brought before the court on *certiorari*. I am of opinion that the order for *certiorari* should go and that the order in question should be quashed.

HILBERY, J.: I agree.

PARKER, J.: I entirely agree.

Order for certiorari. Costs of applicant to be paid by the Ministry of Health and the Gosforth U.D.C.

Solicitors: *Gwylm T. John* (for the applicant); *Solicitor, Ministry of Health* (for the tribunal); *Adam Burn & Son*, agents for *Charles S. Perkins*, Gosforth (for the Gosforth Urban District Council).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WILLIAMS v. LINNITT.

[COURT OF APPEAL (Lord Tucker, Asquith and Denning, L.JJ.), November 21, 22, 23, 24, December 20, 1950.]

Inn—Loss of guest's property—Theft of motor car from car park of inn—Need to prove guest a "traveller"—"Traveller"—Resident in neighbourhood—Car park within hospitium of inn—Notice relieving innkeeper of liability.

On Feb. 15, 1949, at about 9 p.m., the plaintiff, who was returning home in his motor car, stopped at the defendant's inn (admittedly a common inn), to reach which the plaintiff had to pass his own house, and, having placed his motor car in the car park, he had drinks with friends at the inn. On leaving the inn an hour later, he found that his car had been stolen. The car park consisted of an area in front of and contiguous to the inn, with a sign bearing the name of the hotel on one side and the following notice: "Car Park. Patrons only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of or damage to (a) any vehicle (b) anything in or on or about any vehicle, however such loss or damage may be caused. R.W.L., Proprietor." In an action by the plaintiff against the proprietor of the inn for damages for the loss of the car,

HELD: (i) in an action against an innkeeper for damages for the loss of goods of a guest the owner of the goods must prove that at the time of the loss he was a "traveller."

(ii) although the plaintiff was residing in the immediate neighbourhood of the inn and visited it merely to take a drink, he was, none the less, a "traveller" for the purpose of establishing the defendant's liability as an innkeeper at common law.

Observations of KENNEDY, J., in Orchard v. Bush & Co. ([1898] 2 Q.B. 289), applied.

R. v. Rymer (1877) (2 Q.B.D. 136) and R. v. Higgins ([1947] 2 All E.R. 619), not followed.

(iii) the car park being contiguous to the inn and one in which a guest with a car was customarily invited to leave it, there being no evidence that any other accommodation for cars was provided by the inn, and it being part of the defendant's normal business to provide accommodation for the cars of guests, the car park was within the "*hospitium*" of the inn.

(iv) (DENNING, L.J., *dissentiente*) the notice exhibited in the car park did not relieve the defendant of his liability, and, therefore, the plaintiff was entitled to recover.

[EDITORIAL NOTE. Compare this case with *Tinsley v. Dudley*, *ante*, p. 252.]

AS TO LIABILITY OF INNKEEPER IN RESPECT OF GUEST'S PROPERTY, see HALSBURY, Hailsham Edn., Vol. 18, pp. 150-159, paras. 208-218; and FOR CASES, see DIGEST, Vol. 29, pp. 10-18, Nos. 128-226.]

Cases referred to:

- (1) *Calye's Case*, (1584), 8 Co. Rep. 32a; 77 E.R. 520; 29 Digest 2, 1.
- (2) *R. v. Luellin*, (1701), 12 Mod. Rep. 445; 88 E.R. 1441; 29 Digest 9, 105.
- (3) *Grimston v. Innkeeper*, (1627), Het. 49; 124 E.R. 334; 29 Digest 4, 33.
- (4) *Warbrooke v. Griffin*, (1609), 2 Brownl. 254; 123 E.R. 927; 29 Digest 21, 276.
- (5) *Gulielm's Case*, (1625), Lat. 88; 82 E.R. 288.
- (6) *Harland's Case*, (1641), Clay. 97; 29 Digest 5, 42.
- (7) *Bennett v. Mellor*, (1793), 5 Term. Rep. 273; 101 E.R. 154; 29 Digest 12, 162.
- (8) *Lamond v. Richard*, [1897] 1 Q.B. 541; 66 L.J.Q.B. 315; 76 L.T. 141; 61 J.P. 260; 29 Digest 6, 58.
- (9) *Thompson v. Lacy*, (1820), 3 B. & Ald. 283; 106 E.R. 667; 29 Digest 2, 3.
- (10) *Orchard v. Bush & Co.*, [1898] 2 Q.B. 284; 67 L.J.Q.B. 650; 78 L.T. 557; 29 Digest 13, 164.
- (11) *R. v. Rymer*, (1877), 2 Q.B.D. 136; 46 L.J.M.C. 108; 35 L.T. 774; 41 J.P. 199; 29 Digest 9, 108.
- (12) *R. v. Higgins*, [1947] 2 All E.R. 619; [1948] 1 K.B. 165; [1948] L.J.R. 442; 112 J.P. 27; 2nd Digest Supp.
- (13) *Cryan v. Hotel Rembrandt, Ltd.*, (1925), 133 L.T. 395; 29 Digest 5, 40.
- (14) *Jones v. Tyler*, (1834), 1 Ad. & El. 522; 3 L.J.K.B. 166; 110 E.R. 1307; 29 Digest 12, 151.
- (15) *Brand v. Glasse*, (1584), Moore, K.B. 158; 72 E.R. 503; 29 Digest 13, 175.
- (16) *Sanders v. Spencer*, (1566), 3 Dyer 266b; 73 E.R. 591; 29 Digest 13, 173.
- (17) *Drope v. Thaire*, (1626), Benl. 173; Lat. 126; Poph. 178; 79 E.R. 1274; 29 Digest 4, 32.
- (18) *Atkinson v. Sellers*, (1858), 5 C.B.N.S. 442; 28 L.J.M.C. 12; 28 L.J.C.P. 72; 32 L.T.O.S. 147; 23 J.P. 71; 141 E.R. 181.
- (19) *Stephens v. Watson*, (1702), 1 Salk. 45; 91 E.R. 44; *sub nom.*, *Watson's Case*, (1701), 3 Salk. 26; 91 E.R. 26; 30 Digest 81, 633.
- (20) *Carr's Case*, (1583), 1 Roll. Abr. 3 (e).
- (21) *White's Case*, (1558), 2 Dyer, 158b; 73 E.R. 343; 29 Digest 4, 29.

- (22) *York v. Grindstone*, (1703), 1 Salk. 388; 91 E.R. 338; *sub nom.*, *Yorke v. Grenaugh*, 2 Ld. Raym. 866; 92 E.R. 79; 29 Digest 6, 49.
- (23) *Pidgeon v. Legg*, (1857), 29 L.T.O.S. 166; 21 J.P. 743; 29 Digest 3, 5.
- (24) *Lane v. Cotton*, (1702), 12 Mod. Rep. 472; 1 Salk. 17; 88 E.R. 1458; 91 E.R. 17; 29 Digest 6, 48.
- (25) *Nicholson v. Willan*, (1804), 5 East, 507; 102 E.R. 1164; 8 Digest 42, 252.
- (26) *Peek v. North Staffordshire Ry. Co.*, (1863), 10 H.L. Cas. 473; 32 L.J.Q.B. 241; 8 L.T. 768; 11 E.R. 1109; 8 Digest 57, 381.
- (27) *Mosley v. Fosset*, (1598), 1 Roll. Abr. 4; 29 Digest 15, 197.
- (28) *Gee, Walker & Slater, Ltd. v. Friary Hotel (Derby), Ltd.*, (1949), 66 T.L.R. 59.

APPEAL by the defendant from an order of LYNSEY, J., made at Warwick Assizes on July 7, 1950, whereby he awarded the plaintiff £470 damages for the loss of his motor car which was stolen from a car park outside the Royal Red Gate Inn, Nuneaton, of which the defendant was the proprietor, where it had been left by the plaintiff while he took liquid refreshment at the inn.

The defendant contended that (a) the plaintiff, who lived about a mile from the inn, was not within the common law definition of a "traveller" to which an innkeeper owed a duty and (b) that the car park where the plaintiff's car was left was not within the precincts of the inn so as to make the defendant subject to the absolute liability as an innkeeper for the safety of the car. The facts appear in the judgment of LORD TUCKER.

Elwes, K.C., and *J. G. S. Hobson* for the defendant.

Gardiner, K.C., and *J. Stevenson* for the plaintiff.

Cur. adv. vult.

Dec. 20. The following judgments were read.

LORD TUCKER: This is an appeal from the judgment of LYNSEY, J., at the Warwick Summer Assizes of 1950, whereby he awarded the plaintiff £470 damages for the loss of his motor car, which was stolen outside the Royal Red Gate Inn in Watling Street, near Nuneaton, where it had been parked by the plaintiff while he took liquid refreshment at the inn, of which the defendant was proprietor. It was admitted that the inn was a common inn and that the defendant was an innkeeper.

The facts as found by the learned judge and set out in his judgment were as follows. The plaintiff, Mr. John Frederick Williams, lives at Caldecote, near Nuneaton. His farm is some two or three miles from Nuneaton, and on this particular day, Feb. 15, 1949, he had gone in his motor car into Nuneaton. In the evening, on his way home from Nuneaton, he had to pass his own house. He did not stop there, but continued for a further distance of about a mile to the Royal Red Gate Inn. He went there, as he says quite frankly, to meet some friends and drink some beer with them. He got there shortly after 9 o'clock and he had some drinks with his friends, and at closing time (10 o'clock) he came out and found his motor car had disappeared. There is a parking place at the front of the inn. When he had arrived at the inn he had found two other motor cars parked near the front in the parking place, and he placed his motor car next to those, *i.e.*, third away from the front of the inn. Having found his motor car gone, he complained to the police. If his motor car had remained there when he came out, he would have got into it and gone home.

A number of points were raised by way of defence, but the one of most interest and general importance was the contention that on these facts there was lacking one of the essential elements of an innkeeper's liability at common law, namely, that the plaintiff was not a "traveller." It was said by counsel on behalf of the defendant that, whatever might be the proper definition of a traveller in this connection, it was sufficient for his purpose to contend that the word did not include a person residing in the immediate neighbourhood

who leaves his home for the sole purpose of spending an hour or so drinking with his friends at an inn and then returning home. He cited all the relevant authorities from *Calye's Case* (1) onwards down to the year 1948. I do not propose to refer to them all. It suffices to say that they clearly establish that for the purposes of an indictment against an innkeeper for refusing without reasonable excuse to receive, lodge or entertain, it is a necessary averment that the person refused was a traveller: see *R. v. Luellin* (2); and that a similar averment is necessary in the case of a civil action claiming damages for such refusal or for the loss of goods: see *Grimston v. Innkeeper* (3) and the form of declaration in BULLEN & LEAKE, 3rd ed., p. 344. The second resolution in *Calye's Case* (1) is as follows (8 Co. Rep. 32b):

"The words are, *ad hospitandos homines per partes ubi hujusmodi hospitaria existunt transeuntes, et in eisdem hospitantes*, by which it appears that common inns are instituted for passengers and wayfaring men, for the Latin word for an inn is, *diversorium*, because he who lodges there is, *quasi divertens se a via*; and so *diversoriolum*. And therefore if a neighbour who is no traveller, as a friend, at the request of the innholder lodges there and his goods be stolen, etc. he shall not have an action; for the writ is, *ad hospitandos homines*, etc., *transeuntes in eisdem hospitantes*, etc."

It was in early times considered that to be a traveller a man must lodge at the inn. In *Warbrooke v. Griffin* (4), it was said by COKE, C.J. (2 Brownl. 254):

"... and if a neighbour of the innkeeper come to the innkeeper, he shall not answer for the goods, for he is not lodged, but as a tipler, and so if an innkeeper invite any to his house *ad prandendum aut caenandum*, the innkeeper shall not be charged . . ."

In *Gulielm's Case* (5) it was considered by DODERIDGE, J., that the traveller lost his status as such after one day's stay. On the second day he became a "hogen hinde" and on the third day a menial servant. In *Harland's Case* (6), *Calye's Case* (1) was dissented from. It was urged that after a stay of fourteen days at an inn a man could no longer be a traveller, but it was held otherwise. By 1793, when *Bennett v. Mellor* (7) was decided, it had become recognised that it was not necessary for the guest to stay the night in order to charge the innkeeper, but a passing visit for refreshment sufficed. Similarly, in the course of time it became settled that it is a question of fact in each case whether the guest, by prolonging his stay, has ceased to be a traveller and become a lodger: see *Lamond v. Richard* (8). It is, however, remarkable that in only two cases has there ever been any discussion whether the plaintiff on his arrival could properly be considered a traveller. I shall refer to these cases later.

It is argued by counsel for the defendant that in every one of the other reported cases, although the question was not discussed, the facts were such that there was some evidence on which the plaintiff could have been held to be a traveller in the sense for which he contends. On the other hand, counsel for the plaintiff says that all the cases, with one exception, are consistent with the view for which he contends, namely, that the word "traveller" includes all comers who come to an inn from outside, intending to make use of some or all of the facilities it supplies and who are so received. This excludes friends invited as the private guests of the innkeeper, guests who have become lodgers, the servants or family of the innkeeper, and persons visiting the inn for other purposes, for example, a commercial traveller, who comes solely for the purpose of selling his wares.

These contentions necessitate a detailed examination of three cases. The first is *Bennett v. Mellor* (7) decided in 1793. In that case action was brought against an innkeeper for the value of goods stolen at his inn. The case was tried by BULLER, J., at the Lancaster Assizes and the facts were that the

plaintiff's servant had taken the goods in question to market at Manchester and, not being able to dispose of them, went to the defendant's inn and asked if he could leave the goods there till next week (meaning the next market day). He was told by the defendant's wife that she could not tell, as they were full of parcels. The servant then sat down in the inn and had some liquor and put the goods behind him. When he got up after a short time the goods were missing. A verdict was found for the plaintiff. BULLER, J., reporting the case on a motion for a new trial, said (5 Term. 274) that, if the defendant's wife had accepted the goods on the special request made, he should have considered her a bailee and not answerable, having been guilty of no negligence, but, that not being the case, he considered this to be the common case of goods brought into an inn by a guest, and stolen from thence, in which case the innkeeper was liable. It was argued, first, that the innkeeper had refused to take charge of the goods, and was not liable in this form of action, though the plaintiff might have his remedy in another form of action, and, secondly, that the plaintiff's servant did not come as a guest, but for the special purpose of asking the landlord to take charge of the goods. The rule was discharged. GROSE, J., considered the case covered by *Calve's Case* (1), saying (5 Term. 276):

"According to that, if a man go into an inn and is accepted there as a guest, the innkeeper is bound to take care of the goods of the guest; and so says the case in *DYER*."

It is said that, on the facts, the servant had, apparently, come from outside Manchester and was intending to return home, and could, accordingly, be considered a traveller. On the other hand, it would certainly appear that no consideration was given to this aspect of the case by anyone, and GROSE, J., dealt with it on the basis of a relationship arising out of the acceptance of the servant by the innkeeper as a guest.

In *Thompson v. Lacy* (9) the headnote reads:

"A house of public entertainment in London, where beds, provisions, etc., are furnished for all persons paying for the same, but which was merely a tavern and coffee house, and was not frequented by stage coaches and waggons from the country, and which had no stables belonging to it, is to be considered an inn, and the owner is subject to the liabilities of innkeepers, and has a lien on the goods of his guest for the payment of his bill, and that even where the guest did not appear to have been a traveller, but one who had previously resided in furnished lodgings in London."

The facts set out in the report were that the plaintiff, who had previously lived in furnished lodgings in London, went to the defendant's house and engaged a room. He continued to reside there for several months and then left. The defendant charged in his bill for eighty-three nights' lodging, and claimed a lien on the plaintiff's goods. ABBOTT, C.J., directed a non-suit in an action of trover by the plaintiff. A rule *nisi* was obtained. Counsel showing cause confined their arguments to supporting the finding that the house was a common inn. Counsel appearing in support of the rule, however, contended that it was not an inn and that, even if it were, the plaintiff, having been an inhabitant of London, frequenting it and even sleeping there, was not a wayfaring man within the rule. The judgments of ABBOTT, C.J., BAYLEY and BEST, JJ., holding that the house was an inn, occupy a full page in the report of the case in the English Reports (106 E.R. 667), but none of them even mentions the point taken that the plaintiff was not a traveller.

Finally, in *Orchard v. Bush & Co.* (10) the facts were that the plaintiff was in business in Liverpool and lived outside. He went one night to an hotel in Liverpool for supper about 9 p.m., on his way to the station on his return home. His overcoat was stolen while he was at dinner. The county court judge found that the plaintiff was "a guest" of the innkeeper and gave judgment in his

favour. On appeal to the Divisional Court Mr. Lush argued that merely taking temporary refreshment was not enough to constitute the plaintiff a traveller and cited *R. v. Rymer* (11), and *Lamond v. Richard* (8). Mr. Horridge, for the plaintiff, submitted that the relationship of innkeeper and guest is constituted if a person goes to an inn for the purpose of receiving such accommodation and services as are ordinarily given to guests. He is protected if he deposits his goods in a place in which such goods are usually taken in the inn. WILLS and KENNEDY, JJ., dismissed the appeal. WILLS, J., after stating that on the facts the plaintiff was a wayfarer, added ([1898] 2 Q.B. 287):

"I think a guest is a person who uses the inn, either for a temporary or a more permanent stay, in order to take what the inn can give."

KENNEDY, J., said (*ibid.*, 289):

"It was said that the plaintiff in the present case was not a traveller. The authorities give no definition of what is a traveller; but, looking at the reason of the thing, I should have thought that any person, who was neither an inhabitant of the house nor a private guest of the innkeeper or his family, but who came into the house as a guest to get such accommodation as it afforded and he was willing to pay for, was a traveller. It does not seem to me to make any difference whether his journey be a long or a short one. I agree that, on the facts of this case, the plaintiff was a traveller; but, apart from the question whether he was a traveller or not, I am of opinion that if a man is in an inn for the purpose of receiving such accommodation as the innkeeper can give him, he is entitled to the protection the law gives to a guest at an inn. I agree with what is said in the notes to *Calve's Case* (1) (1 Smith L.C., 10th ed., p. 124). 'It is not necessary, in order that a man may be a guest, so as to fix the innkeeper with liability, that he should have come for more than a temporary refreshment.' "

It is true that KENNEDY, J.'s statement of the law was *obiter* on the view taken on the facts, but, none the less, it merits the respect and consideration that are always accorded to the observations of that learned judge, and, in my view, it in no way conflicts with previous authority (save possibly *Rymer's Case* (11) and is entirely consistent with the interpretation of *Bennett v. Mellor* (7) and *Thompson v. Lacy* (9) for which the plaintiff in the present case contends.

This brings me to *R. v. Rymer* (11). In that case the defendant was indicted for refusing to serve liquor to the prosecutor, who was a local resident, and was in the habit of bringing his dogs on the licensed premises, to the annoyance of other customers. It was held by the Court for Crown Cases Reserved, first, that the bar in question which was separated from the inn and had a different name was not part of the inn; secondly, that the prosecutor was not a traveller; and, thirdly, that the defendant had not acted unreasonably. No counsel appeared to argue on either side, but, although the first ground would have been sufficient to dispose of the case, the court clearly decided that the prosecutor, being a local resident who called in for a drink, was not a traveller. There is nothing to show what view WILLS and KENNEDY, JJ., took of this case when it was cited to them in *Orchard v. Bush & Co.* (10). Although it is difficult to see that any distinction can be drawn between what constitutes a traveller for the purposes of such a prosecution and what is necessary in a civil action at the suit of one who has, in fact, been accepted as a guest at an inn and lost his goods therein, none the less I cannot regard the decision in this criminal prosecution as compelling me to the view that the law was incorrectly stated by KENNEDY, J., in *Orchard v. Bush & Co.* (10), and the same observation applies to some words used by LORD GODDARD, C.J., in delivering the judgment of the Court of Criminal Appeal in *R. v. Higgins* (12), in which he said ([1947] 2 All E.R. 621) that, in contrast to the prosecutor, local residents could not be regarded as travellers. For these reasons, I am

prepared to accept the statement of the law quoted above from the judgment of KENNEDY, J., in *Orchard v. Bush & Co.* (10), decided more than fifty years ago and followed and applied in subsequent decisions—for example, in *Cryan v. Hotel Rembrandt, Ltd.* (13).

We were referred to several cases decided under the provisions of the Licensing Acts prior to 1921, but I do not derive much assistance from these decisions, which depend on the language used in the particular statute in question and the problem of the “*bona fide traveller*” seeking intoxicating liquor on Sunday. On this part of the case, I am in agreement with the judgment of LYNSEY, J., who arrived at the same conclusion for substantially the same reasons.

The second defence raised was that the car park was not within “the *hospitium*” of the inn. The car park consists of a wide triangular space in front of the inn which opens on to it, with the road from Watling Street to Fenny Drayton running along the side of the inn. The car park has a tar macadam surface and there is a large sign with the words “Royal Red Gate” in conspicuous letters across one side of the park. It was clearly constructed and intended for the parking of visitors’ cars and was so used. There was, however, attached to one of the uprights supporting the sign a small square board with the following notice on it:

“Car Park. Patrons only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of or damage to (a) any vehicle (b) anything in or on or about any vehicle, however such loss or damage may be caused. R. W. Linnitt. Proprietor.”

The learned judge found that the plaintiff had not seen, or, at any rate, read, the notice and that, in any event, if the car park was part of the inn, such a notice would not relieve the innkeeper of his common law liability. The defendant, on appeal, did not seek to rely on this notice as contractually relieving him from liability, and conceded that, if the car park was within the “*hospitium*,” he could not contract out of his liability, but he contended that the “*hospitium*” of an inn *prima facie* includes only the inn itself, its stables, and (in modern times) its garages, though it may be extended beyond the stables or garages by the innkeeper either by accepting the goods by himself or his servants or by necessary inference from his conduct: see *Jones v. Tyler* (14). This extension being within the control of the innkeeper, he can, it is said, exclude by notice the extension which might otherwise have been inferred from the circumstances. There is no doubt that in former times the “*hospitium*” was limited to the inn and stables and that the innkeeper was not liable for his guest’s horse which was put to pasture by the guest in a field adjoining the inn, but there is no authority which limits the “*hospitium*” to such parts of the premises as are under cover, and the word “*infra*” has been treated as equivalent to “*intra*.” It is conceded that in modern times the “*hospitium*” extends to garages, and I can see no reason why it should not include car parks designed and intended for the use of customers paying visits of short duration, just as in former times the gig would be left in the yard on market days. This applies particularly in cases like the present where the inn, adjoining Watling Street, is obviously catering for motor traffic and where no evidence was given by the defendant as to the existence or extent or situation of any garages in which visitors might place their cars. It is true that in the course of the trial a plan, other than the plan which had been agreed, was received in evidence, and that plan does indicate the existence of such garages at the top of the plan. No evidence was given to explain the situation or nature of these garages or whether they belonged to the defendant or some other person. Therefore, I proceed on the basis that there was, in fact, no evidence of the existence of any garages attached to or forming part of the inn.

The liability of the innkeeper, in my view, extends to the goods of his guest which are placed by the guest in that part of the premises in which such goods

are usually taken in the inn. The innkeeper will not be responsible if a motor car is placed by the guest on some part of the inn premises not intended for, and unsuitable for, the reception of motor vehicles. This is, I think, the explanation of the old cases, such as *Harland's Case* (6), *Brand v. Glasse* (15) and *Sanders v. Spencer* (16), where a distinction is drawn between an "outyard" and an "inner yard." If an innkeeper has an "inner yard" more suitable for the reception of carriages or cars, he can no doubt exclude the user for this purpose of an "outer yard," but, if he has only one yard or car parking space forming part of the inn premises and designed and intended for the use of cars and if he offers no other accommodation for his customers' cars, then I can see no reason why such space is not within the "*hospitium*." Furthermore, if liability is to be determined by the structural nature of the yard, I would ask what are the determining features? Must there be a wall or building on all sides of the space or will a wall on two sides or three sides suffice? Suppose the inn building forms one side of the yard, but on two other sides it is bordered by the walls of adjoining buildings with a gateway or archway leading into the street. Is this an inner yard? Unless I can find some guidance from the authorities as to the answer to such questions as these I prefer what seems to be a more reasonable test, namely, is the place in question a part of the inn premises intended and suitable for user in connection with some part of the innkeeper's business, and, if I find that it is not only intended and suitable for such purpose, but is the only accommodation available for the particular purpose, then it seems to me that such part of the premises must necessarily be within the "*hospitium*" of the inn. If an innkeeper holds himself out as willing to receive customers' motor cars on his premises, he is responsible for their safety. In the present case the defendant so held himself out, there was no evidence of any other accommodation for motor cars, and, in my opinion, the "*hospitium*" of this inn included the car park and the defendant cannot escape liability for the safety of his guests' motor cars parked in the place intended for them merely by exhibiting a notice such as that described above.

One further matter remains to be dealt with. It was said that one of the plans put in evidence at the trial showed that the only access to the saloon bar visited by the plaintiff was from the outside and consequently it did not form part of the premises devoted to the business of an innkeeper. Further inspection of the plan showed that there was apparently access to this bar from the rear, through a courtyard on to which other parts of the premises opened. No evidence was given on this matter at the trial and the learned judge did not deal with it in his judgment. The material available is manifestly insufficient to enable us to say that this well known feature of most inns was not an integral part of the inn premises. For these reasons, I think this appeal fails.

ASQUITH, L.J.: I agree. Obviously a guest, as against the innkeeper of a common inn, enjoys an anomalous status. The innkeeper is bound, under civil and criminal penalties, to receive him, and under civil sanctions to receive, and (subject to the Innkeepers' Acts) to ensure the safety of his goods, so far as they are "*infra hospitium*," while as an offset against these stringent obligations he has a lien on the goods which the guest brings to the inn.

This appeal raises four questions. First, must a guest, seeking to enforce the stringent liability to which a common innkeeper is subject, be a "traveller"?; secondly, if so, what does the term "traveller" mean?; thirdly, in the present case was the plaintiff a "traveller" in the material sense of that term?; and, fourthly, if he was, is he on the facts of this case entitled to enforce those strict liabilities? As regards the first of the four questions formulated above, I think it plain that a plaintiff is not a "guest" for the purpose of acquiring the peculiar remedies which the common law confers as against an innkeeper unless he be also

a "traveller." Whatever precise force attaches to that expression, it must apply to him or he goes without these remedies. This is, I think, established beyond question by the following among other considerations: (i) The old writ, which in the time of Elizabeth: see *Calye's Case* (1); could alone initiate a claim of this kind, described the plaintiff or plaintiffs as "*transiens*" or "*transeuntes*." (ii) In the field of criminal prosecutions, for not "receiving" the prosecutor, the indictment was bad if it did not contain any allegation that the plaintiff was a traveller: *R. v. Luellin* (2); and failure to prove that allegation was one of the grounds on which, in *R. v. Rymer* (11), the Court for Crown Cases Reserved held that the prosecution failed: see also the observations (not, I think, wholly *obiter*) of LORD GODDARD, C.J., in *R. v. Higgins* (12). (iii) In the field of civil litigation, since *Calye's Case* (1) the allegation that the plaintiff was a "traveller" or "travelling" has been held an indispensable averment in the declaration. It is true that in *Drope v. Thaire* (17), the want of this averment, according at least to the case as reported in Norman French (Lat. 126), was treated as immaterial, but in *Lamond v. Richard* (8), the Court of Appeal, basing itself partly on the precedent in BULLEN & LEAKE, 3rd ed., p. 344, clearly affirmed the contrary view. That decision is binding on us. There are decisions which, dealing with the rights of a guest, are silent on the question whether the person suing as guest was a traveller. There are no decisions which say expressly that anyone can be a guest without being a traveller, and the first named decisions, in my view, tacitly assume a guest to have fulfilled the qualification necessary to his becoming a guest, namely, that he should have been a traveller. Many of the decided cases, indeed, concern the question whether, or when, he has lost that character and assume him to have possessed it in the first instance.

The second main question, and a more difficult one, is what precisely the word "traveller" means in this connection. I think its meaning has in the course of time undergone some modification. According to the decisions in Tudor and Stuart times, there might have been some warrant for restricting it to persons who resorted to the common inn for accommodation for the night: see, for example, *Warbrooke v. Griffin* (4). However long this notion endured, it received its quietus when *Bennett v. Mellor* (7) decided that a man who, on his way home from Manchester market, entered an inn and had his goods stolen while he was having a drink, was entitled to the special remedies against an innkeeper, there being no question of his lodging at the inn for the night. This decision, more than a century and a half old, has never been overruled, and I feel it is too late for any agency short of the legislature to overrule it now. What it decides is that, if the plaintiff in transit from another place to his home, resorts to an inn for a meal (or a drink) he is a "traveller." So, again, in *Orchard v. Bush & Co.* (10), the plaintiff was held entitled to enforce the special obligations resting on an innkeeper when he stopped at the inn for a meal when *en route* from his office in Liverpool to his residence some miles outside it. I cannot persuade myself that, if this is so, a person, who travels to an inn from his own residence for a meal or a drink and travels back to his own residence afterwards, is not a "traveller" also.

To this view it is objected that, if it were true, every one visiting an inn would be a "traveller." I think the answer to this objection is that the term "traveller," even on this broad construction, is very far from embracing all comers. It excludes for instance: (a) the innkeeper's family living in the inn, (b) the innkeeper's servants, (c) the innkeeper's private guests, (d) lodgers at the inn, and (e) persons resorting to the inn for purposes unconnected with the enjoyment of the facilities which it provides as an inn—for example, to repair the drains or to sell the innkeeper a sewing machine. This is the gist of the judgment of KENNEDY, J., in *Orchard v. Bush & Co.* (10), which, whether or not it goes beyond the question immediately in issue, gives an

illuminating conspectus of the law. On any other meaning of the word, how can the innkeeper distinguish the traveller to whom he is under strict liability from the non-traveller to whom he is not? On the meaning indicated above, the sheep and the goats can at once be told apart. It is true that in *Atkinson v. Sellers* (18), COCKBURN, C.J., affirmed for the purpose of the proceedings before him the very distinction which I have ventured for the present purpose to reject. His language is as follows (5 C.B.N.S. 448):

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"Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But, if he goes to an inn for refreshment in the course of a journey, whether of business or of pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it."

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He was, however, dealing (a) with criminal and not civil liability, and (b) under a particular statute of 1854 which prohibited serving persons between certain Sunday hours unless they were travellers. Such a decision and many others decided under licensing legislation are not directly relevant in a civil action brought on the innkeepers' common law liability. If the distinction were valid in the different province which we are exploring, more than one of the cases

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cited to us would have been wrongly decided: for example, the decision of GREER, J., in *Oryan v. Hotel Rembrandt, Ltd.* (13), where, the guest of an hotel guest was held a guest (and, therefore, by implication a traveller) *vis-a-vis* the hotelkeeper, whereas she had done no more than dine with the hotel-guest, intending no doubt to return home afterwards. I am, therefore, of opinion that, on the third question, counsel for the plaintiff had established that the plaintiff was a "traveller."

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It does not, however, follow that the defendant was, in the present case, subject to the strict innkeepers' liability in respect of the plaintiff's car, having regard to the place where the plaintiff left it. The absolute liability of the innkeeper for the safety of the plaintiff's goods only attaches where such goods are "*infra hospitium*," namely, within the inn buildings themselves or within

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precincts so intimately related to those buildings as to be treated for this purpose as forming part of them. Stable buildings or garages annexed to the inn, or inner courts enclosed by its walls, have been so treated. Goods placed within these limits by the traveller are "*infra hospitium*" and, except by notice under the Innkeepers' Liability Act, 1863, s. 3, and to the extent that such a notice operates, the innkeeper cannot limit his absolute liability in

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relation to them. He cannot by a special agreement contract out of his strict liability. This is, I think, implicit in the decided cases. If, on the other hand, the traveller places his property in some outlying area which is not actually or constructively part of the inn—if he, for example, deposits his luggage in what was called in *Harland's Case* (6) an "outyard" adjacent to the inn, the "*hospitium*" has been held in some of the older cases not to extend to these

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things. The innkeeper is not absolutely liable for their loss and he can freely limit his liability (which would not, *prima facie*, exceed that of a bailee) in respect of them by special contract, though, if it is not the guest, but the innkeeper himself, who puts the guest's goods in such an outlying area, or invites the guest to put them there, he may by his act extend the "*hospitium*" to

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cover that area, as, for example, in *Jones v. Tyler* (14), where the innkeeper left the guest's gig in a public street outside the inn. On this branch of the case I agree with the conclusions of my Lord. I would add that, whatever the older cases may say, in my view, it is to-day a question in substance of fact whether a debatable area is part of the inn, including in that term the original "*hospitium*" or any extension of it. The most material facts in this case are that the area, being an area contiguous to the inn, is one in which the guest with a motor car is invited to leave it, that there is no evidence that any other accommodation belonging to the inn is provided for cars, and that it is part

of the innkeeper's normal business to provide for guests who arrive in cars. These circumstances are very strong evidence that the area is within the "hospitium" and, as I read the judgment, the learned judge has so found. If I am wrong in thinking that the question is substantially one of fact, I consider that the conclusion which the judge has reached on this point is the right legal inference from the circumstances referred to, and, if his conclusion is right, the strict liability attached and could not, in my view, be displaced by such notice as was put up in the car park, which, incidentally, would be quite invisible at 9 p.m. on a February night. For these reasons and those given by my Lord, I agree that the appeal, though very attractively argued, should be dismissed.

DENNING, L.J.: No one can doubt that the special rights and obligations between innkeeper and guest depend on the guest being a traveller. That appears from the original writ, which, LORD COKE says, in *Calye's Case* (1) (8 Co. Rep. 32a) "is in such case the ground of the common law", and also from the form of declaration which is set out in BULLEN & LEAKE, 3rd ed., p. 344, and from the form of indictment where an innkeeper is charged with refusing accommodation at his inn: see *R. v. Luellin* (2); *R. v. Rymer* (11). The question, however, we are asked to decide is when a man can properly be said to be a traveller.

In the sixteenth and early seventeenth centuries to be a traveller, a man had to "lodge" in the inn, that is, he had to stay the night or, at least, engage a room for the night: see *Warbrooke v. Griffin* (4); and he had not to stay more than three nights, because, if he did so, he ceased to be a lodger and became a boarder (*Gulielm's Case* (5); *Harland's Case* (6)). This test had the merit of simplicity and certainly was entirely in keeping with the distinction between an alehouse and an inn, which was, and still is, that a common inn implies ability to give a lodging to those who wish to stay the night: *Stephens v. Watson* (19); and, naturally enough, only those were considered travellers who wished to avail themselves of this essential facility. The test of staying the night was not only necessary, but also sufficient, to make a man a traveller. So long as he stayed the night, it did not matter whether he was in the middle of his journey or at the end of it: *Drope v. Thaire* (17); nor did it matter whether he came from near or from far. The old cases all recognise that a neighbour who only comes a mile or two, but who stays the night, is a traveller, for they are at pains to say that he is not a traveller when he comes as the invited friend of the innkeeper. So, in 1583 in *Carr's Case* (20) it was held (1 Roll. Abr. 3 (e)) that

"if an innkeeper invites a man to supper and, the night being far spent, he invites him to stay the night, if he is afterwards robbed, yet the innkeeper will not be charged for it, because that guest is not a traveller."

LORD COKE in his celebrated discourse on *Calye's Case* (1), first published in 1611, though the case was decided in 1584, makes the same point (8 Co. Rep. 32a):

"If a neighbour, who is no traveller, as a friend at the request of the innkeeper lodges there and his goods be stolen, etc., he shall not have an action."

The implication clearly is that, if he comes, not as an invited friend, but as a member of the public, he is a traveller, even if he comes from near at hand. There is much good sense in this, because the innkeeper in a large town like London did not, even in those days, know all the people in the place, and, if one of them came and asked to stay the night, the innkeeper might not know the man or how far he had come, and he had no right to ask him those particulars, so he had no ground on which to refuse him accommodation. Accordingly, it was held that, if the man did stay the night, he was a traveller

and the innkeeper was entitled to a lien on his goods. This was so well settled that on one occasion later on, when it was suggested that he was not a traveller, the court treated the point as not worthy of notice: *Thompson v. Lacy* (9).

The simplicity of the sixteenth century test was, however, lost in the succeeding periods. On the one hand, the three days were extended indefinitely. Lawyers at the assizes and gentlemen at the horse races on occasion stayed more than three nights and were still held to be travellers: see the notes to *White's Case* (21) (2 Dyer, 158b), and *Harland's Case* (6); but, of course, a guest might still stay so long that he ceased to be a traveller and became a boarder: *Lamond v. Richard* (8). On the other hand, the requirement that he must stay at least one night at the inn ceased to be effective. The first inroad on the old test was in 1703, when three judges held, against the opinion of HOLT, C.J. (1 Salk. 388), that, if a traveller leave his horse at an inn, and lodge elsewhere, he is a guest "... because the horse must be fed, by which the innkeeper has gain": *York v. Grindstone* (22). This obviously opened the way for the view that when a traveller took advantage of accommodation provided by an inn, the relationship of innkeeper and guest arose, even though he did not stay the night, and that is the way in which the law did, in fact, develop.

In *Bennett v. Mellor* (7), a man was on a journey in the sense that he had come into Manchester on a market day and was on his way to his home in the country, but he had no intention of staying the night and he only had a drink at the inn. Yet it was held that the relationship of innkeeper and guest arose. The effect of that case was stated by Mr. J. W. SMITH in 1837, in the first edition of his *LEADING CASES*, in the notes to *Calye's Case* (1), in these words:

"It is not necessary, in order that a man should be a guest, so as to fix the innkeeper with liability, that he should have come for more than temporary refreshment."

That note has been retained untouched by all subsequent editors, including WILLES, J., KEATING, J., and LORD COLLINS, and has been accepted as good law for more than a hundred years. It was quoted and adopted by KENNEDY, J., in *Orchard v. Bush & Co.* (10), and cannot now be called in question. Counsel for the defendant did not, indeed, question it, but he said that it must be confined to a man who was a traveller in some sense of the word, that is, he must at least be on a journey of some kind or other, be it only a journey from his office to his home, and that it was not sufficient if he was merely a local resident dropping in for a drink. There is very considerable authority in favour of counsel's contention. LORD COKE would certainly not have held that the local resident who drops in for a drink was a traveller. He would have dismissed him as a tippler: see *Warbrooke v. Griffin* (4). So would WATSON, B.: see *Pidgeon v. Legg* (23); and KELLY, C.B.: see *R. v. Rymer* (11); and LORD GODDARD, C.J.: see *R. v. Higgins* (12) ([1947] 2 All E.R. 621).

On reflection, however, I do not think that we can take that view. Once it is accepted that a man, who comes for temporary refreshment while on a journey, is a traveller, there is no practical way of distinguishing him from the local resident. Just as the old lawyers of the sixteenth century found that they could not dismiss the neighbour unless he came as an invited friend of the innkeeper, so we cannot dismiss the local resident unless he comes as an invited guest, and for the selfsame practical reason—that the innkeeper may often not know whether the man is a local resident or not, nor whether he is on a journey or not, and the innkeeper has no right to ask him for those particulars. Yet if the man should be on a journey, the innkeeper dare not refuse him, under pain of being brought before the criminal courts, and, if he is bound to accept him, then he should have a lien for his charges and, correspondingly, should be liable for the safe custody of his goods. It was, of course, easy enough for LORD COKE to dismiss the tippler, because in his day a man, to be a guest, had to lodge in the inn, which the tippler did not do. He did not stay the night.

But since his time the courts have opened the door of the inn to the man who stops for a drink on his way home, and, once he gets his foot in, the door cannot be shut against the local resident, for it is beyond the wit of man to know the one from the other. In the course of the argument, ASQUITH, L.J., put the case of two men walking home from work. Both go to the same inn for a drink, but the home of one is on the hither side of it and the home of the other is on the further side. Is one a traveller and the other not? Such illustrations convince me that we cannot accept the contention of counsel for the defendant and we must hold the plaintiff to be a traveller. A

The second question we have to decide is whether an innkeeper can contract out of his liability to keep safely the goods of his guests. In the seventeenth and eighteenth centuries, an innkeeper could not lawfully contract out of his liability for goods which were brought by the guest within the precincts of the inn. There was a very good reason for this rule. It was because the innkeeper was obliged to accept the goods, and the law would not allow him to derogate from his obligation by attaching conditions to his acceptance. If he refused to accept the goods except at the owner's risk, he was in effect refusing to honour the obligation which the law imposed on him, and that he was not allowed to do. B

HOLT, C.J., made this clear in 1702 in *Lane v. Cotton* (24), when he said (1 Salk. 18) that innkeepers C

" . . . are bound to keep safely, and answer all neglects . . . and so they would be, though they should expressly caution against it."

Similar reasoning was applied in those days to common carriers, for in ST. GERMAIN'S DOCTOR AND STUDENT, by MUCHALL (1787), 18th ed., p. 224, one finds it said that D

" . . . if [the carrier] would percase refuse to carry [goods] unless promise were made unto him that he shall not be charged for no misdemeanour that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." E

The law as to common carriers was afterwards altered by the judges, who allowed common carriers to make special contracts exempting themselves from all liability. This was a retrograde step, which was regretted by LORD ELLENBOROUGH, C.J., in 1804, in *Nicholson v. Willan* (25), when he said (5 East 513): F

" . . . we cannot do otherwise than sustain such right [to contract out] in the present instance, however liable to abuse and productive of inconvenience it may be; leaving to the legislature if it shall think fit to apply such remedy hereafter as the evil may require."

Ultimately Parliament did step in to prevent the carriers from imposing unreasonable conditions: see the history of the law on this matter, set out in *Peek v. North Staffordshire Ry. Co.* (26) (10 H.L. Cas. 493, *per* BLACKBURN, J.). The law as to common innkeepers was, however, never altered by the judges. No retrograde step was taken there. Innkeepers have never been allowed to contract out of the liability imposed on them by the custom of the realm. It is true that this involved them in hardships and Parliament passed the Innkeepers' Liability Act, 1863, to protect them in some respects, but the very passing of that Act implicitly affirms the rule that at common law they cannot make a special contract out. So the law still is that, in respect of goods brought within the precincts of the inn, the innkeeper cannot contract out of the liability which the common law imposes on him. No one disputed this before us, but the matter is of such importance that I think that we should declare it specifically. G H

The third question is what are the "precincts of the inn" for which the innkeeper is strictly liable? LORD COKE said in *Calve's Case* (1) (8 Co. Rep. 32b) that

"... the innholder, by law, shall answer for nothing that is out of his inn, but only for those things which are *infra hospitium*."

This is still the law, but we are left with the question: What is *infra hospitium*? The two extremes are clear. First, everything which is under the cover of the inn-buildings is "*infra hospitium*". LORD COKE says (*ibid.*):

"... the innholder is bound to answer for himself and for his family, of the chambers and stables, for they are *infra hospitium*."

That is clear enough. Everything within the house and stables, or, in these days, the house and garage, is *infra hospitium*. Secondly, nothing which is outside the curtilage of the inn is *infra hospitium*. Thus, a piece of pasture, which is outside the inn, is not *infra hospitium*. That was decided in *Calve's Case* (1), where an innkeeper was held not liable for his guest's horse which was stolen from the pasture. The reason, as LORD COKE said (*ibid.*), is

"... because the horse, which at the request of the owner is put to pasture, is not *infra hospitium* . . ."

Suppose, however, that, instead of a piece of pasture, there is a piece of open land outside the curtilage of the inn, and the innkeeper, at the request of the owner of a motor car, allows him to leave his car on the open space. Is the innkeeper liable if the car is stolen? Clearly he is not liable in the case of the car any more than he is in the case of the horse. Suppose, then, that it becomes a regular thing for owners, with the permission of the innkeeper, to tether their horses in the pasture or to leave their cars in the open space. Is the liability of the innkeeper to be thereby increased? I think not. In each case the innkeeper allows his guest to use the pasture or the open space for their own convenience, but it is not part of the inn, and so he is not liable as an insurer in respect of them, but only for negligence: *Mosley v. Fosset* (27). There is one obvious exception to this extreme. It is this. The innkeeper is strictly liable if he accepts a horse or carriage into his charge as innkeeper and then himself leaves them outside the curtilage of the inn. Such was the case put by LORD COKE in *Calve's Case* (1) (8 Co. Rep. 32a) of the innkeeper who, of his own head, puts his guest's horse to grass, and the case of the gig, of which the ostler took charge and then left it in the street outside the inn: see *Jones v. Tyler* (14). In between the two extremes lies the present case. What is the position of an outer yard or car park which is within the curtilage of the inn, but is not under cover of the buildings? Such a place is, undoubtedly, part of the inn, because it is provided by the innkeeper for the use of his guests; but, unlike the stables or garage, it is not a suitable place for the guests to leave their horses or cars for the night. In most inns there is, or should be, a stable or garage in which travellers can put their horses or cars for the night, for, as I have already said, a common inn implies ability to give a lodging for those who wish to stay the night, and that implies ability to stable the horse or garage the car. The Royal Red Gate Inn in Watling Street apparently provides such accommodation, for it has, according to one of the plans which was handed in at the trial, a double lock-up garage at the back. We have to consider now, however, the car park in the front, which is obviously not a suitable place to leave a car for the night. The car park is not provided for travellers who stay the night, who were the only travellers for whose benefit the common law imposed a strict liability on innkeepers. The car park is provided for travellers who stop for a meal or for a drink, who have only become entitled to be considered travellers by a comparatively recent innovation. Inasmuch as it is provided for these last, I should

not myself be disposed to consider it *infra hospitium* if I could avoid it, because it means yet another extension of the strict liability of innkeepers which has gone far enough already, but I must acknowledge the force of the arguments to the contrary. I can well see that once tipplers and diners are admitted to be travellers, it is logical enough to say that a car park which is provided for them is *infra hospitium*. It is, so to speak, an extended *hospitium* due to the extended notion of a traveller. This court seems to have proceeded on that footing in *Gee, Walker & Slater, Ltd. v. Friary Hotel (Derby), Ltd.* (28) in regard to the forecourt of the Friary Hotel at Derby, and I can see no satisfactory distinction between a forecourt and a car park. I agree, therefore, that the car park was, *prima facie*, *infra hospitium*.

The fourth question is whether an innkeeper can protect himself by putting up a notice that he will not be responsible for cars in the car park. If an innkeeper cannot protect himself by notice, it will be a serious matter, because horses and carriages (including cars) are the only things for which an innkeeper is liable for the full value if they are stolen. Parliament has enabled him to limit his liability for everything else to £30, by putting the proper notice up in the hall of his inn, but that parliamentary limit does not apply to cars. If he has no means of protecting himself in respect of the car park, it means that not only guests who stop for a drink during the day, but also those who come for a meal during the hours of darkness, will be able to leave their cars for a long time in the car park, without telling the innkeeper anything about them, and hold him liable for their full value if they are stolen. The innkeeper will not be able to say that the guest was negligent in leaving the car there, because the guest will be able to say, quite rightly, that it was *infra hospitium* and he was entitled to leave it there, even during the hours of darkness: see *Gee, Walker & Slater, Ltd. v. Friary Hotel (Derby), Ltd.* (28); so that, if carried to an extreme, this responsibility would mean that an innkeeper ought to have an attendant to watch over cars in the car park—all night, if need be. I do not think that we are compelled to carry the law to such a length. There are cases in the books which show that the innkeeper can at common law protect himself by notice in the case of yards which are unprotected and open to the street.

The first was a case decided in 1564, which was vouched for in *Brand v. Glasse* (15) (Moore, K.B. 159):

“A clothier came to an inn with his waggon of wool to lodge there, and on his entry the innkeeper said to him that, if he wished that he should undertake the charge of his waggon, he should draw it into the inner court or otherwise he would not be responsible for it; the clothier did not do it. The wool was stolen and the clothier brought an action; and for this special matter the innkeeper was discharged.”

The same result was reached two years later (1566) in *Sanders v. Spencer* (16), where a clothier came to an inn at Brodeway and, notwithstanding the warning of the innkeeper, laid his packages “in an outer court at large,” where they were stolen; and the innkeeper was held not liable. These cases can be explained, if you please, on the ground that the loss was due to the guest's own fault, but the better ground seems to be that when the goods were placed in an outer court that was open to the street, the innkeeper was entitled to give notice that he would not be responsible for their safety. If they had been placed under cover within the precincts of the inn, the innkeeper could not have escaped liability by giving notice that he would not be responsible, for that would be an attempt to contract out of his strict liability, which is not allowed, but when they were placed in the outer yard, the notice was effective. That was certainly the interpretation put on these cases by WHITFIELD, J., in *Harland's Case* (6) (Clay. 97), where

"it was holden that, though an innkeeper say he will not keep the guest's goods unless he will put them under lock and key, etc., this shall not help the innkeeper, for he is bound by law to keep them safe, and so it differs from packs put in an outyard, etc., where such words will serve the innkeeper . . ."

The notice in such cases is not contractual. It is a limitation which the innkeeper is allowed to put on his strict liability, because of the obvious risk involved if the goods are put in that place. It takes the place, so to speak, out of the *hospitium*, so that the innkeeper is not liable as an insurer in respect of it, but only for negligence. Apply the principles of those old cases to the present case. The car park at the Royal Red Gate Inn was at least as unsafe as any outer yard. It had the whole of one side open to the street for a distance of seventy-five feet and was more in the nature of a "good pull-in for carmen" than anything else. It was so laid out as to be a convenient place for guests to leave their cars, but palpably not a safe place. There was no attendant there, nor would you expect one at a small road-side inn like this. It was obviously no safer than a street parking place. In short, even if there was no notice up there, it was not a place where anyone could reasonably suppose that the innkeeper took full responsibility on himself for cars that were left there, especially during the hours of darkness. But there was, in fact, a notice. The innkeeper had put up a notice in a suitable and prominent place, quite plain for anyone to read if he chose to do so:

"Car Park. Patrons Only. Vehicles are admitted to this parking place on condition that the proprietor shall not be liable for loss of, or damage to, (a) any vehicle, (b) anything in, or on, or about any vehicle, however such loss or damage may be caused."

I think that, following the old cases, that notice was effective to protect the innkeeper from his strict liability. It is true that the notice did not operate as a contract—at any rate, not in the case of the plaintiff, who came by night and did not read it, but the plaintiff cannot make anything of that, because he never made a contract by which he put the car there. He never told the innkeeper it was there at all. If he had asked the innkeeper if his car would be safe there, the innkeeper might well have said, just as the innkeeper did in *Brand v. Glasse* (15): "If you wish me to undertake the charge of your car, you should take it into one of the garages which I have at the back of the inn, or otherwise I shall not be responsible. There is a notice up there which says that I am not responsible for the car park." If such a conversation had taken place and the plaintiff had, nevertheless, put his car in the car park and it was stolen, I should have thought it plain that the innkeeper would not be liable. That would be good sense, and good law on the authority of *Brand v. Glasse* (15) and *Jones v. Tyler* (14). Can the plaintiff be in any better position when he did not so much as ask the innkeeper if the car would be safe there? Should not the notice then serve the innkeeper? I think that it does. It cannot be suggested that it was the duty of the innkeeper to tell the guest that there was a double lock-up garage available at the back, because, after all, the guest did not even tell him that he had come in a car; and, even if the innkeeper had told him that there was a garage available, it is very unlikely that the guest would have put his car in it, especially if there was a charge for it. The guest who came in for a drink would, no doubt, have taken the risk and left it in the car park. So why should he be better off because there was no such conversation? I think that he is not. I think that the notice takes the place of the imaginary conversation. It expresses a limitation on his strict liability, which, in my opinion, an innkeeper is by law permitted to make in the case of an open yard or car park where there is an obvious risk of theft, and, in order to have the benefit of it,

it is not necessary for the innkeeper to prove that he had garage accommodation available, at any rate as against a guest who did not ask for it. The risk of loss by theft should fall on the owner of the car who can, and usually does, insure against it, whether it be stolen in the street, or from a car park, or anywhere else. It should not fall on the innkeeper any more than it does on the keeper of an ale-house or a restaurant who provides a car park. I would, therefore, be in favour of allowing the appeal, on the ground that this was palpably not a safe place to leave a car and that the innkeeper was entitled to protect himself from strict liability by the notice that he put up.

Appeal dismissed with costs.

Solicitors: *J. E. Lickfold & Sons* (for the defendant); *L. Bingham & Co.* (for the plaintiff).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

NOTE.

WILLIAMS v. FALKIRK IRON CO., LTD.

[BIRMINGHAM ASSIZES (Sellars, J.), November 24, December 21, 1950.]

Factory—Protection of eyes—“Fettling”—Moulder removing “runners” or “gates” from castings—Factories Act, 1937 (c. 67), s. 49—Protection of Eyes Regulations, 1938 (S.R. & O., 1938, No. 654), reg. 1, sched.

The plaintiff was employed as a moulder by the defendants in their factory. The work involved the casting of metal man-hole covers in the foundry by the moulders who poured molten metal into moulds consisting of upper and lower cases. When the metal had cooled, the upper case was removed, and the casting then had projections of metal known as “runners” or “gates” where the metal had been poured in. The moulders had to remove these “runners” or “gates” and pass on the casting to the fettlers in the fettling shop who, by means of hammers and chisels, trimmed excess metal from the casting. There was evidence that in the light-metal casting industry it was a practice for the moulder to remove the “runners” or “gates.” In the plaintiff’s factory the usual practice was to remove them by striking with a hammer. On June 24, 1949, the plaintiff removed a casting from the mould, and was striking off the runners or gates, when a piece of metal flew into his eye and injured him. He claimed, *inter alia*, that the defendants were in breach of s. 49 of the Factories Act, 1937, and the Protection of Eyes Regulations, 1938 (S.R. & O. 1938, No. 654) made in pursuance thereof. Under s. 49 of the Act and the regulations the employer is placed under a duty to provide suitable goggles or effective screens for workmen engaged in the processes mentioned in the schedule to the regulations, which included the fettling of metal castings, but not the work of moulders.

E. G. H. Beresford for the plaintiff.

A. J. Flint for the defendants.

Cur. adv. vult.

Dec. 21. **SELLARS, J.**, read a judgment in which he held that the process of removing runners or gates from castings by moulders before passing the castings to the fettlers was not fettling within the meaning of the regulations, and, therefore, the defendants were not in breach of their statutory duty.

Solicitors: *Gichard & Co.*, Rotherham (for the plaintiff); *Harold Jackson & Co.*, Sheffield (for the defendants).

[Reported by R. E. CHAPMAN, Esq., Barrister-at-Law.]

CURRAN v. NEWPARK CINEMAS, LTD. AND OTHERS.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), December 7, 8, 20, 1950.]

Execution—Garnishee order—Prior assignment of debt—Direction and authority to garnishees to pay to third party all moneys owing by them to judgment debtors—No direct evidence of assignment—Law of Property Act, 1925 (c. 20), s. 136 (1).

By a licence agreement, dated Nov. 9, 1948, and made between the judgment debtors and the garnishees, the gross receipts in respect of the distribution by the garnishees of a film produced by the judgment debtors, less costs and expenses and the garnishees' commission, were to be paid to the judgment debtors. On Mar. 16, 1950, the judgment creditor obtained judgment against the judgment debtors for £47 7s. 6d., and £41 7s. 2d. costs, and on Mar. 17 he wrote to the garnishees asking them whether they had distributed the film for the judgment debtors. On Mar. 20 the garnishees were served with a direction and authority from the judgment debtors, purporting to be made pursuant to arrangements entered into for valuable consideration between the judgment debtors and Barclays Bank, Ltd., and stated to be irrevocable, whereby the garnishees were to pay to the bank all moneys payable by them to the judgment debtors under the agreement of Nov. 9, 1948. On Mar. 28 this document was countersigned by a director of the garnishees. No notice was given by the bank to the garnishees of any assignment to it of these moneys. On Mar. 23 the garnishees replied to the judgment creditor, stating that they were the distributors of the film, and on Mar. 29 the judgment creditor wrote to the garnishees asking for details of the financial position between them and the judgment debtors in respect of the proceeds of the distribution of the film, explaining that his object was to enforce the judgment obtained by him against the judgment debtors. On Mar. 31 the garnishees replied that, if the judgment creditor obtained the necessary authority from the judgment debtors, they would provide the information required, but they did not refer to the direction and authority of Mar. 20. In April the judgment debtors paid the debt of £47 7s. 6d. due under the judgment, but not the amount due for costs. The judgment creditor thereupon procured the issue of a garnishee summons against the garnishees, which was served on them on July 27. In opposition to the summons a director of the garnishees swore an affidavit referring to and exhibiting the licence agreement of Nov. 9, 1948, and the direction and authority of Mar. 20, 1950, and copies of the affidavit and exhibits were sent by the garnishees to the judgment creditor on Sept. 20, 1950.

HELD: the document of Mar. 20, 1950, was not an assignment to the bank of the debt due to the judgment debtors from the garnishees, but merely a direction to the garnishees to pay the debt to the bank, and the mere production by the garnishees of the document, without proof of any agreement with, or notice to, the bank by the judgment debtors, did not suffice to establish an absolute assignment of which express notice had been given to the garnishees and which was, accordingly, a legal assignment under the Law of Property Act, 1925, s. 136 (1), but, as there was no evidence that the bank had not been given notice of the direction and authority, in view of the recital therein of the prior arrangements with the bank the document afforded *prima facie* evidence of an assignment, or, at least, substantial grounds for supposing that there might have been an assignment, and, therefore, the court should not make a garnishee order, but should order the bank to appear and state the nature and particulars of its claim to the debt, in accordance with the practice indicated in the County Court Rules, 1936, Ord. 27, r. 11.

Per curiam: "... we think it is clearly wrong, where the garnishee shows that he has notice of a prior assignment, to make an order against him unless he is able to prove strictly and conclusively that the assignment of which he has notice is a valid assignment."

[AS TO GARNISHEE PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 106-112, paras. 170-176; and FOR CASES, see DIGEST, Vol. 21, pp. 631, 632, Nos. 2138-2140.]

Cases referred to:

- (1) *Standing v. Bowring*, (1885), 31 Ch.D. 282; 55 L.J.Ch. 218; 54 L.T. 191; 17 Digest 214, 267.
- (2) *Brice v. Bannister*, (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 8 Digest 428, 63.
- (3) *Harding v. Harding*, (1886), 17 Q.B.D. 442; 55 L.J.Q.B. 462; 8 Digest 442, 191.
- (4) *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionerhoe Obschestro Kom-severputj & Bank for Russian Trade, Ltd.*, [1933] 1 K.B. 47; 102 L.J.K.B. 16; 147 L.T. 231; Digest Supp.
- (5) *Yates v. Terry*, [1902] 1 K.B. 527; 71 L.J.K.B. 282; 86 L.T. 133; 8 Digest 487, 558.

APPEAL by the garnishees, Associated British Film Distributors, Ltd., from a garnishee order made against them by His Honour JUDGE DALE in the Westminster County Court on Oct. 11, 1950.

The garnishees contended that a direction and authority served on them by the judgment debtors on Mar. 20, 1950, purporting to be for valuable consideration and directing them to pay to Barclays Bank, Ltd., all moneys payable by them to the judgment debtors under an agreement dated Nov. 9, 1948, operated as a legal assignment to the bank of the garnishees' debt to the judgment debtors under the Law of Property Act, 1925, s. 136 (1). The judgment creditor contended that the document was not a legal assignment within s. 136 (1). No notice of an assignment had been given by the bank to the garnishees, and there was no evidence that the bank had been given notice of the document of Mar. 20. The learned county court judge took the view that the document was executed with a view to defeating the judgment (which was obtained on Mar. 16, 1950), and held that there was no valid assignment. The facts appear in the judgment of the Court of Appeal delivered by JENKINS, L.J.

C. H. Duveen and A. L. Figgis for the garnishees.
Sabin for the judgment creditor.

Cur. adv. vult.

Dec. 20. JENKINS, L.J., read the following judgment of the court. This is an appeal by Associated British Film Distributors, Ltd. (whom we will call "the garnishees") from a garnishee order made against them by His Honour JUDGE DALE in the Westminster County Court on Oct. 11, 1950, in the following circumstances. The order under appeal was made in respect of a sum of £41 7s. 2d. remaining due under a judgment for £47 7s. 6d. debt and £41 7s. 2d. costs recovered by Mr. Curran, the present respondent (whom we will call "the judgment creditor"), on Mar. 16, 1950, in an action brought by him in the Mayor's and City of London Court against Newpark Cinemas, Ltd. (whom we will call "the judgment debtors").

On Mar. 17, 1950 (*i.e.*, the day after the judgment had been obtained), the judgment creditor's solicitors wrote to the garnishees asking them whether they had distributed for the judgment debtors a film called "Meet the Duke," produced by the latter. On Mar. 23, 1950, the garnishees replied to the effect that they were the distributors of the film in question. On Mar. 29, 1950, the judgment creditor's solicitors wrote to the garnishees asking for details of the

financial position as between the garnishees and the judgment debtors in respect of the proceeds of distributing the film, and said in the final paragraph of this letter:

“You will understand that our object in raising these further points is with a view to enforcing the judgment obtained herein against Newpark Cinemas, Ltd.”

A On Mar. 31, 1950, the garnishees wrote in reply to the effect that, if the judgment creditor's solicitors would obtain the necessary authority from the judgment debtors, the garnishees would provide the information required to the extent so authorised by the judgment debtors. It is to be observed that this correspondence contained no suggestion by the garnishees that anything which might be payable by them in respect of the proceeds of distribution of the film was payable to anyone other than the judgment debtors. In April, 1950, the judgment debtors paid the debt of £47 7s. 6d. due under the judgment, but the £41 7s. 2d. for costs due thereunder remained unsatisfied. In these circumstances the judgment creditor, on filing an affidavit to the effect that the garnishees were indebted to the judgment debtors in an amount unspecified, procured the issue out of the Westminster County Court of a garnishee summons against the garnishees, which was duly served on them on July 27, 1950, and was in the usual form, calling on them to show cause why an order should not be made for the payment by them to the judgment creditor of the debts due and owing or accruing from them to the judgment debtors, or so much thereof as would satisfy the debt due under the judgment and the costs of the summons, and in the meantime attaching the requisite amount of the debts so owing or accruing from the garnishees to answer the judgment.

D In opposition to the summons Mr. L. F. Baker, a director of the garnishees, swore on their behalf an affidavit in which he summarised the terms of a licence agreement between the judgment debtors and the garnishees, dated Nov. 9, 1948, for the exploitation by the garnishees of the film “Meet the Duke,” under which the gross receipts in respect of such exploitation, less costs and expenses and the garnishees' commission, were to be paid to the judgment debtors. After exhibiting a copy of this licence agreement as “L.F.B.1,” the affidavit concluded as follows:

F “On Mar. 20, 1950, the garnishees were served with a direction and authority now produced and shown to me marked ‘L.F.B.2’ given under the seal of the judgment debtors purporting to be for valuable consideration to pay to Barclays Bank, Ltd. all moneys payable by the garnishees to the judgment debtors under the said agreement of Nov. 9, 1948.”

The direction and authority, exhibit “L.F.B.2,” is dated Mar. 20, 1950, and is in these terms:

G “To Associated British Film Distributors, Ltd., 161-171 Oxford Street, London, W.1. Referring to the distribution agreement dated Nov. 9, 1948, made between us (Newpark Cinemas, Ltd.) of the one part and yourselves of the other part whereby in consideration of the agreement on your part therein contained we granted to you the sole and exclusive right and licence to exploit, distribute and exhibit the film ‘Meet the Duke’ until H Nov. 15, 1953, upon the terms as to the gross receipts (as therein defined) being applied and divided as therein mentioned, and pursuant to the arrangements for valuable consideration which we, Newpark Cinemas, Ltd., have made with Barclays Bank, Ltd., we hereby give you irrevocable directions, instructions and authority to pay to the said Barclays Bank, Ltd., at their Moorgate branch, or as they may in writing direct, all moneys payable to us under the terms of the said agreement and we confirm that the receipt of the said Barclays Bank, Ltd. shall be your

full and sufficient discharge for all such payments. This authority and instructions can be varied or cancelled only by a document duly signed on behalf of Barclays Bank, Ltd. Dated Mar. 20, 1950."

The common seal was affixed in the presence of a director and the secretary. It is sealed with the common seal of the judgment debtors, and countersigned by a director of the garnishees with the note: "Counterpart signed 28/iii/50." A copy of Mr. Baker's affidavit and copies of the two exhibits appear to have been sent by the garnishees to the judgment creditor's solicitors with a letter dated Sept. 20, 1950, and we understand this to have been the first intimation received by the latter of any assignment, or alleged assignment, by the judgment debtors of the sums due, or accruing due, to them under the licence agreement of Nov. 9, 1948.

No evidence was filed in answer, there was no cross-examination, and no oral evidence was adduced at the hearing, so that the evidence before the learned county court judge consisted of (i) the purely formal affidavit in support of the summons; (ii) Mr. Baker's affidavit, which did no more than put in evidence the licence agreement of Nov. 9, 1948, and the direction and authority of Mar. 20, 1950, to which should be added (iii) the correspondence already referred to, which, though not formally exhibited, was by consent referred to in the county court and also in the course of the present appeal. It only remains to add that, admittedly, no notice of any assignment to them of the moneys payable to the judgment debtors under the licence agreement of Nov. 9, 1948, had been given by the bank to the garnishees.

Such being the state of the evidence, on Oct. 11, 1950, the county court judge made the garnishee order now under appeal, notwithstanding the direction and authority of Mar. 20, 1950, but included in such order a provision suspending its operation until Oct. 25, 1950, and an undertaking on the part of the judgment creditor (by his counsel) to give notice forthwith to the manager of the Moorgate branch of the bank of the terms of the order made. The learned judge's reasons for so doing appear in the note of his judgment, in the course of which he says:

"There was no evidence that the bank had received or knew of this (*i.e.*, the direction and authority of Mar. 20, 1950) or had accepted the alleged assignment, and the presumption was that they had not done so as otherwise they would have notified the garnishees of the same. It was contended by the judgment creditor that this document was not an effective or genuine assignment, but was a mere subterfuge to avoid payment under the judgment. Correspondence was admitted and apart from the other documents mentioned there was no evidence. The judgment creditor on Mar. 17 informed the garnishees in writing of the judgment he had obtained against the judgment debtors, but notwithstanding this the garnishees, without informing the judgment creditor of the same, signed the document of Mar. 20, 1950. I formed the view that this had been done in collusion with the judgment debtors with a view to defeating the judgment. This being so, I held that the assignment must be strictly proved, and, as there was no other evidence of any assignment, nor was there any evidence that this document had ever come to the knowledge of the alleged assignee to indicate that he had accepted it as an assignment, I held that an assignment had not been proved. The bank might well have refused to accept any assignment in such circumstances. I considered that an assignment could not become effective until the assignee accepted it as such. The judgment creditor himself did not in fact know of the alleged assignment until Oct. 2, 1950, more than two months after the garnishee summons had been served. I held that there had been no assignment and that the document of Mar. 20, 1950, was merely an authority given by the judgment debtors to the garnishees to pay to Barclays Bank certain moneys

due to them from the garnishees and was not a valid assignment. I therefore granted an order against the garnishees in respect of the sum due, but at the invitation of counsel for the judgment creditor I directed that the order should not become effective for fourteen days on the undertaking by the judgment creditor to inform the bank forthwith of the document of Mar. 20, 1950, so that it might if so advised apply to discharge the order."

A The county court judge's decision was attacked by counsel for the garnishees primarily on the ground that the direction and authority, of which the garnishees undoubtedly had express notice, operated as a legal assignment of the debt in question by virtue of the Law of Property Act, 1925, s. 136 (1), which imparts that operation to:

B "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor . . ."

He relied on *Standing v. Bowring* (1) as authority for the proposition (stated in the headnote) that:

C "A transfer of property to a person without his knowledge, if made in proper form, vests the property in him at once, subject to his right to repudiate it when informed of the transfer."

He also cited, with respect to the form of the document, *Brice v. Bannister* (2) and *Harding v. Harding* (3) as showing that a direction in writing to a debtor D by his creditor to pay a third party, handed to the third party, will suffice to effect a legal assignment on notice of such direction being given to the debtor.

Counsel for the judgment creditor, on the other hand, contended that s. 136 (1) only applied where there was a document amounting to an absolute assignment and that the document here in question, being in form not an assignment but merely a direction to the garnishees to pay a third party (*i.e.*, the bank), could only answer that description if and when communicated to the bank, as, until so communicated, it was revocable by the judgment debtors at any time and, therefore, not absolute. He referred in this connection to *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionernoe Obschestro Komseverputj & Bank for Russian Trade, Ltd.* (4), which he also relied on as showing that a direction to pay which was uncommunicated to the third party and, therefore, revocable F at the date of the service of a garnishee order *nisi* (to which the garnishee summons in this case corresponds), is revoked by such service. We are disposed to think counsel for the judgment creditor right on this part of the argument.

It is, no doubt, true that s. 136 (1) does not require any particular form of assignment, or that the notice given to the debtor should necessarily have been given by the assignee. The sub-section does, however, clearly postulate G that, whatever its form, there should be a document amounting to an absolute assignment by writing under the hand of the assignor. Given such an assignment, and given the requisite notice to the debtor, the assignment (to put it shortly) is to operate as a legal assignment of the debt in question. Section 136 (1), however, does not provide that a document which would not, independently of the sub-section or its predecessor (Supreme Court of Judicature

H Act, 1873, s. 25 (6)), have operated as an absolute assignment at law or in equity is to have the force of an absolute assignment for the purposes of the sub-section. The document here relied on is the direction and authority, which in point of form is not an assignment to the bank of the debt in question but merely a direction to the garnishees to pay the debt in question to the bank. On the footing that there had, in fact, been no prior agreement with the bank to give such a direction, and that the bank had not been notified of the fact that such a direction had been given, we think the result would follow that

the direction and authority, though expressed to be irrevocable except with the consent of the bank, could in fact have been revoked by the judgment debtors at any time as amounting to no more than an arrangement between the judgment debtors and the garnishees in which they alone were concerned and which, in the absence of any such agreement or notification, conferred no interest in the debt on the bank. If that is right, then we think that the contention of counsel for the garnishees to the effect that the mere production by the garnishees of the direction and authority, without proof of any agreement with, or notice to, the bank, sufficed in itself to establish an absolute assignment of which express notice had been given to the garnishees, and hence a legal assignment by virtue of s. 136 (1), necessarily fails. A

This, however, by no means concludes the matter. There was no evidence that the bank had been given notice of the direction and authority, but, on the other hand, there was no evidence that the bank had not been given such notice. Moreover, there was some evidence, in the form of an admission by the judgment debtors in the document itself, that the directions thereby given were given pursuant to "arrangements for valuable consideration" made by them with the bank. If that statement was true and meant, as, if it meant anything, it must have meant, that the judgment debtors had agreed with the bank to give the direction and authority to the garnishees, then we think that there was, by the joint effect of the agreement with the bank and the direction and authority given in pursuance of it, a good assignment, whether legal or equitable—for the present purpose it matters not which—of the debt in question. Of course, the direction and authority might have been a mere sham and the recital of the prior arrangements with the bank a mere fiction. The learned county court judge thought this to be the case on grounds which sufficiently appear from the facts as already stated and from the notes of his judgment quoted above. We think, if anything, he overstates these grounds. He does not mention the fact, for what it is worth, that the judgment debtors had actually paid the portion of the judgment representing the debt sued on before the service of the garnishee summons. He also says that the judgment creditor was not informed of the direction and authority until Oct. 2, 1950, when, in fact, his solicitors seem to have been sent copies of the affidavit in opposition to the summons and of the exhibits thereto in a letter from the garnishees' solicitors, dated Sept. 20, 1950. Giving full weight, however, to all the equivocal circumstances referred to by the learned judge or appearing from the facts as stated above, including the reticence as to the existence of the direction and authority observable in the garnishees' letters, we find in all these circumstances grounds for suspicion and nothing more. As against this there is the direction and authority, which, in the absence of fraud—and fraud is by no means to be presumed without proof—must, we think, be regarded (in view of the recital of the prior arrangements with the bank) as affording *prima facie* evidence of an assignment. If that is putting it too high, at all events the direction and authority affords at least substantial grounds for supposing that there may have been an assignment. Whichever way it is looked at, we think that the learned county court judge was wrong to make the order in the face of this document. It must be remembered that a garnishee is in a difficult position. He has to obey any order made against him, yet, if he has had notice of a prior assignment, the order is no protection to him, and, if he pays in compliance with the order, he nevertheless remains liable to the assignee to pay the debt over again: see *Yates v. Terry* (5). This being so, we think it is clearly wrong, where the garnishee shows that he has notice of a prior assignment, to make an order against him unless he is able to prove strictly and conclusively that the assignment of which he has notice is a valid assignment. B C D E F G H

The proper course in such circumstances is indicated in the County Court Rules, 1936, Ord. 27, r. 11, which is in these terms:

"(1) If in garnishee proceedings it is suggested that the debt belongs to or is claimed by some third person, or that any third person has or claims to have a lien or charge upon it, the judge may order the third person to appear and state the nature and particulars of his claim to the debt. (2) After hearing the third person if he appears, the judge may bar the claim of the third person or may order an issue to be tried between the third person and the judgment creditor, or make such other order (including an order as to costs) as may be just."

This rule corresponds to R.S.C., Ord. 45, r. 5 and r. 6. We cannot regard the service of notice of the order on the bank in the present case (which produced no action on the bank's part, and certainly did not amount to an explicit invitation to the bank to move to discharge the order if so advised) as by any means a satisfactory substitute for the procedure thus laid down. In the result, therefore, we would allow the appeal, discharge the garnishee order of Oct. 11, 1950, and remit the case to the county court with a view to the bank being ordered to appear and state its claim in accordance with the County Court Rules, 1936, Ord. 27, r. 11. If the bank fails to appear, or fails to establish its claim as assignee, a fresh garnishee order binding the bank and protecting the garnishees in their compliance with it can be made.

Appeal allowed with costs. Case remitted to county court judge. Costs of first hearing in discretion of county court judge.

Solicitors: *M. A. Jacobs & Sons* (for the garnishees); *Atkins, Walter & Locke* (for the judgment creditor).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

WHITNEY v. WHITNEY.

[LEEDS ASSIZES (Willmer, J.), December 11, 12, 13, 1950.]

Divorce—Desertion—Termination—Intercourse on number of occasions with deserting spouse during attempts at reconciliation—Condonation—Deserting spouse's refusal to resume cohabitation—Revival of original desertion.

In December, 1945, the wife left her husband in circumstances which were held to amount to desertion on her part. Between that time and August, 1947, the husband visited the wife on a number of occasions to effect a reconciliation. On those occasions the parties resumed marital intercourse, but the wife maintained throughout her determination not to return to live with her husband. The husband's answer alleging desertion by the wife was dated July 17, 1950.

HELD: (i) desertion, once established, continued until it was proved to have been brought to an end; the fact that intercourse took place on a number of occasions during genuine efforts by the husband to effect a reconciliation did not bring the wife's desertion to an end; and, therefore, the husband was entitled to a decree of divorce.

Mummery v. Mummery ([1942] 1 All E.R. 553) and *Bartram v. Bartram* ([1949] 2 All E.R. 270), *applied*.

(ii) even if, whenever, intercourse took place, the husband must be taken to have condoned the wife's previous desertion, that desertion was on each occasion revived by the wife's repeated refusal to resume cohabitation.

[AS TO CONDONATION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 679-682, paras. 1004-1009; and FOR CASES, see DIGEST, Vol. 27, pp. 339, 340, Nos. 3184-3203, and Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Mummery v. Mummery*, [1942] 1 All E.R. 553; [1942] P. 107; 111 L.J.P. 58; 166 L.T. 343; 2nd Digest Supp.
- (2) *Pulford v. Pulford*, [1923] P. 18; 92 L.J.P. 14; 128 L.T. 256; 27 Digest 307, 2846.
- (3) *Bartram v. Bartram*, [1949] 2 All E.R. 270; [1950] P. 1; [1949] L.J.R. 1679; 113 J.P. 422; 2nd Digest Supp.
- (4) *Hopes v. Hopes*, [1948] 2 All E.R. 920; [1949] P. 227; [1949] L.J.R. 104; 113 J.P. 10; 2nd Digest Supp.

PETITION for divorce by the wife on the ground of her husband's desertion in August, 1945. In his answer dated July 17, 1950, the husband denied the desertion alleged and put in a cross-prayer for divorce on the grounds of his wife's desertion. The facts appear in the judgment of WILLMER, J.

H. S. Pears for the wife.

J. B. Willis for the husband.

WILLMER, J.: In this case each of the parties alleges desertion against the other and seeks relief on that ground. The parties were married in September, 1938. The wife is a Leeds woman who, on her marriage, went to reside with her husband in Hull. They lived in Hull until September, 1939, when the husband was called up for service in the Royal Engineers. It is common ground that after he was demobilised in September, 1945, the husband went to Leeds, where during most of the war the wife had been residing with her mother, and that the parties cohabited there. Both sides agree that marital intercourse then took place. The wife says that was the last occasion on which there was marital intercourse between them. The husband says that it continued for some time after that. The husband was anxious to get back to his civilian occupation in Hull, and, being a docker, he was more or less tied to the port of Hull, as there was no work for which he was fitted to be had in Leeds. The husband went back to Hull after his stay with his wife in Leeds, and, it is said, it was arranged that the wife should follow with the two children of the marriage. After a brief while the wife did go to Hull to join her husband, who at that time was residing with his father. The wife was not asked to stay at the father's house, so she went to stay with the husband's sister. The wife says that she and her husband did not reside together, but he says that during the time his wife was with his sister he moved to her house and slept there with his wife, maintaining normal marital relations. After a short period the wife took rooms in the house of a Mrs. Cartwright. She says that she stayed there some three or four weeks until December, 1945. Mrs. Cartwright, who gave evidence, is clear that at least on one occasion, and she thinks on other occasions, the husband stayed with the wife and they spent the night together as husband and wife while the wife was residing at Mrs. Cartwright's house. In December, 1945, the wife gave up her rooms with Mrs. Cartwright and went back to Leeds because, she says, her husband told her to go, saying that he did not want her any more, and she might as well go back to her own mother. The husband, on the other hand, says that it was against his wish that she went; that he realised that, if she did go, it would prejudice their chances of getting a house in Hull; and that the wife's departure was due to the intervention of her mother who came down and took her daughter away. Be that as it may, the wife has resided at the mother's house in Leeds ever since.

Both sides rely on the events of December, 1945, as being evidence of an act of desertion on the part of the other. It seems to me that the separation between the parties dates from December, 1945. The wife says that it was due to the husband in effect turning her out and sending her from Hull back to her mother, and that since that date she has, from time to time, seen the husband on a day's visit when he went to Leeds to see the children. There has been no

resumption of cohabitation and nothing to interrupt the desertion which, according to the wife, was originally started by the husband. If I were to accept as truthful the wife's story of how the separation came about and the subsequent events, this case would not present the slightest difficulty. It would be a clear case of desertion on the part of the husband. On the other hand, if I accept the husband's evidence, the separation in December, 1945, was due entirely to the wife's conduct. The question then arises whether that desertion persisted for the necessary statutory period, having regard to the evidence which has been given as to the subsequent history.

As to the final parting between the two parties I accept the husband's account of that. I think that the wife left Hull in December, 1945, because she was tired of the marriage and saw no point in continuing in Hull, waiting for a non-existent house in a place which she did not like, ultimately to resume cohabitation with a man of whom she was getting rather tired. I am satisfied that the separation between the parties was brought about by what amounted to an act of desertion on the part of the wife. Again, if I accepted the wife's evidence as to subsequent events, the rest would be easy, because she says that since that time there has been no cohabitation and no intercourse between the parties, so that there would be nothing to break the running of the desertion which by her conduct she has brought about. That, however, will not fit in with the husband's story which I must now deal with, and I am bound to say that, having accepted his account of what had taken place up to that date, I feel I must accept his account of the subsequent events which then occurred. It is very unfortunate for the husband because it makes his case much more difficult. He says that he frequently went over to Leeds, beginning at Christmas, 1945, which he spent there, and continuing during 1946 and part of 1947. He says that he went over three or four times at week-ends in 1946, that he was there for Easter week-end, 1947, and again for a week-end in August, 1947. During those times, according to him, he stayed in the same house as, and slept with, his wife, and behaved as her husband, and that marital intercourse regularly took place on those occasions up to and including August, 1947. After November, 1947, he gave up trying to see his wife and I do not think he saw her again until after the launching of the present proceedings. It is common ground that early in 1950, after the presentation of the petition, he did have an interview with his wife. He then made a last effort at reconciliation inviting the wife to withdraw her pleadings. The wife denies that is so, but on that I accept the evidence of the husband and I have no doubt that he did make a genuine effort, even as late as this year, to become reconciled to the wife, but that she refused his overtures.

The husband's answer, on which he seeks relief on the ground of his wife's desertion, is dated July 17, 1950. Bearing in mind that on his own showing the parties stayed together and that marital intercourse took place between them as recently as August, 1947, it is obvious that the question arises whether the husband is in a position to prove the three years' continuous desertion immediately preceding the presentation of the answer required by the Matrimonial Causes Act, 1937, s. 2. I must consider, therefore, whether I can properly regard the desertion as having commenced in December, 1945, and as having been continuous since then, or whether I am bound to conclude that the desertion only started after the last visit in August, 1947. Counsel for the husband has argued that, once desertion has started, the mere fact that the parties cohabit in the course of a genuine effort by one of them at reconciliation is not necessarily enough to interrupt the running of the statutory period of desertion.

On that proposition, I will first refer to the decision of LORD MERRIMAN, P., in *Mummery v. Mummery* (1). In that case the wife was proceeding against her husband on the ground of desertion, but it appeared that, during the three

years' period on which she was relying, the parties had met on a single occasion and had had intercourse at the instance of the deserting husband. The learned President came to the conclusion that in the circumstances the period of desertion was not in law interrupted by the single act of intercourse which took place. I think it would be helpful if I read what I regard as the material part of his judgment, because, as I see it, he states the principle involved in terms which are wide enough to embrace the present case. The learned President said ([1942] 1 All E.R. 555):

"It seems to me that the whole question turns on what cohabitation means, and what a resumption of cohabitation means. Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place, but from a state of things (*Pulford v. Pulford* (2), at p. 21). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do. The question, then: is does coming together for a single night raise an irrebuttable presumption that the parties have resumed cohabitation even for that short time. Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? I am bound to say that I think that it would lead to an absurd state of things if one were bound to hold that that is so. Quite clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support. It would, for example, be quite ludicrous if, because during a period of desertion the parties met by arrangement to talk over their difficulties, and the deserted wife did her very best to persuade her husband to come back, while he remained obdurate, one were bound to hold that meetings of that sort, however protracted, and even if they involved spending the night under the same roof together or several nights under the same roof together, interrupted or brought to an end the state of desertion. Why, then, should a wife who goes a step further in the hopes of effecting a reconciliation, and allows her husband to sleep the night with her, be held to have condoned the offence and to have resumed cohabitation when it is clear, beyond the slightest shadow of doubt, that the husband at the same time had no intention whatever of resuming cohabitation? I do not think that I am obliged so to hold. I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebuttable presumption that cohabitation has been resumed."

Clearly in that case LORD MERRIMAN, P., stated the proposition of law on which he was relying in terms wide enough, it seems to me, to cover the present case. It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place and where the innocent party was the wife. Here we have, not one occasion, but a number of occasions to deal with, and it may be said that this is not, like *Mummary v. Mummary* (1), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party. The facts in this case are, undoubtedly, different from those in *Mummary v. Mummary* (1), and if that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended

to cover the present case. But I have also received assistance from *Bartram v. Bartram* (3), a decision of the Court of Appeal.

The facts in *Bartram v. Bartram* (3) are very different from those of the present case, but they are similar in one material respect, in that it was a husband's petition. The question there was whether desertion on the part of the wife was terminated by the fact that she returned to live under the same roof as the husband. It was not suggested that intercourse took place or that they had any common life, but it was said that she lived for some time preceding the presentation of the petition under the same roof as the husband, in circumstances in which they met each other and on some occasions had meals together. It was in relation to that state of affairs that the Court of Appeal expressed the opinion to which I am about to refer. Though the facts were different, there are passages in the judgment of BUCKNILL, L.J., which seem to me to state the principle on which the present husband's case must be weighed. BUCKNILL, L.J., said ([1949] 2 All E.R. 272):

" . . . I may refer to another passage in a judgment, also by the learned President, in *Mummery v. Mummery* (1) where he said ([1942] 1 All E.R. 555): 'Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do.'"

That is the quotation from *Mummery v. Mummery* (1) which I have already read. BUCKNILL, L.J., continued (*ibid.*):

" In *Hopes v. Hopes* (4) the husband failed to prove his case because he never succeeded in proving desertion. He never proved that there was any actual separation of husband and wife, although he did prove the intention on the part of the wife to desert. Therefore, the case failed on the threshold. In the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion once established continues until it is proved that it has been brought to an end. The wife does not suggest for one moment that she brought it to an end. The question is: Do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run."

ASQUITH, L.J., said (*ibid.*, 273):

" . . . it seems to me wrong to hold that the three years' period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of LORD MERRIMAN, P., in *Mummery v. Mummery* (1), a bilateral intention on the part of both spouses to set up a matrimonial home together."

Lastly, DENNING, L.J., said (*ibid.*):

" *Hopes v. Hopes* (4) does not apply because there the period of desertion never began to run. Here the period of desertion had begun to run before the parties came to live together again under the same roof. Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together

again for a time. That was laid down by LORD MERRIMAN, P., in *Mummery v. Mummery* (1) and has never been doubted since. Indeed, I would say in such a case the period of desertion does not cease to run unless, and until, a true reconciliation has been effected . . . Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful."

That case, it appears to me, carries with it an authoritative statement on principle by the Court of Appeal, and it is for me to apply that principle as best I can to the present case. I am satisfied on the facts that the period of desertion brought about by the wife began to run in December, 1945. There is no evidence that any "true reconciliation" has ever been effected between the parties since. I take that phrase from the judgment of DENNING, L.J. It is equally true to say that in this case there is no evidence of any intention on the part of the wife since December, 1945, to "set up a matrimonial home" with the husband—the phrase used by BUCKNILL, L.J., and ASQUITH, L.J. There is no evidence here since 1945 of any bilateral intention on the part of both spouses to set up a matrimonial home together. On the contrary, it appears to me that the wife has maintained throughout her determination to live separate and apart from the husband. It was the husband who made repeated efforts to bring about a reconciliation, going over for that purpose from Hull to Leeds. In my judgment, such efforts at reconciliation can only be regarded as meritorious conduct on the part of the husband, and I should be sorry if, through such conduct, the husband were to lose any right to relief which he otherwise would have. But, having regard to the matters to which I have referred, I am satisfied that, on the true view of the law, notwithstanding the periodical visits by the husband for the purpose of effecting reconciliation, and notwithstanding the fact that intercourse took place during those visits, in law the desertion started by the wife in December, 1945, has never ceased to run, but continued running for a period exceeding three years immediately preceding the presentation of the husband's answer.

I would add this. It may very well be that each time an act of intercourse took place between these parties, the husband must be taken to have condoned the previous desertion of the wife, but each time the wife refused to go back to Hull and resume cohabitation with the husband there it seems to me that she was guilty of a fresh act of desertion which revived the previous desertion. In law the proper answer seems to me again to be that the initial desertion started by the wife in December, 1945, must be regarded as continuing. For these reasons it seems to me that the husband is entitled to a decree.

Decree nisi.

Solicitors: *G. I. Chisholm*, Law Society's Divorce Department, Leeds (for the petitioner); *Richard Witty & Co.*, Hull (for the respondent).

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

NOTE.

GEORGE WIMPEY & CO., LTD. v. JOHN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Parker, JJ.),
December 15, 1950.]

Carriage of Goods—Carriage for hire—Delivery of goods “subjected to a process or treatment in the course of trade or business carried on” by contractor—Open-cast coal mining—Carriage of coal from site to and from screening plant—Road and Rail Traffic Act, 1933 (c. 53), s. 1 (5) (b).

CASE STATED by Carmarthen justices sitting at Ammanford.

On May 27, 1949, the appellants, a firm of contractors, entered into a contract with the Ministry of Fuel and Power whereby they undertook, *inter alia*, to excavate coal and transport it by road from certain open-cast mining sites owned by the Ministry to a screening and washing plant, or, in the case of rejected coal, from that plant back to the sites. For that purpose the appellants used a number of goods vehicles in respect of which they held private carriers', *i.e.*, “C,” licences. The appellants were summoned on eight informations charging them with using goods vehicles for the carriage of goods for hire or reward other than under a “B” licence, contrary to s. 1 (1) of the Road and Rail Traffic Act, 1933. The justices found the offences proved and imposed a fine of £2 on each summons.

[FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 675; and FOR CASES, see DIGEST Supplement, Carriers, Nos. 1579-1606.]

Glyn-Jones, K.C., and *Stewart-Brown* for the appellants.

J. P. Ashworth and *Morris Morgan* for the respondent (clerk to the licensing authority, South Wales Traffic area).

LORD GODDARD, C.J.: Whether the appellants were carrying on the business of open-cast coal miners or not, they were certainly carrying on the business of contractors and as contractors (to use the expression “contractors” as meaning people engaged in engineering, constructional or other work of that description), on the findings of the justices they have brought themselves within s. 1 (5) (b) of the Act of 1933. They were delivering goods which had been, or were to be, “subjected to a process or treatment in the course of a trade or business carried on” by them. The trade or business carried on by them undoubtedly was the carriage of coal to the screening plant and the carriage therefrom of coal which had either been accepted or rejected.

Solicitors: *McKenna & Co.* (for the appellants); *Treasury Solicitor* (for the respondent).

Appeal allowed.

J.D.P.

GARFORTH-BLES v. GARFORTH-BLES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pearce, J.), December 20, 21, 1950.]

Variation of Settlement—Variation inimical to interests of child—Withdrawal of funds from settlement by husband—Husband guilty party—Facts to be considered.

In 1939 the parties were married, and in 1940 a child was born. The parties had entered into an ante-nuptial settlement under which the wife's fund was settled on the wife for her life and after her death on the husband for his life, and thereafter the fund was given to the children or remoter issue of the marriage as the husband and wife jointly should appoint. The husband's fund was directed to be held on similar trusts *mutatis mutandis*, the husband taking the first life interest. In 1948 the marriage was dissolved on the ground of the husband's adultery. On the question of the variation of the settlement, the husband and the wife agreed that the rights, powers, and interests of each in the other's fund should be extinguished as if the one had died in the lifetime of the other, but on behalf of the child objection was taken to the husband's request that he be at liberty to revoke the trusts of the settlement relating to a moiety of his fund and to appoint that moiety or any part thereof to any after-taken wife or issue of any marriage. The value of the wife's fund was approximately £6,000, and the husband's fund, which consisted only of reversionary interests, approximately £12,000.

HELD: having regard to the facts that the variation agreed would remove one life interest standing between the child and her reversion to each fund, and that, as the husband had settled all his property as part of his fund and had no expectations, the husband might, if no revocation were permitted, have such a feeling of injustice as to impair the satisfactory relationship which seemed to exist between the husband and the child, the husband ought to be allowed to revoke the trusts relating to two-fifths of his total fund, subject to his appointing the remaining three-fifths to the child.

[AS TO PRINCIPLES ON WHICH SETTLEMENTS WILL BE VARIED, see HALSBURY, Hailsham Edn., Vol. 10, pp. 803-807, paras. 1280-1285; and FOR CASES, see DIGEST, Vol. 27, pp. 521-528, Nos. 5632-5703.]

Cases referred to:

- (1) *Prinsep v. Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; Digest Supp.
- (2) *Whitton v. Whitton*, [1901] P. 348; 71 L.J.P. 10; 85 L.T. 646; 27 Digest 519, 5600.

MOTION to confirm the report of the registrar on an application to vary an ante-nuptial settlement after the dissolution of the marriage of the parties. The decree had been granted on the wife's petition on the ground of the husband's adultery. The registrar recommended *inter alia* that the husband should be at liberty to revoke the trusts of the settlement in respect of a moiety of his fund, and to appoint that moiety or any part thereof to any after-taken wife or issue of any marriage. On behalf of the child of the marriage, objection was taken to that recommendation. The facts appear in the headnote and the judgment.

Karminski, K.C., and *R. J. A. Temple* for the husband.

S. A. Morton for the wife.

H. V. Brandon for the child of the marriage.

PEARCE, J.: This is an application to confirm a report of the registrar as to the variation of an ante-nuptial settlement. The husband asks that the report be confirmed. Counsel for the child asks that it should be varied, though

no notice to that effect has been given. The wife takes a neutral attitude on the point of difference between the husband and the child. The parties all agree that the registrar's report should be confirmed so far as it extinguishes the rights, powers, and interests of the husband in the wife's fund as if he had died in the wife's lifetime and also in so far as it extinguishes the rights, powers, and interests of the wife in the husband's fund as if she had died in the husband's lifetime. The parties also agree with the registrar's submissions dealing with the appointment of new trustees and with costs. They disagree on the submission of the registrar that the court should grant the husband's request that he be at liberty to revoke the trusts of the settlement relating to a moiety of his fund and to appoint the said moiety or any part thereof to any after-taken wife or issue of any marriage. Counsel for the husband argues that it is fair to allow the husband to do this because of the following facts. The child will have a reversion to the whole of the £6,000 in the wife's fund, since the child can now have no brothers or sisters to share it with her, and also to the £6,000 which will, if the husband's request be granted, remain in the husband's fund. This reversion is subject to an appointment by the husband in favour of the child's own children, which is possible, but not probable. The child also has a reversion on the wife's death to £2,750 under another settlement, but this will be shared equally by future children, if any, of the wife by her present or any future husband. The child also, he argues, has expectations from the wife's side. The wife herself has something like £10,000, and the wife's father is well-to-do, but he has three children other than the wife, and five grandchildren. The child also has the benefit of a consent order against the husband of £220 free of tax for her maintenance until she is twenty-two years of age. The child also, I am told, receives the tax allowance in respect of this. The husband argues that this is a more generous order than the court would have made and that it lasts for longer than a court order could have lasted had the husband not consented. The husband says (though this is disputed) that this order was made while the question of variation was under consideration and should be taken into account as a benefit accruing to the child when the question of variation is considered.

Against this, counsel for the child argues that no benefit to the child that is not part of this actual variation of the settlement should be taken into account, and that the original settlement does not allow the husband to settle funds even on a wife taken after the decease of his first wife, so that, subject to the appointment to remoter issue, the child's interest had vested and should not be disturbed. He also argues that the husband's request is a detriment to the child, and that it ought to be wholly refused since no corresponding benefit for the child is produced by the proposed variation. He also takes the point, though he admits that on the cases it cannot be successfully taken in this court, that I have no power to grant the husband's request. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, provides that this court may make such orders with reference to the application of the whole or any part of the property settled for the benefit of the children of the marriage or the parties to the marriage as the court thinks fit. The discretion so given is a wide one. It must, of course, be used in accordance with the settled general principles that have been laid down from time to time.

Various cases have been cited to me, but, though those cases are helpful in showing the general principles, it is to the facts of this particular case that I must apply my discretion. It seems clear from the cases cited to me and also from unreported cases in which a similar relief has been granted to respondents that I have power to grant the husband's request if on the facts it is just to do so. The words of HILL, J., in *Prinsep v. Prinsep* (1), cited with approval in more than one case, seem to me helpful in considering this question. He said ([1929] P. 236):

"The main object of variation is to make proper provision for the injured spouse and the children of the marriage. And *prima facie*, settlements ought not to be interfered with further than is necessary for that purpose. But the court which has annulled the marriage must not only protect the injured party, but also be fair to the wrongdoing party."

The child's expectations on the maternal side do not weigh with me. She had those in any event. Moreover, it is reasonable to suppose that any wife whom the husband may marry in the future will be as well-to-do as the first wife, and that any child born of such marriage will have as good expectations on the maternal side as this child has. The generous nature of the husband's maintenance of the child does not weigh with me, though it is right that it should be put before the court as part of the general picture. A generous father may reasonably hope to receive a more sympathetic hearing than one who has no regard for his paternal liabilities. But I must protect the interests of the child, and I must be satisfied that justice requires the proposed variation, and that it benefits, or at the very least, does nothing to the disadvantage of, the child.

In this case the proposed variation will remove one of the two life interests that stand between the child and her reversion to the mother's fund of £6,000. The removal of this life interest is a substantial benefit: see the words of SIR FRANCIS JEUNE, P., in *Whitton v. Whitton* (2) ([1901] P. 353.) The proposed variation will also remove one of the life interests that stand between the child and so much of the husband's fund of £12,000 as is left in the settlement after the variation. The husband tells me that he is prepared to appoint to the child (as opposed to any remoter issue) all that remains in the husband's fund. The effect of this will be that, although probably the child would have received this benefit in any case, she is now assured that the funds in the husband's fund will come to her and will not be appointed to her children. Since this gives her now the certainty of receiving that reversion, it is of considerable value.

There is a further consideration that is, in my view, to the child's interest in allowing the husband to remove a part of his fund from the settlement. He brought into the settlement reversions that were substantially all that he possessed. He now has, apart from these funds, no expectations and very little property. If, as seems likely in view of his age, he re-marries, he has extremely little to settle on any future wife or children. If, by my order, I refuse the husband's request and devote exclusively to this child all the money that came from the husband and allow none of it to go to any future wife or child of his, it may quite reasonably give him a feeling of injustice and impair the satisfactory relationship between father and child, a relationship of whose existence his generous dealing with the question of her maintenance gives some indication. Moreover, in the eyes of fair-minded members of the family, or friends, and of the child herself when she grows up, such an order will probably seem unjust and an excessive preference of the child's interests to those of her father. To produce this result would cause a loss to the child which the retention of the money would not compensate. To produce a happier result by the surrender of some part of the husband's fund would, in my view, be a benefit to the child. There may be cases where financial stringency might compel one to disregard such a benefit, owing to the necessity of keeping every available penny for the child, but this is not such a case. In my view, it is reasonable and just that the husband should be granted his request in part, but I think that a moiety is rather too large a portion for the husband to remove from the fund, and the fair amount is two-fifths. With this variation I confirm the report, subject to the husband's appointing the remaining three-fifths of the husband's fund to the child.

Order accordingly.

Solicitors: *Pickering, Kenyon & Co.* (for the husband); *Braby & Waller* (for the wife); *Neish, Howell & Haldane* (for the child of the marriage).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

COLE v. MILSOME.

[KING'S BENCH DIVISION (Lloyd-Jacob, J., sitting as a judge of the King's Bench Division), December 18, 1950.]

Bill of Exchange—Requirements of form—Document in form of cheque—"Pay cash or order"—Not payable "to or to order of specified person or to bearer"—Bills of Exchange Act, 1882 (c. 61), s. 3 (1).

Bill of Exchange—Consideration—Payment of cheque into bank—Drawing of cheques on account at request of drawer's agent.

A document drawn in the form of a cheque was made payable to "cash or order." It was passed by the holder to a third party who, at his request, paid it into her bank account and then drew against it cheques to meet various commitments of the holder. Subsequently the bank refused payment on the document. In an action on the document by the third party against the drawer,

HELD: a document payable to "cash or order" was not payable "to or to the order of a specified person, or to bearer" within the meaning of s. 3 (1) of the Bills of Exchange Act, 1882, and, therefore, was not a bill of exchange within the meaning of that section.

A cheque was delivered by the agent of the drawer to the payee to whom the drawer was not indebted, but who received it in good faith, with the request, made by the agent, that the payee should pay the cheque into her account and draw cheques in favour of persons whom he indicated amounting substantially to the amount of the cheque. Subsequently payment of the drawer's cheque was stopped. In an action on the cheque by the payee against the drawer,

HELD: the payee had acted pursuant, as she believed, to a request of the drawer, conveyed by her agent, that the amount specified in the cheque should be used for the purposes indicated by the agent, and, therefore, the paying by the payee of the cheque into her account and the drawing of cheques by her on her account against it was sufficient consideration to support an action on the cheque by the payee against the drawer.

[AS TO BILLS MADE PAYABLE TO BEARER, see HALSBURY, Hailsham Edn., Vol. 2, pp. 618-620, paras. 845-848; and FOR CASES, see DIGEST, Vol. 6, pp. 46, 47, Nos. 337-342.]

AS TO WHAT CONSTITUTES CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 646-650, paras. 890-893; and FOR CASES, see DIGEST, Vol. 6, pp. 114-117, Nos. 768-786.]

Case referred to:

(1) *North & South Insurance Corpn., Ltd. v. National Provincial Bank, Ltd.*, [1936] 1 K.B. 328; 105 L.J.K.B. 163; 154 L.T. 255; Digest Supp.

ACTION for two sums claimed to be due on two cheques which, on presentation, were dishonoured.

The plaintiff was employed by one Hignett, who induced her to receive two cheques, to endorse them, to pay them into her bank account, and to draw cheques against them to meet certain obligations of Hignett. Both cheques were drawn by the defendant. The first cheque was made payable to "cash or order", and the second to the plaintiff in person. It was contended for the defendant that the cheques could not be sued on as bills of exchange, the first because it was not payable "to or to the order of a specified person or to bearer" within the meaning of the Bills of Exchange Act, 1882, s. 3 (1), and the second because there was no consideration as between the plaintiff and the defendant for its transmission. The facts appear in the judgment.

H. J. Phillimore for the plaintiff.

de Montmorency for the defendant.

LLOYD-JACOB, J.: This is a claim by Mrs. Cole, the plaintiff, against a Miss Milsome, the defendant, for £302 10s., the sum of two cheques, one for £137 10s. and the other for £165, drawn by the defendant on her bank, Barclays Bank, Ltd., Thornton Heath branch, the first on Mar. 25 and the second on Mar. 28, 1949. The real issue between the parties is who is to suffer for the fraudulent behaviour of an intermediary, one Hignett, who was known to both parties and who transmitted the cheques.

The document, dated Mar. 25, 1949, which for convenience I call a cheque, was drawn by the defendant for the sum of £137 10s. It was brought to the plaintiff by Hignett who asked her to cash it in the sense of paying it into her own account and drawing against it a number of cheques to meet various commitments which he had. The defendant submits that the document is not properly so called a bill of exchange, and, therefore, the plaintiff is not entitled to recover as against the drawer the sum specified in it. The document is in the form of a cheque. It consists of printed and written words on what is, in ordinary common parlance, called a cheque form. The only material part for this purpose is the direction as to payment, which is: "Pay cash or order," the words "pay" and "or order" being printed and the word "cash" having been inserted in ink. To be a bill of exchange within the Bills of Exchange Act, 1882, the document must satisfy the language of that Act, and, in particular, I should refer to s. 3 (1) and s. 7 (1). Section 3 (1) reads as follows:

"A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."

It is conceded that this document is an unconditional order in writing. It is addressed by the defendant to her bankers, Barclays Bank, Ltd., at the branch I have mentioned. It is signed by the defendant and it requires the bank to pay on demand a sum certain in money, namely, £137 10s. (which is both written and expressed in figures). The only question which arises is as to the payee, and I have to determine whether the expression "pay cash or order" is a payment to the order of a "specified person, or to bearer." The document can only qualify as a bill of exchange if the expression "pay cash or order" be read as indicating payment to bearer, a question which is not entirely free from authority.

Section 7 (1) deals with the case where a bill is not made payable to bearer, as in the present case, and provides that the payee must be named or otherwise indicated therein with reasonable certainty. Although that is not directly in point, it shows that one of the essentials of a bill of exchange is reasonable certainty regarding the person to whom payment is directed. So far as concerns payment to bearer, "bearer" is defined in s. 2, as

"... the person in possession of a bill or note which is payable to bearer."

That does not carry the matter any further on the point with which I have to deal because I have to determine whether on its fair construction this bill is payable to bearer. If it is, no question arises but that it was presented to the bank by a person who was holding the document *bona fide* and could, therefore, be regarded as the bearer of the document.

My attention was directed to a judgment of BRANSON, J., in *North & South Insurance Corp., Ltd. v. National Provincial Bank, Ltd.* (1). In that case the learned judge was dealing with a document which in all material respects is identical with that with which I have to deal. The circumstances were not the same because the bank to whom the order was directed had paid the sum set out in the cheque and the action there was on behalf of the liquidator of

the company which drew the cheque in an endeavour to recover from the bank the amount of money which the bank had paid and with which they had debited the company's account. In the result, the learned judge decided the case in favour of the defendants on the view that by necessary implication the document was a direction to the bank to pay the sum of money set out to the bearer. Had that decision been one which interpreted the language of s. 3 in favour of the defendants in that case, I should have been disposed to follow it, but the case did not decide that, on the proper construction of s. 3 (1), a payment expressed to be to "cash or order" was a payment to bearer. Indeed, in the early part of his judgment the learned judge expressed his opinion that the document in question could not properly be called a cheque at all and drew attention to the fact that under s. 73 of the Act a cheque must be a bill of exchange. He recalls the language of s. 3 (1), including the words "or to bearer", and notes that sub-s. (2) provides that an instrument which does not comply with these conditions is not a bill of exchange. He then goes on to consider the scope of the words, "or to the order of a specified person," but he does not in terms deal with the other alternative, namely, that of a document addressed to bearer. Therefore, this is not a precise authority on the point which I have to decide.

I have come to the conclusion, with some reluctance, that the language used in this document, namely, "pay cash or order," cannot fairly be construed as constituting a bill of exchange within s. 3 (1) of the Bills of Exchange Act, 1882. In those circumstances, the plaintiff must fail in that part of her claim relating to this document because, in the circumstances in which it came into her possession, she is not entitled to claim except on the footing that it does constitute a bill of exchange.

With regard to the second document, it is not suggested that it is not in form a bill of exchange. It was drawn by the defendant in favour of the plaintiff or her order, and was for the sum of £165. The plaintiff has satisfied me that she was wholly innocent of any improper motive in her dealings with these two cheques. She appears to have occupied a position in the employ of Hignett, and it was as part of and pursuant to her employment that the occasion arose for dealing with matters involving money. After she had received the first cheque (which I have dealt with) and had drawn cheques substantially for the amount therein shown, within three days Hignett again called on her, presented to her the second document, and sought her assistance in meeting certain obligations which in total amounted to something less than the £165. The plaintiff was entirely ignorant of the fact that the earlier cheque had been dishonoured, and, at Hignett's request, she drew cheques on her own account for a little over £100 of the amount, and a day or two later drew a cheque for some £60 odd, the total amounting substantially to the full amount of this cheque. It so happened that, before they were cleared, she received notice from her bankers that the defendant's cheque had been stopped, and she told me in evidence that she has managed to stop the various cheques which she drew in connection with this £165, but precisely what her liabilities or obligations are in respect of them I have no evidence.

It is submitted by the defendant with regard to this document that, although it was a bill of exchange received in good faith by the plaintiff, the plaintiff is not in a position to recover against the defendant in respect of it because there has been no consideration as between the plaintiff and the defendant for its transmission. Counsel for the defendant has rightly conceded that the burden is on him to prove the absence of consideration, and that is a burden which cannot easily be discharged in the absence of any affirmative evidence. Here the plaintiff and the defendant were immediate parties to the deal. It is not suggested that the defendant was under any obligation to the plaintiff for this or for any sum of money, and, therefore, it is argued that the plaintiff must

have received this document in the full understanding that it was not in respect of any transaction whereby she had given any consideration. It is said that such consideration as she did give, namely, the provision of banking facilities to Hignett, cannot properly be regarded as consideration given or offered to the defendant.

I take the view that in the circumstances which happened this cheque was delivered to the plaintiff by Hignett as agent for the defendant and was transmitted to her by him as such agent with an admitted request that the plaintiff should draw cheques on her account in respect substantially of the total. It seems to me that the whole question I have to decide is whether, in seeking that convenience from the plaintiff, the intermediary Hignett was acting, or can fairly have been assumed by the plaintiff to be acting, as the agent of the defendant. I take the view that the receipt of this cheque, its endorsement by the plaintiff, its payment into her bank, and the drawing by her of cheques against the amount, were made by her pursuant (as she believed) to an implied request by the defendant that the amount set out in this cheque should be utilised for the purpose which Hignett was representing to her was the purpose of its transmission to her and the fact that it was drawn in her name. I am satisfied that in receiving this cheque, in endorsing it, in paying it into her own account, and in drawing cheques against it, the plaintiff was moved and actuated by the representations of Hignett which she believed he was making as agent for the person who had drawn the cheque. In those circumstances, it does not seem to me I can hold that the completion of this cheque by the defendant amounted to nothing more than a voluntary promise on her part to pay the plaintiff so long as she was minded so to do and that it could be withdrawn at any time before payment was completed. The plaintiff informed me on oath that after these cheques had been stopped, when she communicated with the defendant by telephone, complaining of the fact that the cheques had been stopped and informing the defendant that she (the plaintiff) had exposed herself to liability by drawing cheques against the amount, the substance of the reply she got was that she was not to worry and she would receive her money. That seems to me to be wholly inconsistent with an attitude on the part of the defendant that she had written out the cheque expressly payable to the plaintiff merely to indicate a voluntary promise on her part which could be withdrawn at any time before the bank had honoured the draft. In my view, I must read into this transaction the necessary business implications which follow from the transmission of a document drawn in this form to the expressed payee in the circumstances which I have stated. In the result, the plaintiff is entitled to recover the sum of £165 from the defendant.

Judgment for the plaintiff for £165 with costs.

Solicitors: *Elvy Robb & Co.* (for the plaintiff); *Henry Boustred & Sons* (for the defendant).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

HALPERN v. HALPERN.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), December 6, 21, 1950.]

Variation of Settlement—"Settlement"—*Part of house conveyed by wife to husband for no consideration—Provision for husband, and in view of continuance of matrimonial relations—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 192.*

The parties were married on Mar. 12, 1942. On July 5, 1945, for no stated consideration, the wife conveyed to her husband a half-share in a house of which she owned the freehold. On Mar. 31, 1950, the wife was granted a decree *nisi* of divorce, which was made absolute on May 16, 1950. On an application by her for variation of the conveyance to the husband as being a post-nuptial settlement,

HELD: the conveyance by the wife to the husband was for the purpose of making a provision for him because he was her husband and it was made with a view to the continuance of matrimonial relations between the parties, and, therefore, it constituted a post-nuptial settlement within s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the court had power to deal with it under that section.

Principles stated by DENNING, J., in Smith v. Smith ([1945] 1 All E.R. 585), *applied*.

[AS TO VARIATION OF SETTLEMENT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 800-803, paras. 1274-1278; and FOR CASES, see DIGEST, Vol. 27, pp. 517-523, Nos. 5576-5647, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Prinsep v. Prinsep*, [1929] P. 225; 98 L.J.P. 105; 141 L.T. 220; Digest Supp.
- (2) *Hubbard (otherwise Rogers) v. Hubbard*, [1901] P. 157; 70 L.J.P. 34; 84 L.T. 441; 27 Digest 520, 5623.
- (3) *Chalmers v. Chalmers*, (1892), 68 L.T. 28; 27 Digest 520, 5622.
- (4) *Bosworthick v. Bosworthick*, [1927] P. 64; 95 L.J.P. 171; 136 L.T. 211; Digest Supp.
- (5) *Stone v. Stone & Brownrigg*, (1864), 3 Sw. & Tr. 372; 33 L.J.P.M. & A. 95; 10 L.T. 140; 164 E.R. 1319; 27 Digest 516, 5551.
- (6) *Dormer (otherwise Ward) v. Ward*, [1900] P. 130; 69 L.J.P. 65; 82 L.T. 469; *revsd.*, [1901] P. 20; 69 L.J.P. 144; 83 L.T. 556; 27 Digest 521, 5629.
- (7) *Gunner v. Gunner & Stirling*, [1948] 2 All E.R. 771; [1949] P. 77; [1948] L.J.R. 1904; 2nd Digest Supp.
- (8) *Brown v. Brown*, [1936] 2 All E.R. 1616; [1937] P. 7; 105 L.J.P. 103; 155 L.T. 418; Digest Supp.
- (9) *Bown v. Bown & Weston*, [1948] 2 All E.R. 778; [1949] P. 91; [1948] L.J.R. 1912; 2nd Digest Supp.
- (10) *Smith v. Smith*, [1945] 1 All E.R. 584; 114 L.J.P. 30; 173 L.T. 8; 2nd Digest Supp.

APPLICATION by the wife, a petitioner in a divorce suit, for the variation of a conveyance to her husband of freehold property, which, she alleged, constituted a post-nuptial marriage settlement. The facts are set out in the judgment of COLLINGWOOD, J.

Baskerville for the wife.

E. O. Roberts for the husband.

Cur. adv. vult.

Dec. 21. COLLINGWOOD, J., read the following judgment. This is an application by the wife (the petitioner for divorce), for variation of a post-nuptial settlement. The parties were married on Mar. 12, 1942, and there is

one child of the marriage, a girl born Nov. 12, 1944. In November, 1942, the wife's father purchased the freehold property known as "Folda," Kirriemuir, Scotland, in the name of his daughter, expressly directing that the title deeds should be completed in her name. The husband contends that the property was given to the wife and himself jointly as a wedding present, and in support of this he relies on a letter from his father-in-law to him dated May 17, 1943, but, in my opinion, this is inconsistent with the express directions referred to above. On July 5, 1945, the wife, for no stated consideration, conveyed a half-share in the property to the husband. She states that this was done at his request in order that he could hold the property jointly with her and thus have a better opportunity of obtaining naturalisation. On Feb. 15, 1950, the wife filed a petition for divorce, on Mar. 31, 1950, she was granted a decree *nisi*, and on May 16, 1950, the decree was made absolute.

Counsel for the wife contended that the conveyance of July 5, 1945, was a post-nuptial settlement within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. Counsel for the husband submitted that the deed was not a "settlement" at all, and, therefore, not a marriage settlement. There is no precise definition of the term "post-nuptial settlement." In *Prinsep v. Prinsep* (1) HILL, J., held that, in deciding whether a settlement comes within the purview of the section, the material question is ([1929] P. 232):

"Is it upon the husband in the character of husband or on the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses, and with reference to their married state."

The case most strongly relied on by counsel for the husband was *Hubbard (otherwise Rogers) v. Hubbard* (2). In that case a husband executed a deed by which he assigned to a trustee a leasehold house on trust to assign the same at once to the wife absolutely, and the trustee assigned accordingly. It was held by the Court of Appeal, reversing the decision of SIR FRANCIS JEUNE, P., that the assignment was not a "settlement," in any sense, and could not, therefore, be a settlement within s. 5 of the Matrimonial Causes Act, 1859, and that the court had no jurisdiction to vary its provisions. RIGBY, L.J., said ([1901] P. 161):

"I am inclined to say that the decision of the learned President himself in *Chalmers v. Chalmers* (3) is directly in point, and is to be preferred to his decision in the present case."

In *Chalmers v. Chalmers* (3), the wife petitioner had, some twenty years before the date of the decree, assigned to her husband certain property of which she then stood possessed subject to mortgages. The President held that the assignment was not a "settlement" within the meaning of the Act, but that on a petition by the wife for maintenance the court could order, and did order, the husband to secure to the wife, by way of maintenance, the property which she had formerly assigned to him, subject to outstanding mortgages. The same view and the same course were taken by the registrar in the present case.

The matter was again considered by the Court of Appeal in *Bosworthick v. Bosworthick* (4). There, in 1902, a wife, married in 1897, executed a bond whereby she secured to her husband an immediate annuity for his life. The marriage was dissolved in 1925 on the petition of the wife, who applied for an order for discharge of the bond. It was contended on behalf of the husband that a bond for payment of an annuity was not a "settlement." It was held

that a liberal interpretation, according to their obvious purpose, must be given to s. 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that, although the bond did not involve the settlement of property or a charge on property for successive interests, it nevertheless amounted to a post-nuptial settlement within the meaning of those sections and that the court had power, consequent on the dissolution of the marriage, to discharge the bond. LORD HANWORTH, M.R., after pointing out that no light was thrown on the meaning of "settlement" in this section by looking at other Acts dealing with settlement—as, for instance, the Bankruptcy Acts—said ([1927] P. 68):

"It is not unimportant to see that at a very early stage, within a few years of the passing of the Act of 1859, LORD PENZANCE, referring to s. 5 of that Act, said in *Stone v. Stone & Brownrigg* (5): 'I am not prepared to say that the separation deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed'."

LORD HANWORTH, M.R., also referred to *Dormer (otherwise Ward) v. Ward* (6), in which the Court of Appeal held that a covenant to pay a yearly sum constituted settled property, the disposition of which could be varied under the Act, and rejected the argument that the covenant merely created a debt, and he continued (*ibid.*, 71):

"... if we were to hold that there was no jurisdiction in the present case, I think that we should be running counter to the decision of this court in *Dormer (otherwise Ward) v. Ward* (6), which we cannot do. On consideration of the authorities, the ground of my decision is that the section is to be construed liberally and widely, and I do not intend to narrow the meaning of the word 'settlement'."

SCRUTTON, L.J., said (*ibid.*):

"About what we might have done if there had been no authority on this point, I decline to speculate, but I think that the ordinary Chancery barrister would have recoiled from the proposition that a deed containing a covenant to pay £300 per annum was a settlement of property. There are a series of decisions in the Divorce Court to show that a much wider meaning has been given to the word 'settlement' than it has received in equity."

ROMER, J., said (*ibid.*, 72):

"I do not think we get any assistance from the Settled Land Act or the Bankruptcy Act, or from the way in which the word 'settlement' is usually employed by conveyancers. What we have to do is to consider the meaning of the word in these particular sections. We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and, in my judgment, those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

In *Gunner v. Gunner & Stirling* (7) by the terms of an insurance policy effected by the husband on his life the payees were identified as the person or persons entitled under the Married Women's Property Act, 1882, to receive the policy moneys, and the insurance was effected under the provisions of that Act for the benefit and separate use of the wife of the assured absolutely. The marriage

was subsequently dissolved by reason of the wife's adultery and the husband sought to vary the provisions of the policy. It was contended on his behalf that the effect of the policy was to create a trust in favour of the wife absolute on the death of her husband and that it gave her an immediate vested interest in the policy moneys, and that, while it was not a "settlement" in the strict sense, it was one within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. For the wife it was contended that it was a gift and not a settlement. WALLINGTON, J., held that a trust had been created whereby the wife as main beneficiary was given an immediate vested interest in the rights under the policy, that the policy had been effected to make provision for the wife in her character as wife, and that the court had the necessary jurisdiction under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to vary the policy in question as being a post-nuptial settlement. WALLINGTON, J., considered *Chalmers v. Chalmers* (3), *Hubbard (otherwise Rogers) v. Hubbard* (2) and *Brown v. Brown* (8) which were the three cases principally relied on by counsel for the husband in the present case. He continued ([1948] 2 All E.R. 777):

"In *Chalmers v. Chalmers* (3), there was an absolute assignment of property subject to mortgages. SIR FRANCIS JEUNE, P., in his judgment used this phrase (68 L.T. 29): 'A settlement means the settlement of property subsisting between husband and wife, and the Act gives power to alter or vary it when, and only when, the relation of husband and wife has ceased to subsist. The power to dispose of it absolutely does not seem to be the test.' That was a case in which the court held there was no settlement variable under the Matrimonial Causes Act, 1859, s. 5, because there was a complete and completed assignment by the wife to the husband and the property had entirely passed. *Hubbard (otherwise Rogers) v. Hubbard* (2) was somewhat, though not exactly, similar. There the husband had assigned to a trustee a leasehold house and some furniture, on trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife having obtained a decree of nullity, the Court of Appeal held that the assignment was not a settlement within the provisions of s. 5 of the Matrimonial Causes Act, 1859. *Brown v. Brown* (8) was a case in which a wife had purchased an annuity and the society granting the annuity had covenanted to pay it to the husband or his assigns. The wife had parted with her money and there was no possibility of anything coming back to her on the terms of the transaction, and the court held that that could not be a settlement within the meaning of this section."

This case was followed and applied in *Bown v. Bown & Weston* (9) where, in consideration of a single premium paid by a husband, a life assurance company issued a policy whereby they undertook to pay a certain sum on his death. The wife of the assured was specified as the beneficiary during her lifetime. WALLINGTON, J., held that the policy, which was issued for the benefit of the wife in her character of a wife, was a post-nuptial settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, although there was no trust, the policy not being issued under s. 11 of the Married Women's Property Act, 1882.

The case principally relied on in support of the wife's case was *Smith v. Smith* (10). The facts are set out in the judgment of DENNING, J., in these words ([1945] 1 All E.R. 585):

"On Nov. 6, 1929, the parties married. On Nov. 4, 1933, a house was bought in their joint names. They lived in it as their home and brought up their three children there. On Oct. 11, 1943, the husband presented a petition for divorce against his wife, and on Feb. 8, 1944, he was granted

a decree *nisi*. On Aug. 16, 1944, a decree absolute was pronounced dissolving the marriage. The wife is still in the house. The husband wants possession of it. To that end he says that it is the subject of a 'post-nuptial settlement' within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192. The wife says it is not.

A In point of law the purchase of the house was a joint affair. The conveyance was taken in the joint names of husband and wife. They entered jointly and severally into covenants with the vendor restricting the use of it. The greater part of the purchase price was raised from a building society on a mortgage of the house under which husband and wife were jointly liable for the repayments and for performance of the covenants. B In point of fact, however, the moneys for the purchase were provided solely by the husband, and the mortgage was paid off by him by instalments, the final repayment being in February, 1940.

C The conveyance expressly defined the interests of husband and wife in much the same way as would otherwise be imported by statute from the fact that it was taken in their joint names. The house was expressly conveyed to the husband and wife 'in fee simple as joint tenants,' and it was expressly stated that they were to stand possessed of it 'upon trust to sell the same with power of discretion to postpone any sale' and to stand possessed 'of the net proceeds of sale' and 'of the net rents and profits until sale in trust for the husband and wife as joint tenants beneficially.' The result was that the husband and wife held a joint tenancy of the legal estate in the land (which could not be severed) and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking appropriate steps). D The presumption is that the interest of the wife was intended by the husband as an advancement by him. So long as husband and wife were living together in the house, they, of course, shared the occupation and acquiesced in a postponement of sale, and if they had continued in that way till one died, the survivor would take the whole legal and beneficial interest in it. E If they together let or sold the house, either of them could sever the equitable joint tenancy in the income or proceeds whereupon each would be entitled to one-half. No letting or sale could, however, be effected by one without the consent of the other, except by order of the Court of Chancery, which would consider whether in the particular circumstances it was right and proper that such an order should be made. F Neither party has yet applied for such an order.

Counsel for the petitioner submitted that the provision of the house was for the future benefit of both the spouses and was a 'settlement.' He relied on *Bosworthick v. Bosworthick* (4) and *Prinsep v. Prinsep* (1). G Counsel for the respondent submitted that it was a gift to the wife of a half-share in the house and was not a 'settlement.' He relied on *Hubbard (otherwise Rogers) v. Hubbard* (2) and *Brown v. Brown* (8).

I find it difficult to reconcile the decisions in *Hubbard (otherwise Rogers) v. Hubbard* (2) and *Brown v. Brown* (8), with the principle that runs through the rest of the cases on this subject. That principle, as I understand it, is that where a husband makes a continuing provision for the future needs of his wife in her character as a wife, which is still continuing when the marriage is dissolved, the provision is a 'settlement' which can be brought before the court to see whether the provision should continue now that she has ceased to be a wife. The same applies to a provision by a wife for her husband or by each or either for both. The provision usually takes the form of periodical payments either with the intervention of trustees as in an ordinary marriage settlement, or without them as in a separation deed or a bond; but it may take other forms. The transfer of an invest-

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ment into a wife's name whether it be a house or shares, or an annuity, seems to me to be in its nature just as much a continuing provision for her future needs as is a periodical payment. The fact that it is made for no consideration other than natural affection and is in that sense a gift does not mean that it is not a 'settlement.' The bond securing the annuity in *Bosworthick's* case (4) was in that sense a gift. Again, the fact that it is assignable does not mean that it is not a 'settlement.' A wife is often free to assign her interest under an ordinary marriage settlement or a separation deed, but it is none the less a 'settlement.' If she should assign her interest, the court might treat the proceeds in her hands as representing the property; and a co-respondent, or indeed any person, who takes an assignment from her with notice that proceedings are pending as to the application of the property, will find that the arm of the court is long enough to reach the property in his hands. Neither *Hubbard (otherwise Rogers) v. Hubbard* (2) nor *Brown v. Brown* (8) directly covers this case. This freehold house was a continuing provision for the future needs of both husband and wife in their character as such. Neither could dispose of it without the consent of the other except by taking proceedings in Chancery. Applying the principles I have stated, I think it was a 'post-nuptial settlement'."

In my opinion, the present case comes within the test laid down by DENNING, J., in the case which I have just cited and within the wide and liberal meaning of the term "settlement" in s. 192 to be derived from the cases to which I have referred. The conveyance by the wife to the husband was for the purpose of making a provision for him, not, it is true, in respect of the matrimonial home, but of a "house," and I do not think that when DENNING, J., speaks of a "house" that that is restricted to the matrimonial home. It was, I think, a conveyance by the wife to the husband because he was her husband, and with a view to the continuance of the matrimonial relations between them, and constituted a "settlement" which can be brought before the court to decide whether the provisions thereof should continue now that he has ceased to be her husband. In my opinion, it is a post-nuptial settlement within s. 192, according to the principles which have been laid down in the cases to which I have referred.

Application to vary settlement granted.

Solicitors: *Digby & Co.* (for the wife); *Henry S. L. Polak & Co.* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

HOWKINS AND ANOTHER v. JARDINE.

[COURT OF APPEAL (Somervell and Jenkins, L.JJ., and Hodson, J.), December 12, 13, 20, 1950.]

Agriculture—Agricultural holding—Notice to quit—Land and cottages—Land, but not cottages, used for agriculture—No severance of cottages—Agricultural Holdings Act, 1948 (c. 63), s. 1 (1), (2).

On Apr. 1, 1935, the landlords' predecessor in title let to the tenant on a yearly tenancy seven acres of agricultural land on which stood three cottages which, at all material times, were not occupied by persons engaged in agriculture. On Mar. 23, 1949, the landlords served a notice to quit in respect of the land and cottages and the tenant served a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1). The Minister of

Agriculture gave his consent to the notice, but the tenant appealed to the Agricultural Land Tribunal which allowed his appeal, and, in consequence, the notice to quit became ineffective. The landlords then began proceedings for possession of the cottages, contending that the refusal to give consent to the notice to quit applied only to the land and not to the cottages so that the notice was effective as regards the cottages.

HELD: "agricultural land" in s. 1 (1) and (2) of the Agricultural Holdings Act, 1948, meant land let substantially for agricultural purposes; the land comprised in the present tenancy was substantially "used for agriculture" and the Act did not provide for the severance from the rest of the tenancy of the cottages although they were being used for non-agricultural purposes; and, therefore, the notice to quit had no effect with regard to the cottages, and the landlords' claim failed.

Dunn v. Fidoe ([1950] 2 All E.R. 685), distinguished.

[FOR THE AGRICULTURAL HOLDINGS ACT, 1948, s. 1, see HALSBURY'S STATUTES, Second Edn., 1948 STATUTES, pp. 26, 27.]

Cases referred to:

- (1) *Re Lancaster & Macnamara*, [1918] 2 K.B. 472; 87 L.J.K.B. 1250; 119 L.T. 440; 2 Digest 42, 232.
- (2) *Dunn v. Fidoe*, [1950] 2 All E.R. 685.
- (3) *Re Russell & Harding*, (1922), 128 L.T. 476; Digest Supp.

APPEAL by the tenant from an order made by His Honour JUDGE TUCKER at Uttoxeter County Court on Oct. 27, 1950, declaring that the landlords were entitled to possession of three cottages situate at Stubwood, Staffordshire, and mesne profits from the date of expiry of a notice to quit given by the landlords in respect of a tenancy comprising the cottages and seven acres of agricultural land. The facts appear in the judgment of SOMERVELL, L.J.

Heathcote-Williams, K.C., and *Kisch* for the tenant.

Ferns for the landlords.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SOMERVELL, L.J.: On Apr. 1, 1935, the late landlord, whose executors are now the landlords, let to the tenant three cottages and seven acres of land at Stubwood, Staffordshire, at a rent of £52 a year on a tenancy from year to year with a provision for six months' notice to quit. The cottages were on the seven acres. At that time the tenant lived in one of them. The lease contained provisions usual in a lease of an agricultural holding. To adopt the terminology used in one of the cases, I have no doubt that it was in substance a lease of an agricultural holding. In 1942 the tenant acquired a farm in the neighbourhood and went to live there. At the date of these proceedings none of the three cottages was occupied by persons engaged in agriculture. On Mar. 23, 1949, the landlords served a notice to quit in respect of the three cottages and land, the subject-matter of the lease. Section 23 (1) of the Agricultural Holdings Act, 1948, provides that a notice to quit an agricultural holding as defined by that Act has to be a twelve months' notice, notwithstanding any provision to the contrary in the contract of tenancy. The notice served was a twelve months' notice. Under s. 24 (1) a tenant, on receipt of such a notice, can serve a counter-notice. The tenant did so. The effect of a counter-notice is that the notice to quit has no effect unless the Minister of Agriculture consents to its operation. The procedure is dealt with in s. 25 (2), and there is no suggestion that the proper procedure was not followed here. The Minister gave his consent. Under s. 25 (4) a landlord or tenant dissatisfied with the Minister's decision has a right of appeal to the Agricultural Land Tribunal. The tenant appealed, and the tribunal allowed his appeal. The effect of that was that the notice to quit was inoperative. The landlords then started these

proceedings in Utttoxeter County Court. In their points of claim, after setting out what I have recited above, the landlords raised the issues with which this appeal is concerned. They depend on the construction of provisions of the Act of 1948 to which I will refer. It was contended that the counter-notice related only to agricultural land comprised in the agreement, in other words, it must be read as not relating to the cottages which were occupied by non-agricultural tenants, and, alternatively, that the refusal of consent did not relate to the three cottages. The landlords, therefore, claimed possession as against the tenant of the rents and profits of the cottages. They claimed, and the county court judge so held, that they were entitled to a declaration to that effect with mesne profits from the expiry of the notice to quit.

The position is on the face of it remarkable. The tenancy agreement remains in existence, the three cottages being taken out of it, the rent and other terms, so far as the judge's decision is concerned, remaining unaltered. The argument turns on s. 1 of the Act of 1948, which reads as follows:

"(1) In this Act the expression 'agricultural holding' means the aggregate of the agricultural land comprised in a contract of tenancy, not being a contract under which the said land is let to the tenant during his continuance in any office, appointment or employment held under the landlord. (2) For the purposes of this and the next following section, the expression 'agricultural land' means land used for agriculture which is so used for the purposes of a trade or business and includes any other land which, by virtue of a designation of the Minister of Agriculture and Fisheries (hereafter in this Act referred to as 'the Minister') under sub-s. (1) of s. 109 of the Agriculture Act, 1947, is agricultural land within the meaning of that Act."

Counsel for the landlords submitted that these words take out of the scope of the Act any parcel, however small, which is not at some relevant date being used for an agricultural purpose. It follows, I think, that the words must bring in as an agricultural holding any parcel of the whole of what is demised used for agriculture, even though the lease was plainly not in the ordinary sense an agricultural lease—for example, a large hotel with three or four acres of pasture. On this view the parcels within the land let which constitute the agricultural holding will fluctuate. A cottage when occupied by a postman is outside the Act. If he leaves and it is occupied by an agricultural worker it comes within the Act. There seem to me two issues. Does the definition provide for severance in any case or is it necessary to find that the tenancy is in substance one of agricultural land? Does the presence of a shop in a row of cottages in the lease of a hundred acre farm take that cottage out of the provisions of the Act leaving the remainder of what is demised within? Secondly, if it severs, does it sever on the basis of user of isolated plots or cottages which happen at the moment not to be used for agricultural purposes—cottages occupied, as here, by non-agricultural workers, or, say, a pasture field, part of a large farm, used for a time as a playing field and not pastured? Or, if it severs, does it only do so in the case of something which is clearly severable by its nature, say, an inn let with a farm, but carried on wholly independently of the farm?

Construing the words in the context of the Act, I have come to the conclusion that the definition does not effect a severance and that for the Act to apply the tenancy as a whole must be in substance a tenancy of agricultural land. There is some authority and an argument based on previous Acts dealing with the same subject-matter supporting the view that this is wrong, and that the definition does, at any rate in certain cases, effect a severance. On this basis, however, I am clear that it only does so in cases where what is non-agricultural is severable by its nature as, for example, an inn or factory independent of the farm and farmlands. For the wider proposition counsel

for the landlords relied on the words "used for agriculture" in s. 1 (2). In my view, this sub-section is not directed to severance, but to take out of the Act land which is used for the purposes of agriculture within the definition in s. 94, but not as a trade or business. If severance is to be found, it must be found in s. 1 (1).

A Before coming to the main argument I will mention one point which can be disposed of shortly. Counsel for the tenant submitted that the county court judge had no jurisdiction, the matter of the whole holding having been submitted to and decided by the land tribunal. This would be, in effect, a plea of *res judicata*. Counsel for the landlords submitted that this point had not been taken below and could not be taken here. We were satisfied that it had not been taken below. There was no evidence before us as to the course of argument before the land tribunal. If the point had been taken, such evidence might well have been relevant. We, therefore, decided that the point could not be taken in this court.

B The argument for the landlords, in so far as it is based on history, was as follows. In *Re Lancaster & Macnamara* (1) a farm and an inn were let under one tenancy at one entire rent. The business of the inn was entirely separate from the farm. On the expiry of the lease the tenant claimed compensation in respect of improvements to the farm. The court held that this could not be done as the subject of the letting was not a holding within the definition. C The relevant words in the Agricultural Holdings Act, 1908, s. 48 (1), were

D " 'holding' means any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral . . . "

E The inn, which was of considerable size, was clearly not within these words. It was argued, as here, that the words allowed a severance so that the farm would be within the Act and the inn outside it. The argument, to my mind, was certainly forcible on that definition as on the present one. SIR C. SWINFEN EADY, M.R., considered the machinery and other provisions of the Act and rejected the argument as quite impossible.

The position was regarded as anomalous and was dealt with by s. 33 of the Agricultural Holdings Act, 1923, which reads as follows:

F " (1) Where the land comprised in a contract of tenancy is not a holding within the meaning of this Act by reason only of the fact that the land so comprised includes land (hereinafter referred to as 'the non-statutory land') which, owing to the nature of the buildings thereon or the use to which it is put, would not, if it had been separately let, be a holding within the meaning of this Act, the provisions of this Act relating to compensation for improvements and disturbance shall, unless otherwise agreed in writing, apply to the part of the land exclusive of the non-statutory land as if that part were a separate holding. (2) This section shall not apply in relation to a contract of tenancy made before Jan. 1, 1921."

G We were told there was no similar section in the Act of 1948. Parliament cannot have intended, counsel for the landlords submitted, to revive the *Re Lancaster & Macnamara* (1) anomaly. Therefore, it must have presumed that the definition H solved it by severance. I do not think there is great force in this. The present Act, unlike the Act of 1923, gives the power, applied in the present case, to extend tenancies. There would be no ground for affording this protection to an inn. There would, therefore, have to be machinery, which is lacking, for apportionment of rent. There seems, I agree, no reason why in a combined lease the tenant should not be able to claim for improvements to a farm. Section 33 may, however, have created anomalies as well as solved one. It may be that it was thought simpler to proceed on the basis that those who

want the benefits conferred by the Act must see that they get leases which are in substance agricultural leases and do not cover other subject-matter.

The authority relied on by the county court judge, and by counsel for the landlords before us, is *Dunn v. Fidoe* (2). In that case twelve acres of pasture and orchard were let with an inn. The tenant had made substantial profits from the land mainly by the sale of fruit. The house, the inn, though not a farm house, had been adapted for use with the land, and TUCKER, L.J., read the county court judge's findings as meaning that these premises, that is, the inn, in which the tenant lived were a necessary part of the land. The land was of small value compared to the inn. The landlord served a notice to quit. The tenant invoked the procedure of s. 24. The Minister did not give his consent. The landlord sought an order for possession in the county court. The judge held that the land and the inn together constituted an agricultural holding, and, therefore, no order could be made as the Minister's consent had been refused. It is to be noted that the landlord was not, as here, seeking to sever and claim the inn only. The actual issue of severance and its consequences was not before the court. TUCKER, L.J., did, however, base his decision on the view that the definition in s. 1 (1) clearly contemplated a tenancy which comprised in part agricultural and in part non-agricultural land, the agricultural part being an agricultural holding within the Act. Counsel for the landlord had argued that the test was the dominant or main user. TUCKER, L.J., accepted this formula as the test under the earlier definition which I have cited. He regarded it as no longer the test because the new definition provided for severance in cases where the dominant user might be said to be non-agricultural if, of course, there was agricultural land. That test, therefore, being out of the way, he had no difficulty in coming to the conclusion on the findings I have cited that the whole was an agricultural holding. In a short judgment ASQUITH, L.J., agreed that the appeal failed and added ([1950] 2 All E.R. 689):

"The findings of fact of the learned county court judge make it unnecessary to decide some of the interesting and critical questions of law around which the argument revolved."

I would conclude from this that he did not think it necessary to rely on the construction put by TUCKER, L.J., on the definition. In any event, in the latter part of the judgment TUCKER, L.J., expressly leaves open the question whether a notice to quit could be held inoperative under the Act in respect of the agricultural portion only in a case where the tenancy covered also a building "totally unconnected" with the agricultural land. I do not think, therefore, that that decision is to be treated as one binding on this court in respect of the argument put forward by the landlord here. If, then, I am free to consider the matter, I have come to the conclusion that an examination of the Act as a whole shows that the definition should not be construed as effecting a severance of a tenancy. In the first place, I think the words do not compel such a conclusion. The words "comprised in a contract of tenancy" are, I think, apt to cover the whole of what is demised, though in certain contexts they might indicate any part. The word "aggregate," I think, has reference to the definition of agriculture in s. 94, where all the various activities to be included are set out. I think the words used, if anything, indicate severance less than the earlier definition where that argument was negatived having regard to other provisions of the Act.

I will, therefore, consider the present Act. If severance had been intended, the first thing one would expect to find is machinery for apportionment of rent in cases where the tenant gets protection for part only of the subject-matter of the tenancy. Counsel for the landlords submitted that this was to be found in s. 8. Section 8 (1) is obviously necessary having regard to the fact that the Act gives power to prolong contractual tenancies as such beyond the date

when, according to their terms, they could have been terminated. Its wording is inapt to cover the suggested severance contended for here. One would need some such words as these: "Where a notice to quit has been held inoperative under s. 24 in respect of an agricultural holding which is part only of the lands comprised in the original tenancy," and so on, giving the arbitrator power to take into account what has been severed in settling the reduced rent. Sub-section 2 makes it clear to my mind that this section is inapt for the purpose for which counsel for the landlord contends. One would expect words similar to those found in s. 33 of this Act. That is the last of three sections dealing with cases where the Act expressly provides for notice to quit in respect of part of an agricultural holding. This is authorised by s. 31 for a variety of purposes—for example, where the land is required for the provision of allotments. Section 32 gives the tenant the right to treat such a notice as a notice to quit the whole holding. Section 33 provides that where the landlord resumes possession of part of the holding under s. 31 or in virtue of a provision in the contract of tenancy the tenant shall be entitled to a reduction of rent

" . . . of an amount to be settled by arbitration under this Act, proportionate to that part of the holding and in respect of any depreciation of the value to him of the residue of the holding caused by the severance or by the use to be made of the part severed."

In other words, where the Act provides for severance, machinery is set up for enabling the rent to be reduced and provides for the basis of the reductions. Assistance is, I think, also to be gained from the wording of s. 3 and s. 24. Section 3 (1) reads as follows:

"A tenancy of an agricultural holding for a term of two years or upwards shall, instead of terminating on the expiration of the term for which it was granted, continue (as from the expiration of that term) as a tenancy from year to year, but otherwise on the terms of the original tenancy so far as applicable, unless, not less than one year nor more than two years before the date fixed for the expiration of the term, a written notice has been given by either party to the other of his intention to terminate the tenancy."

The opening words themselves, I think, suggest that the Act contemplates a tenancy of an agricultural holding, not a tenancy which is of or includes such a holding. If counsel for the landlords is right, this section would not operate on a cottage occupied by a postman. The tenancy *quoad* that cottage would cease on the expiry of the term. Again there is no machinery for adjustment of the rent, and such a construction would lead to great confusion. Section 23 and s. 24 use the words

"notice to quit an agricultural holding or part of an agricultural holding."

The latter words are necessary having regard to s. 31. If counsel for the landlords is right, one would expect in these sections words expressly covering the case where the notice to quit operates, as it must at common law, on the whole subject-matter, but where part only of the subject-matter is within the Act. The main structure of the Act, its wording, and what it does not contain are, therefore, in my opinion, against the construction which the county court judge put on s. 1. The judge was referred to, and naturally relied on, the passages which I have summarised in the judgment of TUCKER, L.J., in *Dunn v. Fidoe* (2). In that case TUCKER, L.J., referred to the fact that no provision seemed to have been made, at any rate in express terms, in the rest of the Act for the consequences of severance. No doubt on this issue, which was directly raised in this case, we have had the advantage of a much fuller consideration of the difficulties so arising which, as the Master of the Rolls said in *Re Lancaster & Macnamara* (1), are relevant to the meaning to be given to the definition.

I have, therefore, come to the conclusion, this being in substance an agricultural tenancy and the definition not providing for severance, that the tenant succeeds. If I had felt myself bound by *Dunn v. Fidoe* (2) to hold that the definition does provide for severance in certain cases, I would have held that this did not cover cottages such as those on this plot of land not being occupied for the time being by agricultural workers. There is, of course, no such thing as permanence in human affairs, but an inn will presumably continue as an inn and a factory as a factory, though either might, no doubt, be converted into an agricultural building. A cottage, however, may at any time change hands. An agricultural worker may succeed to someone not engaged in agriculture. To treat such cottages, covered in what is in substance an agricultural tenancy, as coming within and going out of the Act according to the occupation of the tenants at the moment would be a result so absurd that only the clearest words would make me come to such a conclusion. For these reasons I think the appeal must be allowed.

JENKINS, L.J.: I agree. The landlords' argument, which prevailed before the county court judge, is substantially to this effect: (i) The definition of "agricultural holding" in s. 1 of the Act of 1948 is so framed that where land in part agricultural and in part non-agricultural is held under a single contract of tenancy at one entire rent the agricultural part is an agricultural holding to which the provisions of the Act apply whereas the tenancy *quoad* the non-agricultural part is unaffected by the Act. (ii) It follows that in such a case, although under the contract of tenancy a valid notice to quit can only be given with respect to the whole of the land comprised in the contract, a notice so given, provided that in point of length it complies with s. 23 (1) of the Act, is, nevertheless, effective to determine the tenancy *quoad* the non-agricultural land comprised in the contract, notwithstanding that it is rendered ineffective *quoad* the agricultural land owing to the withholding by the Minister under s. 24 (1), or on appeal by the Agricultural Land Tribunal under s. 25 (4), of the requisite consent to its operation. (iii) In the present case the tenancy comprises (a) an agricultural holding within the meaning of the Act consisting of the seven acres less the three cottages and (b) non-agricultural land in the shape of the three cottages which, as their tenants are not agriculturally employed, are not "agricultural land" within the meaning of s. 1 (2). (iv) Therefore, although consent to the operation of the notice to quit was withheld on appeal to the tribunal, such withholding of consent only made it ineffective as regards the seven acres less the three cottages, and did not prevent it from achieving a valid termination of the tenancy so far as the three cottages were concerned. (v) Admittedly, this argument involves the severance of a "mixed" tenancy of this description into two tenancies, the one being a tenancy of an agricultural holding within the meaning of the Act and the other an ordinary tenancy of non-agricultural land, for which severance no express provision is to be found in the Act. This consequence follows as a matter of necessary implication from the terms of s. 1, and any apportionment of rent necessitated by such severance can be effected by recourse to arbitration under s. 8.

It will be seen that the essential foundation of the landlords' argument is the construction placed on s. 1 of the Act. That section, read in conjunction with the definition of "contract of tenancy" contained in s. 94, provides by sub-s. (1) that the expression "agricultural holding" means the aggregate of the agricultural land (as defined by sub-s. (2)) comprised in a letting of land or agreement for letting of land for a term of years or from year to year. Sub-section (2) defines "agricultural land" as land used for agriculture which is so used for the purposes of a trade or business, and "agriculture" is defined in s. 94 as including a variety of pursuits which need not be here stated in detail. Speaking for myself, and treating the question first of all as turning

simply on the construction of s. 1 in the light of the definition in s. 94 and without regard to any of the other provisions of the Act, I find it impossible to exclude from the definition of "agricultural holding" provided by s. 1 (2) "land used for agriculture" comprised in a letting or agreement for the letting of land merely on the ground that such letting or agreement for letting also includes other land not so used. So far, therefore, I find myself in accord with the view expressed by TUCKER, L.J., in *Dunn v. Fidoe* (2). I do not think *Re Lancaster & Macnamara* (1) affords any direct support for the contrary opinion, as the definition contained in s. 48 (1) of the Act of 1908 is in entirely different terms. That case does, however, afford useful guidance as to the bearing of other provisions of the Act on the effect of the definition, a matter to which I will return later. Assuming for the sake of argument that the construction which I have provisionally placed on s. 1, and for which the landlords contend, is right, does it follow that they are entitled to the relief granted by the county court judge? In my view, it does not. For this purpose I also provisionally accept the landlords' contention that the circumstances of the case, as regards the occupations of the tenants of the three cottages, are such as to support the conclusion that the agricultural holding here in question cannot include the three cottages.

On this footing, what is the position? So far as the contract of tenancy is concerned, it could be determined, if at all, only as to the whole subject-matter of the tenancy agricultural and non-agricultural, by one and the same notice to quit. How has the Act affected that state of affairs? So far as the agricultural holding is concerned, s. 23 (1) enacts that a notice to quit is invalid if it purports to terminate the tenancy before the expiration of twelve months from the end of the then current year of the tenancy. I cannot construe that provision, in its application to a "mixed" tenancy, as meaning that a notice to quit can validly be given to take effect on two different dates, namely, the contractual date as regards the non-agricultural part and the statutory date as regards the agricultural part. There is nothing in this provision to validate a notice to quit which would be invalid according to the terms of the contract of tenancy which demand that the entire contract should be determined as regards its entire subject-matter by notice expiring on one and the same date. So far, therefore, the position appears to be that a "mixed" tenancy can only be determined by the notice which the statute enjoins with respect to the agricultural holding included in such tenancy. Then, by s. 24, where notice to quit an agricultural holding is given, and the tenant within the prescribed time serves the appropriate counter-notice, the notice to quit shall not have effect unless the Minister under that section, or the agricultural land tribunal on appeal under s. 25 (4), consents to the operation thereof. What is the effect of that provision in the case of a "mixed" tenancy containing no special provisions as to giving notice piecemeal? The notice to quit, in order to be valid under the contract of tenancy, must relate to the entirety of the demised premises, agricultural and non-agricultural, and must take effect, if at all, as a determination of the entire contract as regards the whole of the property let. The Act does not say that in such a case the notice shall not have effect as regards the agricultural land, but shall nevertheless have effect as regards the non-agricultural land. It simply says the notice to quit shall not have effect. In the case put of a "mixed tenancy" where the notice to quit to be valid under the contract is necessarily given with respect to the whole of the land comprised in the contract, that provision must, I think, render the notice to quit wholly inoperative for the purposes of the contract of tenancy as regards the whole of the land comprised in it, non-agricultural as well as agricultural.

The Act confers no new power of partial determination so as to enable a "mixed" tenancy to be determined as regards the non-agricultural land while continuing as regards the agricultural land. It simply says that the only notice

to quit recognised by the contract, namely, a notice to quit taking effect with respect to the whole of the demised premises, shall not have effect. That may, no doubt, be taken as meaning in the "mixed" case "shall not have effect as regards the agricultural land," but the result is, in my view, the same. The Act prevents the notice from operating as a notice determining the entire contract, and, the contract not recognising partial determination, the result so far as I can see is that the notice can have no operation at all under the contract. I think this is borne out by s. 31 which provides in sub-s. (1) that:

"A notice to quit part of an agricultural holding . . . given by the landlord of the holding shall not be invalid on the ground that it relates to part only of the holding . . ."

if it is given for certain specified purposes. That shows an appreciation of the objection under the ordinary contract of tenancy to a notice to quit part only of the demised premises and of the need for a special statutory provision to enable such a partial notice to be validly given. There is no similar provision to meet the case of a "mixed" tenancy so as to enable it to be determined as regards the non-agricultural land where it cannot be so determined as regards the agricultural land. Again, s. 33 makes provision for the adjustment of the rent payable in respect of the part of an agricultural holding retained by a tenant where possession of part has been resumed by the landlord under s. 31 (1). No similar provision is to be found in the Act to meet the case of an agricultural holding forming part of the land comprised in a tenancy where the landlord has resumed possession of the remainder (and non-agricultural part) of the demised premises. Section 8, relied on by the landlords, will not meet the case, as that section is clearly directed to the revision of an existing rent payable in respect of an agricultural holding, and what is here needed is a provision enabling a separate rent to be fixed for the first time in respect of an agricultural holding previously held under a tenancy agreement with other premises at one entire rent for the whole subject-matter of the demise.

These considerations lead me to the conclusion that, even if s. 1 of the Act is given the meaning which, taken alone, its language, read in conjunction with s. 94, appears to me to indicate, the landlords in the present case should not succeed, because the Act contains no such provisions for severance as would be required to enable a notice to quit in respect of a "mixed" tenancy to be given a separate and effective operation in regard to the non-agricultural part of the demised premises where it is rendered ineffective as regards the agricultural part by reason of the withholding of the requisite consent. Moreover, these and other considerations to be collected from the various provisions of the Act appear to me to cast grave doubt on the *prima facie* construction of s. 1 taken alone. It is difficult to believe that, if severance in the case of "mixed" tenancies was really intended, express provisions as to the effect of a notice to quit on the non-agricultural part, where the requisite consent is withheld as regards the agricultural part, of the demised premises would not have been included in the Act, and the same observation applies to the apportionment of rent in such a case.

Apart from these general considerations there are several provisions in the Act which appear to proceed on the assumption that the tenancy under consideration comprises the agricultural holding and nothing more, besides forms of reference to the tenant, the landlord, the tenancy or the contract of tenancy in relation to the holding which suggest the same intention. Section 3 (1) which converts "a tenancy of an agricultural holding" for a term of two years or upwards as from its expiration into a tenancy from year to year, in the absence of written notice by either party within a prescribed time of his intention to terminate the tenancy, is hardly intelligible if it is to be applied in cases in which the tenancy does not relate exclusively to an agricultural holding. A similar observation might be made with respect to s. 4. Then one finds in s. 5

provisions for settling the terms of "a tenancy of an agricultural holding," where the terms are not reduced to writing or so far as recorded in writing are incomplete. This surely can only refer to a case where the tenancy in question comprises an agricultural holding and nothing more. That, indeed, is what the expression "a tenancy of an agricultural holding" in itself strongly suggests. There are in the Act *passim* references to "a tenancy of an agricultural holding," "the tenant" or "the landlord" of an agricultural holding, or both (see, for instance, s. 8, s. 9, s. 12), which naturally suggest an agricultural holding as the sole subject of the letting and are hardly to be tortured into the framework of the definition given by s. 1 so far as it indicates the contrary. Perhaps even stronger are the references which occur more than once to "the contract for a tenancy of an agricultural holding" (see. s. 10) or "a contract of tenancy of an agricultural holding" (see s. 15). I need not multiply examples. Section 18, which relates to distress, refers to "a landlord entitled to the rent of an agricultural holding." That, to my mind, strongly suggests a rent attributable exclusively to an agricultural holding. Section 32, which enables a tenant who has received notice to quit part of an agricultural holding to serve a counter-notice accepting the notice to quit as a notice to quit the entire holding, is hardly consistent with the hypothesis that the tenancy might include non-agricultural land which, not being agricultural, would not form part of the holding. In such a case it is difficult to see what would happen to the non-agricultural residuum.

For these reasons I think it may well be the case that, notwithstanding the construction I am disposed to place on s. 1, read only in conjunction with s. 94, the true conclusion to be collected from the provisions of the Act as a whole is that the Act, like its predecessor of 1908, only applies where an agricultural holding is the sole subject of a given contract of tenancy, or, in other words, that the law as stated in *Re Lancaster & Macnamara* (1) remains in this respect unaltered. On this basis the substance of the matter must be looked at to see whether as a matter of substance the land comprised in the tenancy, taken as a whole, is an agricultural holding. If it is, then the whole of it is entitled to the protection of the Act. If it is not, then none of it is so entitled. If that is the right test to apply, then I have no doubt that the whole of the land here in question is an agricultural holding. The literal construction of the word "used" in s. 1 (2) as requiring actual use of every inch of the holding for agriculture or for the purposes of an agricultural trade or business at any given time would make the Act wholly unworkable. The cottages here in question must, I think, be regarded as ancillary to the holding of seven acres of undeniably agricultural land. The whole, including the cottages, was let under an agreement in terms clearly appropriate to an agricultural holding. The character of the demised premises as agricultural or non-agricultural land cannot, in my judgment, be made to depend on the occupation of the persons to whom the cottages may be let from time to time. Else, by parity of reasoning, if the cottages were at any time vacant the property as a whole could not constitute an agricultural holding because the vacant cottages would not for the time being be used for agriculture. In my judgment, the letting of cottages such as these to other persons because they are not required for agricultural tenants (or as may well be the case because possession cannot be obtained from the existing tenants) should not affect the result.

I would add that for similar reasons I do not think that the principle of severance of tenancies comprising both agricultural and non-agricultural land into a tenancy of an agricultural holding, on the one hand, and an ordinary non-agricultural tenancy, on the other hand, even if the Act on its true construction enjoins such severance in appropriate cases, would produce any different result in the circumstances of the present case. On the facts of this case I think the true view is that the whole of the property let, that is to say,

the seven acres and the three cottages, is an agricultural holding within the meaning of the Act. In the result, therefore, although the Act presents problem of construction which, speaking for myself, I find it impossible to resolve with any confidence, I cannot see that on any construction of which the Act appears to me to be capable the landlords' claim to possession of the three cottages in the circumstances of this case is made out. Accordingly, I would allow the appeal.

HODSON, J.: I wish to add a few words of my own to the judgments which have been delivered because of the reliance placed by the landlords on the language used by TUCKER, L.J., in *Dunn v. Fidoe* (2). The county court judge recognised as expressly left open the question whether s. 1 (1) and (2) of the Agricultural Holdings Act, 1948, effect a severance when a parcel of land is not used for agricultural purposes although the remainder of the demised land is so used. In *Dunn v. Fidoe* (2) TUCKER, L.J., expressed himself as follows ([1950] 2 All E.R. 689):

" . . . I think it is a possible view that, having regard to the scheme of the Act of 1948, the language of s. 1 and the provisions of s. 31 and s. 32, it may be that a notice to quit premises . . . could be held to be invalid without consent in so far as it applies to the agricultural portion but valid for the remainder."

No severance had been effected by the decision of the county court judge in that case, and the question of severance did not directly arise. He held that the land and inn comprised in the tenancy together constituted an agricultural holding within the definition of s. 1 of the Act of 1948, and this court upheld his decision on the facts of that case, the inn being used not only for its normal purpose, but also for the tenant's agricultural business. Part of the *ratio decidendi* of the judgment of TUCKER, L.J., appears, however, to have been that the test of dominant or main user had applied under earlier definitions, but no longer applied in view of the changed wording of s. 1 of the Act of 1948.

Under the Agricultural Holdings Act, 1908, the definition of "holding" in s. 1 is, so far as here relevant,

"any parcel of land held by a tenant, which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral . . ."

In *Re Lancaster & Macnamara* (1), decided under the Act of 1908, an inn and farm were let together at an entire rent under a single agreement of tenancy and the subject of the letting was held not to be an agricultural holding. The rateable value of the inn was very much less than that of the land, but the test of dominant user was not applied. SIR C. SWINFEN EADY, M.R., and SCRUTTON, L.J., both proceeded on the footing that it was necessary to look and see whether or not a substantial part of the holding was used for non-agricultural purposes. SCRUTTON, L.J., said ([1918] 2 K.B. 483):

" . . . if you find any substantial part of the land used for a purpose which is neither agricultural nor pastoral, Parliament . . . has not thought right, in my view, to give compensation either in respect of the whole land, or in respect of that part of it which is wholly devoted to pasture."

I prefer this wording to the formula "dominant or main user," which was put forward by counsel for the landlord in *Dunn v. Fidoe* (2). I think the test as put in the judgment I have quoted justifies the decision in *Dunn v. Fidoe* (2) irrespective of the change which TUCKER, L.J., considered had been brought about by the definition contained in s. 1 of the Act of 1948.

I am of opinion that the reasoning applied in *Re Lancaster & Macnamara* (1) applies here, and the court has in each case to consider whether land as a whole comes within the definition of s. 1 of the Act of 1948, and in arriving at this conclusion to decide whether a substantial part is at the relevant date used

for a purpose which is not agricultural. In my judgment, the holding under our consideration, let, as it was, by an agricultural lease, is not taken out of the definition of an agricultural holding in s. 1 of the Act of 1948 because of the user of the three cottages, even though two of them were never occupied by farm labourers either at the time of the letting or subsequently. I am fortified in this conclusion by the decision in *Re Russell & Harding* (3), decided under the Act of 1908, where the farmhouse let by an agricultural lease was turned into a guest house during the tenancy without, in the opinion of the court, altering the status of the land demised from that of an agricultural holding. In view of the nature of the cottages themselves I am not driven to the conclusion that a substantial part of the land was used for non-agricultural purposes so as to take the holding out of the definition of s. 1 of the Act of 1948. If I were driven to such a conclusion, I should be of opinion that the whole holding was outside the definition, and for the reasons already given by SOMERVELL, L.J., that severance could not be effected. I agree, therefore, that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Taylor, Jelf & Co.*, agents for *Eddowes, Simm & Waldron*, Ashbourne (for the tenant); *Collyer-Bristow & Co.*, agents for *Wilkins & Thompson*, Uttoxeter (for the landlords).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

irmed. H.L. [1952] 1 All E.R. 501.

KEMSLEY v. FOOT AND OTHERS.

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.JJ.), November 30, December 1, 14, 1950.]

Libel—Fair comment—Article criticising conduct of newspaper—Need for facts on which comment made to be stated in alleged libel.

In an action claiming damages for libel the plaintiff, K., a shareholder and director of companies owning newspapers, alleged that the libel was contained in an article, written and published by the defendants, which was headed "Lower than [K.]" and which, making no further direct reference to K., was an attack on a report contained in a newspaper with which K. was not connected. K. claimed that the words meant, and were understood to mean, that he was a person who used his position as a director of newspaper companies to procure the publication of statements he knew to be false. The defendants in their defence denied the innuendo and pleaded: "Further or in the alternative if and so far as the said words refer to [K.] they are a fair comment made in good faith and without malice on a matter of public interest namely the control by [K.] of the newspapers . . . referred to in para. 1 of the statement of claim . . . Particulars of the specific facts on which the said words are a fair comment are delivered separately." K. argued that the defence of fair comment was not available because the facts, or some of them, on which the comment was made were not contained or specifically referred to in the article.

HELD: the criticism of a person alleged to be responsible for the conduct of a newspaper, directed to the manner in which that newspaper presented news, was *prima facie* to be dealt with on the same lines as criticism of a book or play, and, therefore, it was not necessary, at least where, as here, the general nature of the comment was indicated in the rest of the article, that there should be in the article citations or examples by reference to which the reader could judge the fairness of the comment.

McQuire v. Western Morning News Co. ([1903] 2 K.B. 100), *applied*.
Roos v. Stent (1909), (T.S. 988), *distinguished and criticised*.

HELD, *further*, procedure under R.S.C., Ord. 19, r. 27, or Ord. 25, r. 4, to have the defence struck out was not appropriate to this case, and should be employed only in plain and obvious cases. If there was a point of law requiring serious discussion, an objection should be taken on the pleadings, and the point set down for argument under R.S.C., Ord. 25, r. 2.

[AS TO FAIR COMMENT, see HALSBURY, Hailsham Edn., Vol. 20, pp. 486-496, paras. 593-606; and FOR CASES, see DIGEST, Vol. 32, pp. 141-151, Nos. 1730-1824.]

Cases referred to:

- (1) *London Corpn. v. Horner*, (1914), 111 L.T. 512; 11 Digest 177, 554.
- (2) *Hubbuck & Sons v. Wilkinson, Heywood & Clark*, [1889] 1 Q.B. 86; 68 L.J.Q.B. 34; 79 L.T. 429; 32 Digest 209, 2599.
- (3) *Carr v. Hood*, (1808), 1 Camp. 355, n.; 32 Digest 147, 1779.
- (4) *Strauss v. Francis*, (1867), 4 F. & F. 1107; 15 L.T. 674; 32 Digest 147, 1783.
- (5) *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100; 72 L.J.K.B. 612; 88 L.T. 757; 32 Digest 151, 1826.
- (6) *Roos v. Stent*, (1909), T.S. 988; 32 Digest 44, f.
- (7) *Hunt v. Star Newspaper Co., Ltd.*, [1908] 2 K.B. 309; 77 L.J.K.B. 732; 98 L.T. 629; 32 Digest 139, 1702.
- (8) *Burton v. Board*, [1929] 1 K.B. 301; 98 L.J.K.B. 165; 140 L.T. 289; Digest Supp.
- (9) *Merivale v. Carson*, (1887), 20 Q.B.D. 275; 58 L.T. 331; 52 J.P. 261; 32 Digest 152, 1837.
- (10) *Mangena v. Wright*, [1909] 2 K.B. 958; 78 L.J.K.B. 879; 100 L.T. 960; 32 Digest 140, 1722.
- (11) *Campbell v. Spottiswoode*, (1863), 3 B. & S. 769; 32 L.J.Q.B. 185; 8 L.T. 201; 27 J.P. 501; 122 E.R. 288; 32 Digest 149, 1802.
- (12) *Aga Khan v. Times Publishing Co., Dawson v. Same*, [1924] 1 K.B. 675; 93 L.J.K.B. 361; 130 L.T. 746; 32 Digest 153, 1847.
- (13) *O'Brien v. Salisbury (Marquis)*, (1889), 54 J.P. 215; 32 Digest 172, 1009.
- (14) *Lyons v. Financial News, Ltd.* (No. 1), (1909), 53 Sol. Jo. 671; 32 Digest 152, 1846.

APPEAL by the defendants from an order of PARKER, J., made on a summons under R.S.C., Ord. 19, r. 27, and Ord. 25, r. 4, issued by the plaintiff in a libel action to have struck out a paragraph of the defence of each of the defendants, which raised a plea of fair comment, and the particulars delivered thereunder, on the ground that they were vexatious and contrary to the rules of pleading and tended to prejudice, embarrass and delay the fair trial of the action, and disclosed no reasonable cause of action, and were frivolous. PARKER, J., struck out the paragraph and the particulars.

The first and second defendants appeared in person, and adopted the arguments of the third and fourth defendants.

Gardiner, K.C., and *H. J. Baxter* for the third and fourth defendants.

Sir Walter Monckton, K.C., *Diplock, K.C.*, *T. G. Roche* and *Du Plessis* for the plaintiff.

Cur. adv. vult.

Dec. 14. The following judgments were read.

SOMERVELL, L.J.: The point raised can be indicated in outline. The plaintiff submits that for the defence of fair comment to be available, the facts, or, at any rate, some of the facts, on which the comment is a comment must be contained or referred to in the alleged libel or in the article or document from which the words complained of are taken. A "bare comment" may be

justified as true—that, of course, would be a question for the jury—but no plea of fair comment can be raised. He submits that the present libel falls within such a principle. The defendants are not concerned to dispute that there may be subject-matters and circumstances in which such a principle is applicable. They dispute its applicability to the present case, in which, as will be seen, the alleged libel deals with the conduct of newspapers and with the honesty of their presentation of news in regard to political issues and personalities. They claim that in the circumstances of the case a plea of fair comment is open to them. The “facts” are, they submit, what I will call the plaintiff’s newspapers. They admit their liability to give particulars of what they rely on in those newspapers as justifying their comment as fair.

The type of case appropriate for application under these rules was considered, among other cases, in *London Corpn. v. Horner* (1) and *Hubbuck & Sons v. Wilkinson, Heywood & Clark* (2), a decision of this court. These cases are referred to in the ANNUAL PRACTICE under R.S.C., Ord. 25, r. 4, and counsel for the plaintiff at one time submitted that so strict a principle did not apply to R.S.C., Ord. 19, r. 27. An examination of the latter case makes it, I think, clear that, although the application, as here, was under both rules, it was R.S.C., Ord. 19, r. 27, that was substantially in question. The effect of the cases is accurately summarised in the ANNUAL PRACTICE, and I think applies to both rules. They should be applied only in plain and obvious cases, and, if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under R.S.C., Ord. 25, r. 2. Counsel for the third and fourth defendants relied on these cases, but he delivered a full argument on the merits, to which counsel for the plaintiff replied. The court must, of course, go into the merits to some extent to see whether the point is one for serious discussion. We all came to the conclusion that the point of law was one that required serious discussion and that the procedure under these rules was not appropriate. Both parties, however, desired us, if we felt able to reach a clear conclusion on the material before us, to treat the issue raised as one for our decision. The matter having reached this court and been fully argued, we propose to do so, though this must not be taken as a precedent justifying resort to these rules in other than plain cases.

The plaintiff, in para. 1 of the statement of claim, which is admitted, states that he is, and is widely known to be, a director of and shareholder in companies owning newspapers and generally known to the public as a “newspaper proprietor.” He has no connection with the “Evening Standard.” The first three defendants are editors or on the editorial staff of a weekly newspaper called “Tribune.” The fourth defendant publishes the “Tribune,” and the fifth is the printer and does not appear in this appeal. The alleged libel was contained in an article in the “Tribune” of Mar. 10, 1950. To understand the article it is necessary to state that one Fuchs, said to be a communist, had just been convicted and sentenced to a long term of imprisonment under the Official Secrets Act, 1920, s. 1, for communicating information likely to be useful to an enemy. The Mr. Strachey referred to in the article was, and is, the Secretary of State for War. The article admittedly written by the first defendant and published by all is headed “Lower Than Kemsley.” In the statement of claim is added in brackets: “meaning the plaintiff.” Though this is not admitted in the defence, it was not disputed for the purpose of the argument before us.

The article, parts of which I will read, is an attack on the “Evening Standard” for certain headlines coupling the name of the convicted Fuchs with that of the Secretary of State for War. These are the extracts from the article:

“The prize for the foulest piece of journalism perpetuated [*sic*] in this country for many a long year—and that is certainly saying something—must go to Mr. Herbert Gunn, editor of the ‘Evening Standard,’ and all

those associated with him in the publication of the attack on John Strachey last week. Since that newspaper has now sought to cover up its original story with long and misleading disputations on the matter, it is worth re-printing the headlines which appeared in the 'Evening Standard' on Thursday, Mar. 2. Those headlines read as follows: 'Fuchs and Strachey: A great new crisis. War Minister has never disavowed communism. Now involved in M.I.5 inefficiency probe'. This 'great new crisis' was completely fabricated in the 'Evening Standard' office . . . But it is obvious from these headlines which we have reprinted what the 'Evening Standard' was suggesting. It was suggesting that Strachey might be a supporter of communism in the same sense in which Fuchs was a communist. Otherwise the conjunction of headlines had no point at all . . . We would have liked to have seen the decent journalists who may be left in other newspaper offices demanding that their craven editors should speak a word in the cause of honest journalism . . . And any journalist worth the name should consider his attitude to the disgraceful perversions, distortions, and innuendoes which some newspapers sedulously purvey."

That, I think, is sufficient to give the general nature of the article. The innuendo in para. 4 of the statement of claim is as follows:

"The said words meant and were understood to mean that the plaintiff was a person who used his position as a director of newspaper companies to procure the publication of statements he knew to be false and that his name was a byword in this respect, so that the best method of bringing home to the readers of the article what was, in the writer's view, the extreme dishonesty in this respect of the other persons referred to in the article was to say that they were 'lower than the plaintiff'."

Now, of course, when the matter comes for trial the plaintiff may or may not succeed in establishing the innuendo, but for the purpose of his present application it must be taken as what the words meant and were understood to mean. In other words, the comment is not completely in the air—such as a statement that "A. is unfit for human society," without any indication to the reader in the statement or the surrounding circumstances as to the nature of the acts which render him unfit. The defendants in their defence, after matters to which I have referred, deny the innuendo, and then, in para. 5, plead as follows:

"Further or in the alternative if and so far as the said words refer to the plaintiff they are a fair comment made in good faith and without malice on a matter of public interest, namely, the control by the plaintiff of the newspapers (other than the 'Evening Standard') referred to in para. 1 of the statement of claim. Particulars of the specific facts on which the said words are a fair comment are delivered separately."

It is this paragraph which the learned judge has struck out. There was no argument before us on the particulars as such. If the learned judge was right, the particulars fall with the paragraph. If the paragraph stands, the particulars, as left by the learned master's order, stand so far as we are concerned. I should also add that the particulars as delivered with the defence were struck out as objectionable in form and the further and better particulars delivered are now before the court.

It was not disputed before us that the matters involved were of public interest. Although the so-called "rolled-up" plea in its various forms and the questions that have arisen as to particulars thereunder are comparatively modern, the plea of fair comment or fair criticism is, of course, of considerable antiquity. In *Carr v. Hood* (3) the plaintiff, an author, complained that as an author he had been immoderately ridiculed in a publication of the defendant. LORD ELLENBOROUGH, C.J., in the course of his judgment, said (1 Camp. 557):

"We really must not cramp observations upon authors and their works . . . Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him; but I cannot hear of malice on account of turning his works into ridicule."

A In *Strauss v. Francis* (4), although after argument the proceedings were withdrawn, the court regarded the right of criticism as covering very violent words which in the libel complained of were unsupported by quotations, or references to passages, or any general description of the book which was the subject-matter. It was said to be the worst attempt at a novel that had ever been perpetrated, and the words complained of referred to its vulgarity, profanity, B indelicacy, and its irrelevant abuse of great men living and dead. Of course, at the trial the book in passages from it became relevant, or, at any rate, might become relevant, in order to see whether this was criticism at all or a malicious attempt to injure the author as a man as distinct from an honest criticism of his work. In one sense, of course, his character was attacked, but it was not an attack unconnected with his authorship. A more modern case relied C on by counsel for the third and fourth defendants was *McQuire v. Western Morning News Co.* (5). That case concerned a criticism of a play described as a musical absurdity, comprised of nothing but nonsense. The songs were said to be common, not to say vulgar, and there were other highly critical statements. There was no citation from the play and no songs were quoted, nor was there any description of the play or its plot. There was nothing in the article to D enable a reader to judge of the fairness of the comment. That could only be done by those who had seen the play which had been presented for the first time the evening before the article. Like other criticism of works of literature or art on their first appearance, it was primarily addressed to those seeking guidance whether they should read the book or see the play or other work of art. The defence was that it was fair and *bona fide* criticism, that is, fair comment E on the play and its performance which were matters of public interest. The trial judge left the issue to the jury, who found for the plaintiff. This court entered judgment for the defendant. They held there was no evidence on which a rational verdict for the plaintiff could be founded.

These cases show that, in criticising something put before the public, as is a play or book, for its approval or disapproval, the defence is, or, at any rate, F may be, open although there are no citations or examples by reference to which the reader can judge of the fairness of the comment. This is, perhaps, even more clearly applicable to works of art in the popular sense. A man can criticise paintings or sculpture without producing reproductions of the works criticised. The facts, counsel for the plaintiff submits, in such cases are sufficiently referred to and are available. This is true in one sense, but the G object of the article in *McQuire's* case (5) was to discourage anyone from paying the price necessary to ascertain the facts. The facts were, no doubt, available to those who were prepared to pay for a seat and could be accommodated during the run of the play. In considering whether a comment is a bare comment within counsel's principle it is important to consider the subject-matter to which the comment is directed. It is obviously relevant that the subject-matter is, like a book, play or newspaper, something published and so H submitted to the public for approval or disapproval.

There is a different class of case, to which I will refer now because it is relevant when I come to consider the case mainly relied on by the plaintiff. The act or acts of a public man, unlike a play after its first night or a book just published, may be both undisputed and under such vigorous discussion at the moment that what might in form seem to be a bare comment might to any reader be plainly referable to that act or acts. I will take an example from the past.

Many people regarded those who negotiated the Treaty of Utrecht as having betrayed their country. A bare comment on the loyalty of one of the negotiators might so obviously be understood as referring to the fact of the treaty and the negotiator's part in it that I would hesitate to say the writer would be shut out from the plea of fair comment although there was no express reference to the treaty. At the other end of the scale one may imagine a comment reflecting on the integrity of a subordinate official, whose activities had so far received no publicity, where it might be held that the defence was not available unless the facts relied on were substantially set out or indicated. A

I will now refer to the case mainly relied on by counsel for the plaintiff. It was *Roos v. Stent* (6). Roman-Dutch law had adopted our law as to fair comment, and the careful judgments in that case are based on the English authorities, and, in particular, on what is admittedly a dictum of FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* (7). Passages from the judgments are quoted in English text-books and they deserve, if I may say so, serious consideration. It is necessary shortly to set out the facts. In 1898 the government of the then South African Republic had given financial assistance to the formation of a cold storage company, known as the Koelkamers Company. Three of the directors were to be appointed by the government and three elected by the shareholders. Later, another storage company, the Imperial, succeeded in acquiring a majority of the shares, and was, therefore, in a position to elect the three elected directors. In 1908 violent attacks, which became widely known, were made by a Mr. Gillingham, a shareholder, against the elected directors of Koelkamers. He called them thieves and swindlers, accused them of producing false balance sheets, and so on. The suggestion, of course, was that they had the Imperial company's interests in mind and not those of Koelkamers. The Attorney-General refused to prosecute the directors, nor was Mr. Gillingham prosecuted. Civil proceedings, as INNES, C.J., says, were out of the question as Gillingham was insolvent. The plaintiff was one of the directors at the time. The article containing the libel appeared shortly after. It dealt with the high price of meat in Pretoria, where Koelkamers operated. The last sentence ran as follows: C D E

"Here is an opportunity for the Koelkamers to do something in the public interest and to show that at the present moment, at any rate, the company is being honestly run for the benefit of its own shareholders."

The defendants admitted that the words were an attack on the directors in the past, of whom the plaintiff was one, and meant that these directors had had regard to the interests of the Imperial company rather than Koelkamers. The court held that the words were defamatory. F

The question then arose with which we are concerned: Could the defendants plead fair comment? INNES, C.J., who delivered the first judgment, held that no reference to any of Mr. Gillingham's specific charges could fairly be deduced from the words used by the writer of the article. This is, I think, all-important. I am not concerned with whether I should have come to the same conclusion. It may well be that Mr. Gillingham's accusations were so violent and vague that they could not be treated as "facts" on which anyone was entitled to comment. The fact that INNES, C.J., so held indicates to my mind that his decision might have been different if, for example, Mr. Gillingham had made one specific charge to which any normal reader would have regarded the comment as directed. In considering the nature of the defence INNES, C.J., says ((1909), T.S. 998): G H

"it must be clear to those who read it what the facts are and what comments are made upon them. And for two reasons. Because it is impossible to know whether the comments are fair unless we know what

the facts are: and because the public must have an opportunity of judging of the value of the comments."

He then cites the passages from FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* (7) ([1908] 2 K.B. 319). The sentence particularly relied on is (*ibid.*):

"If the facts are stated separately and the comment appears as an inference drawn from those facts, any injustice that it might do will be to some extent negatived by the reader seeing the grounds upon which the unfavourable inference is based."

FLETCHER MOULTON, L.J., was dealing with cases where comment and fact are intermingled in the words complained of, but INNES, C.J., extracted a general principle, whether it be right or wrong, from this sentence.

Now, it seems to me quite plain, and *McQuire's* case (5) shows it, that there are many cases where the reader cannot judge from what he reads whether the comment is fair or not. INNES, C.J., later disclaims the view that all the facts must be set out, but he says there must be some reference in the article which clearly indicates what facts are being commented on. SMITH, J., puts it in this way ((1909), T.S. 1009):

"Can the defence of fair comment be successful in a case in which none of the facts upon which the comment is founded appear in the article itself? I think there may be cases where the facts are so notorious that they may be incorporated by reference."

It was decided that no facts were indicated or referred to. The comment was "in the air" and the plea of fair comment was not available. The defendant could have justified, but he had not sought to do this. I am not suggesting that that decision on its facts and in the circumstances as found, applying English law, was wrong, but, in considering the general statements made, it is important to bear in mind that the subject-matter was the honesty of a director. It was not a play, book, newspaper or exhibited work of art, something put before the public, although it was a matter of public interest and the public had known of Gillingham's violent accusations. I think this is shown clearly by SMITH, J.'s reference to cases where the facts are notorious. It is, however, an abuse of language to say that when a book is just published or after the first night of a play the facts on which the comment is based are notorious, and yet there is no need to set out or specifically refer to passages. All that is necessary is a "reference" to the play. The general statements in that case to which I have referred, if regarded as applicable generally, and, in particular, to comments on published matter, are not, in my view, an accurate statement of our law

I think that *Burton v. Board* (8) assists the defendants' submission. The libel complained of was in letters to a newspaper. Fair comment was pleaded and the defendant gave particulars setting out the facts on which he was commenting. He specified a number of letters which the plaintiff had written to the same paper. It seems clear that these had not been specified in the defendant's letters or it would have been unnecessary to specify them in the particulars. The issue was whether the defendant could do this without justifying the words in the ordinary sense. It was held that he could. HORRIDGE, J., had struck out a number of the particulars as embarrassing, but this court restored them and held that the defendant could plead fair comment without justifying.

Criticism of those alleged to be responsible for the conduct of a newspaper, directed to the manner in which that newspaper presents news, seems to me *prima facie* to be dealt with on the same lines as criticism of a book. To say, of the author of a book written, for example, on one side or the other in party politics, that the author in his book dishonestly presented his case would seem to me to fall within the cases to which I have referred. The writer would not be

shut out from the plea of fair comment because he had not given or referred to examples in his criticism. The only difference that I can see is that in criticising the general manner in which newspapers are conducted, the comment, if fair, must be based on a great deal of material over a considerable period of time. This, if anything, might seem to assist the defendants' argument. To give the whole material would be impossible. To give two or three examples might be misleading in the sense that no newspaper proprietor can see and approve everything that appears in all his papers. There might be circumstances attaching to the examples selected which would acquit the proprietor of all personal responsibility, whereas, if the whole material was available, the comment might be regarded as fair. I am not saying that, if a comment gave no indication of the nature of the class of facts to which it was directed—for example, "The 'Daily X' is a disgraceful paper"—the principle contended for by the plaintiff might not apply. It would depend on surrounding circumstances, but here the general nature of the comment is indicated and for our purposes can be taken to be as stated in the innuendo. I have, therefore, come to the conclusion that the learned judge applied a wrong principle and that the appeal should be allowed.

JENKINS, L.J.: I agree that the appeal should be allowed, and for the reasons stated in the judgment just delivered and also in the judgment about to be delivered by **BIRKETT, L.J.**, which I have had the opportunity of reading, I concur entirely in those judgments, and find nothing I can usefully add.

BIRKETT, L.J.: The present appeal raises, as I think, questions of very great importance. The defence of fair comment is now recognised to be one of the most valuable parts of the law of libel and slander. It is an essential part of the greater right of free speech. It is the right of every man to comment freely, fairly, and honestly on any matter of public interest, and this is not a privilege which belongs to particular persons in particular circumstances. It matters not whether the comments are made to the few or to the many. Whether they are made by a powerful newspaper or by an individual, whether they are written or spoken, the defence that the words are fair comment on a matter of public interest is open to all. When defendants who wish to rely on this defence are deprived of it, the importance of the matter is manifest to all, and the character of the defence, as I have just summarised it, is not without importance in the consideration of the facts in the present appeal.

It is now very well established that this defence of fair comment has a wide application. In *Merivale v. Carson* (9), **LORD ESHER, M.R.**, made this plain in what is now a celebrated passage (20 Q.B.D. 280):

"Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said . . .?"

In *Hunt v. Star Newspaper Co., Ltd.* (7), **FLETCHER MOULTON, L.J.**, said ([1908] 2 K.B. 319) that those observations of **LORD ESHER, M.R.**, were to be applied to literary criticism, but not to the imputation of motives to an individual. This was not the point on which the decision in that case turned, and neither **COZENS-HARDY, M.R.**, nor **BUCKLEY, L.J.**, said anything to support this view, and, indeed, **BUCKLEY, L.J.**, said the exact opposite (*ibid.*, 323): "The defence of fair comment extends to the imputations of motive." He also said (*ibid.*, 324):

"Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated does or does not honestly represent the opinion of the person who gives expression to it and was not without foundation."

A These words "facts truly stated" were relied on by counsel for the plaintiff in his argument as supporting the view that some facts, at least, must be stated. I will deal with the argument at a little greater length in a few moments, but I will say here that these words, which appear in many judgments of the courts, do not, I think, help to decide the question which is before us now. In my opinion, these words apply to every defence of fair comment, however pleaded, and were intended to mean what is now universally accepted, that, if a comment is made on facts, the facts, however ascertained, must be true facts. To falsify or distort facts and then to comment on them as though they were true facts would mean that the comment could not possibly be fair and the defence of fair comment would have no application. The only exception to this rule would be where the facts were as stated by PHILLIMORE, J., in *Mangena v. Wright* (10). The words of CROMPTON, J., in *Campbell v. Spottiswoode* (11) (3 B. & S. 778) are not without their bearing on the questions to be determined in this appeal:

D "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice or in Parliament, or the publication of a scheme or of a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits . . ."

E It cannot be doubted, I think, that the conduct of a newspaper is a public matter, and that the final judgment on fairness or unfairness is to be given by a jury on the subject-matter discussed, that is, the conduct of the newspaper.

There are various forms in which the plea of fair comment may be pleaded. In the case before us, the defence in para. 5, which has been struck out, reads:

F "Further or in the alternative if and so far as the said words refer to the plaintiff they are a fair comment made in good faith and without malice upon a matter of public interest namely the control by the plaintiff of the newspapers (other than the 'Evening Standard') referred to in para. 1 of the statement of claim. Particulars of the specific facts upon which the said words are a fair comment are delivered separately."

G If the plea is made in this form, or in what is called the "rolled-up plea", but without stating that the comments are made on "the said facts," particulars must be given of the matters of public interest on which the comment is based if they are not given in the pleading, and the defendant is entitled to deliver particulars of the facts on which he based his comments.

In *Aga Khan v. Times Publishing Co.* (12), SCRUTTON, L.J., said ([1924] 1 K.B. 682):

H "Where the comment is alleged generally to be 'on a matter of public interest' particulars are, as far as I know, always ordered, in order that it may be seen what facts beyond those stated in the libel the defendant intends to rely on."

It is clear, therefore, and, indeed, it was not contended otherwise, that *all* the facts need not be stated, but when the matter is submitted to the judgment of a jury particulars of the facts relied on must be supplied.

Now, in my opinion, the form of the pleadings in this case are of the utmost importance in coming to any conclusions on the various submissions made before us. The plaintiff, in para. 1 of the statement of claim, had said:

"The plaintiff is and is widely known to be a director of and shareholder in companies owning newspapers and is generally known to the public as a 'newspaper proprietor' ",

and in para. 3 of the statement of claim had set out in full the article in the "Tribune" of Mar. 10, 1950, which was the libel alleged. The only words which referred directly to the plaintiff were contained in the heading of the article, "Lower than Kemsley." The remainder of the article referred to what was called "the foulest piece of journalism perpetuated [*sic*] in this country for many a long year" by the editor of the "Evening Standard" and those associated with him. Paragraph 4 of the statement of claim set out the innuendo: A

"The said words meant and were understood to mean that the plaintiff was a person who used his position as a director of newspaper companies to procure the publication of statements he knew to be false and that his name was a byword in this respect, so that the best method of bringing home to the readers of the article what was in the writer's view the extreme dishonesty in this respect of the other persons referred to in the article was to say that they were 'lower than the plaintiff'." B

At this stage of the action, whatever may be the position at the trial, the form of the innuendo put on the words by the plaintiff himself seems to me to be of cardinal importance. The plaintiff is alleging that the comment is dealing with his position as a director of newspaper companies, and the way in which he used that position to procure the publication of false news, and that in this respect his name was a byword. The plaintiff is there saying in the pleading that the matters commented on are matters of public notoriety, and that the ordinary reader would understand from the words complained of that what was being commented on was the conduct of the plaintiff in the conduct of the newspapers with which he was connected. It was conceded that the words "Lower than Kemsley" were capable of being construed as comment, but it was argued before the master, before PARKER, J., and before us that the defence of fair comment was not open to the defendants because none of the facts on which the comment was based was contained in the article complained of, neither were those facts specifically referred to. Counsel for the plaintiff, in addition to the submission already referred to, argued that the words "Lower than Kemsley," being the only words which referred to the plaintiff, must be taken to be what he called "a naked comment," and, while the defence of justification was open to the defendants, the defence of "fair comment" was not, and the naked comment in the special circumstances of this case must be treated as though it were a statement of fact. C

Before the defence of fair comment became applicable, some facts must be stated or some specific reference made to them. D

With the exception of the observations of FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* (7), to which I have referred, there is no distinction to be drawn in the application of the defence of fair comment, whether the subject-matter of the comment be a newly published book, or the first-night production of a stage play, or the presentation of a new film, or the first performance of an orchestral work, or the conduct of a public newspaper, or anything which is submitted to the judgment and taste of the general public. They are all offered to the public as matters of public interest or concern and must, of course, be subject to public criticism. In the case of a newly published book, or the first-night production of a stage play, or the exhibition of a new film, or the first performance of an orchestral work, the critic will usually make E

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some reference to some of the facts on which his comment is based, but this is by no means true in every case. A critic might very well say: "In my opinion, this book, or this play, or this film is an unworthy, or, indeed, a disgraceful, production, and ought not to receive any encouragement from the public." No facts are stated in the criticism, none is specifically referred to, but nobody doubts that in such a case the critic could rely on the defence of fair comment if an action were brought. No doubt, the facts on which he based his comment would have to be supplied, but at the time of publication the ordinary member of the public to whom the words were addressed would have no means of knowing there and then, or of judging, whether the comments were fair or unfair. He would know the subject-matter, that is, the book, the play, or the film, and the facts are in a sense available, for he can buy the book or go to see the play or the film if he wishes so to do. *McQuire v. Western Morning News Co.* (5) is a very good illustration. No facts were included in a very damaging criticism of a newly produced play, and most certainly no reader of the criticism was in any position to judge of the fairness or otherwise of the comment, yet the defence of fair comment was set up, and, though it failed in the court of first instance, it succeeded in the Court of Appeal.

If the defence of fair comment is open to a defendant in commenting on a book offered to the public when no facts are stated, it is difficult to see why a different rule should apply when the subject-matter is a public newspaper offered to the public. Counsel for the plaintiff relied very strongly on *Roos v. Stent* (6), and the headnote in that case lends strong support for his argument. Apart from the fact that the South African court placed great reliance on the passages from FLETCHER MOULTON, L.J., in *Hunt v. Star Newspaper Co., Ltd.* (7), to which I have referred, and that the subject-matter was not a book or play or newspaper, the basis of the decision would appear to be that as a matter of construction no reference to any facts could be incorporated by reference, and that it was, therefore, a "naked comment." SMITH, J., seems to say that, if facts could have been so incorporated, the decision might have been different. In any event, in view of the English authorities, I do not think that the South African case can be an authority for the general proposition that before the defence of fair comment is applicable the facts must be set out in the matter complained of so that the reader may judge of the fairness of the comment or otherwise. I do not think it is possible to lay down any rule of universal application. If, for example, a defamatory statement is made about a private individual who is quite unknown to the general public and has never taken any part in public affairs, and the statement takes the form of comment only and is capable of being construed as comment and no facts of any kind are given, while it is conceivable that the comment may be made on a matter of public interest, nevertheless the defence of fair comment might not be open to a defendant in that case. It is almost certain that a naked comment of that kind in those circumstances would be decided to be a question of fact and could be justified as such if that defence were pleaded, but, if the matter is before the public, as in the case of a book, a play, a film, or a newspaper, then I think different considerations apply. Comment may then be made without setting out the facts on which the comment is based if the subject-matter of the comment is plainly stated. This seems to me to accord with good sense and the true public interest. In the illustration given by counsel for the defendants: "This newspaper [naming it] does not represent the views of the public, and is not worthy to do so," it would not be practicable to set out the facts on which the comment was based. They might cover twenty years of the newspaper's history, and to set out one or two facts and ignore the others might distort the issue in a much more damaging way. But to say in such a case that the commentator should be deprived of the critic's most valuable defence, fair comment, would be unjust to the defendant and injurious to the

public interest, which is best served by free, frank, and open discussion undeterred by the fear that the criticism would have to be justified in the fullest sense and sustained by the knowledge that it will be enough to show that the comment was fair. "He is under no duty to prove that his opinion coincides with that of a jury, but only that he was fair and honest in expressing his view."

In the case before us the comment is made as a heading to an article which alleged that another newspaper, unconnected with the plaintiff, was guilty of lowering the standards of journalism, and thereby commented that the plaintiff was guilty of low standards of journalism too. The Kemsley newspapers, if I may use a convenient phrase, are public newspapers and to the knowledge of the public report news and conduct public controversy. The subject-matter of the comment is not in doubt. It is admittedly a public matter, and in those circumstances I cannot see how the case of a public newspaper can be different from that of a published book. The facts are not specifically referred to, but at this stage of the action I think the facts on which the comment is based must be taken to be the facts of the public newspapers controlled by the plaintiff and the conduct of the said newspapers. I think the defence of fair comment can be raised, and that the order of PARKER, J., should be reversed.

In the RE-STATEMENT OF THE LAW OF TORTS, adopted and promulgated by the American Law Institute, it is of interest to observe that in chapter 25, para. 606, dealing with what is termed "privileged comment," it is laid down that defamatory criticism is "privileged" if the criticism is based on a true statement of the facts or on facts otherwise known or available to the recipient as a member of the public, and to be "privileged comment" under this rule the facts on which the opinion is based must be stated or they must be known or readily available to the persons to whom the comment or criticism is addressed, as in the case of a newspaper criticism of a play or a review of a book.

It was said in the present case that the "Tribune" had repeatedly referred in previous issues to the question of the "Kemsley newspapers" and that they had been the subject of much public discussion. For the purpose of my judgment I exclude this matter and prefer to deal with the question as though there had been no previous discussion. The decision to which I have come is supported, I think, by the decided cases. In *O'Brien v. Salisbury (Marquis)* (13) LORD SALISBURY made a speech in which he referred to a speech made by Mr. William O'Brien, M.P., at Ballyneale in September, 1888, and commented on it in the severest terms. The defences set up in answer to the action for slander brought by Mr. O'Brien were justification and fair comment. The speech of Mr. O'Brien had been reported in the "Times" and had been the subject of comment in the House of Commons. LORD SALISBURY commented on the speech as a matter of public notoriety and concern, and as a fair and *bona fide* comment on the speech and the matters to which it referred. FIELD, J., said of the report (54 J.P. 216):

"It was surely of the very essence of the defendant's case that he should be at liberty to prove, if he could, that the persons taking unlet farms had been subjected to the treatment which he had alleged, in order not only to show that the allegation which he had made as to treatment was true, but also that what he had said was in the nature of comment upon facts to which he had referred, and which were capable of proof. If he had not been permitted to prove those facts they might have been taken as non-existent, and his comments, therefore, baseless."

In *Lyons v. Financial News, Ltd.* (No. 1) (14) FLETCHER MOULTON, I.J., said (53 Sol. Jo. 671):

"In this case the particulars just stated the grounds on which the defendants were going to say that the matter commented upon was a

matter of public interest. The second set of particulars were of the facts which were going to be relied upon by the defendants, some of which were expressly stated in the libel, and some of which, though relevant to the matter of the libel, were not expressly stated therein. The defendants told the plaintiff that they were going to rely on all those facts stated in the particulars to justify or to show that the comment they made was fair. He doubted whether an order could have been made on the defendants requiring them to give such particulars as appeared in their statement of defence, but they had put them forward, and his Lordship was not satisfied that they would embarrass the plaintiff at all. The order appealed from would therefore be set aside and this appeal allowed."

The last quotation I desire to make is from ODGERS ON LIBEL AND SLANDER, 6th ed., p. 166:

"Sometimes, however, it is difficult to distinguish an allegation of fact from an expression of opinion . . . If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out he identifies the conduct on which he comments by a clear reference."

There is, of course, the further matter which, in my view, is decisive in the proceedings before us. The application to the master and to PARKER, J., was made, as is customary, under Ord. 19, r. 27, and Ord. 25, r. 4, though counsel for the plaintiff relied on R.S.C., Ord. 19, r. 27. It would, of course, have been possible to leave this matter until the trial of the action, though the objections to that course are overwhelming, and it would have been possible to invoke the provisions of R.S.C., Ord. 25, r. 2. I am clear that the procedure under R.S.C., Ord. 19, r. 27, was quite inappropriate to the facts of this case, and I think PARKER, J., was wrong in applying it. For all these reasons I think this appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Hale, Ringrose & Morrow* (for the third and fourth defendants); *Theodore Goddard & Co.* (for the plaintiff).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

R. v. LONDON SESSIONS APPEAL COMMITTEE.

Ex parte ROGERS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 17, 1951.]

Quarter Sessions—Appeal—“Order made on conviction”—Committal for sentence—Appeal against committal—Competency—Criminal Justice Act, 1948 (c. 58), s. 36 (2).

The applicant was convicted before a court of summary jurisdiction of obtaining money by false pretences and was committed to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. He appealed to quarter sessions against the committal.

HELD: a committal to quarter sessions for sentence was not an “order made on conviction” within the meaning of s. 36 (2) of the Criminal Justice Act, 1948, and, therefore, there was no right of appeal to quarter sessions against the committal under s. 36 (1).

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 36 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 1016.]

Cases referred to:

- (1) *R. v. Middlesex Quarter Sessions, Ex p. Director of Public Prosecutions*, [1950] 1 All E.R. 916; [1950] 2 K.B. 589; 114 J.P. 276.
- (2) *R. v. London Sessions Appeal Committee, Ex p. Beaumont*, ante p. 232.

MOTION for an order of *mandamus*.

The applicant was convicted by a metropolitan magistrate of two offences of obtaining money by false pretences when applying for public assistance and was committed for sentence to the County of London Quarter Sessions. The applicant appealed against the committal order to the appeal committee of the quarter sessions, but that court held that, as the order was not one made on conviction, there was no right of appeal therefrom, and, therefore, they had no jurisdiction to entertain the appeal.

Heathcote-Williams, K.C., and *Evelyn Russell (R. D. Ross with them)* for the applicant.

Southall for the respondents.

LORD GODDARD, C.J.: This is an application for an order of *mandamus* directing the appeal committee of the London Sessions to hear and determine an appeal lodged by the applicant against an order by a court of summary jurisdiction committing him to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948.

When one examines the structure of s. 29, it seems to me to be clear that from the time when the justices decide to send the offender to quarter sessions for sentence the case is to be regarded as though it were a committal for trial, the only exception to the procedure on a committal for trial being that quarter sessions will not have to inquire into the facts of the case, but will treat it as though the offender was before them on a plea of Guilty. Section 29 (3) provides:

"Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say—(a) The appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment."

In other words, they are to deal with him as though he had been convicted before them. It is for that reason that in *R. v. Middlesex Quarter Sessions, Ex p. Director of Public Prosecutions* (1), it was decided that an order made under s. 29 (1) committing an offender for sentence was a nullity. In that case quarter sessions had no power to deal with the prisoner since the Prevention of Corruption Act, 1906, under which he was charged, provides by s. 2 (5) that quarter sessions shall not have jurisdiction to try prosecutions on indictments for offences under the Act. Section 29 (3) continues:

"(b) The Poor Prisoners Defence Act, 1930, shall apply as if the offender were committed for trial for an indictable offence . . . (c) The Costs in Criminal Cases Act, 1908, shall apply in relation to the proceedings before the appeal committee or court of quarter sessions as it applies in relation to the prosecution of an offence before a court of quarter sessions; and (d) If the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal . . ."

That means that if the offender is sentenced to more than six months by the court of quarter sessions, he can appeal to the Court of Criminal Appeal. If, however, quarter sessions see fit to pass only the same sentence as the justices

can pass, he does not have a right of appeal. When that section is read as a whole it makes it clear that a person who is committed for sentence is to be treated in the same way as if he were indicted at quarter sessions.

Section 36 provides:

"(1) A person convicted by a court of summary jurisdiction shall have a right of appeal—(a) if he pleaded Guilty or admitted the truth of the information against his sentence; (b) in any other case, against the conviction or sentence, to a court of quarter sessions in manner provided by the Summary Jurisdiction Acts; and a person sentenced by a court of summary jurisdiction in respect of an offence of which he was convicted by another court of summary jurisdiction shall have a like right of appeal against his sentence. (2) For the purpose of the last foregoing sub-section, the expression 'sentence' includes any order made on conviction by a court of summary jurisdiction, not being—(a) a probation order or an order for conditional discharge; (b) an order for the payment of costs; (c) an order under s. 2 of the Protection of Animals Act, 1911 (which enables the court to order the destruction of an animal); (d) an order made in pursuance of any enactment under which the court has no discretion as to the making of the order or the terms thereof."

It is argued in the present case that that gives the applicant a right of appeal against the order of committal, because the order is said to be an order "made on conviction." It seems to me, however, clear that a mere committal for sentence cannot be an order made on conviction by a court of summary jurisdiction within the meaning of sub-s. (2), for so to hold would nullify this new procedure which Parliament has set up. Where a court of summary jurisdiction commits an offender to quarter sessions for sentence because it does not think it can impose a sufficiently severe sentence, is it to be open to quarter sessions to say they do not think the justices ought to have come to their conclusion and send the case back to the justices? I cannot think that that was meant and what DEVLIN, J., said in the course of the argument is very applicable here, namely, that where one has a possible construction which on the bare words of the section may be open to an argument, but would make nonsense of the new provisions which these sections are designed to set up, we ought not to give the enactment that construction. I do not think that a committal for trial can be included in the words "any order made on conviction by a court of summary jurisdiction" so as to be included in the sentence. These words, as I said in *R. v. London Sessions Appeal Committee, Ex p. Beaumont* (2), include such matters as disqualification for holding a driving licence or licence for firearms, or an order for the forfeiture or restoration of goods—things which are part of the judgment of the court. I think the justices were right in holding in the present case that they had no power to entertain this appeal.

HILBERY, J.: I concur.

DEVLIN, J.: I concur.

Application dismissed.

Solicitors: *Freeborough & Co.* (for the applicant); *Solicitor to the National Assistance Board* (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re SMITH'S LEASE. SMITH v. RICHARDS.

[CHANCERY DIVISION (Roxburgh, J.), January 16, 1951.]

Landlord and Tenant—Lease—Assignment—Covenant not to assign without consent—Provision for circumstances in which refusal not to be deemed unreasonable—Validity—Landlord and Tenant Act, 1927 (c. 36), s. 19 (1).

By a lease dated Nov. 1, 1948, the lessor demised a flat to the lessee for a term of seven years, and it was provided that the lessee "will not at any time assign underlet or part with possession of the said premises or any part thereof for all or any part of the tenancy hereby created . . . without the previous written consent of the lessor . . . such consent . . . not to be unreasonably withheld . . . Provided always that any refusal by the lessor to consent to any particular assignment or . . . underletting . . . shall not be deemed to be an unreasonable withholding of consent by reason only that the lessor at the time of intimating any such refusal may offer to accept from the lessee a surrender of the tenancy hereby created and in the event of any such offer being made by the lessor the lessee . . . shall either . . . withdraw her application for the lessor's consent to assign or . . . underlet the said premises or shall surrender to the lessor the tenancy hereby created . . ."

The lessee applied for the lessor's consent to a proposed assignment and the lessor refused it, but offered to accept a surrender of the lease. The lessee claimed that, having regard to the Landlord and Tenant Act, 1927, s. 19 (1), the lessor's refusal was unreasonable.

HELD: the parties to the lease could not curtail the operation of s. 19 (1) by stipulating circumstances in which the lessor's refusal should not be deemed unreasonable, and refusal on the ground that the lessor desired to obtain possession for himself was unreasonable.

Balfour v. Kensington Gardens Mansions, Ltd. (1932) (49 T.L.R. 29) and *Creery v. Summersell and Flowerdew & Co., Ltd.* ([1949] Ch. 751), applied.

[AS TO UNREASONABLE WITHHOLDING OF CONSENT, see HALSBURY, *Halsbury's Laws of England*, Vol. 20, pp. 349-352, paras. 421, 422; and FOR CASES, see DIGEST, Vol. 31, pp. 382-384, Nos. 5279-5291.]

Cases referred to:

(1) *Balfour v. Kensington Gardens Mansions, Ltd.*, (1932), 49 T.L.R. 29; Digest Supp.

(2) *Creery v. Summersell and Flowerdew & Co., Ltd.*, [1949] Ch. 751; [1949] L.J.R. 1166; 2nd Digest Supp.

ADJOURNED SUMMONS for a declaration that on the true construction of a lease dated Nov. 1, 1948, made between the defendant (as lessor), of the one part, and the plaintiff (as lessee), of the other part, and in the events which had happened the refusal of the lessor to grant a licence to assign the said lease was unreasonable, and that notwithstanding such refusal the lessee without any licence from the lessor was entitled to make the proposed assignment.

H. H. Harris and *A. J. Phelan*, for the lessee.

Robert S. Lazarus for the lessor.

ROXBURGH, J.: By a lease dated Nov. 1, 1948, the defendant demised to the plaintiff a suite, or flat, with four rooms, kitchenette and bathroom, comprising the fourth floor of a building known as 17 Upper Wimpole Street in the county of London for a term of seven years from Nov. 11, 1948, at the yearly rent of £250 payable quarterly in advance.

Clause 2 (13) (A) of the lease provides that the lessee

"will not at any time assign underlet or part with possession of the said premises or any part thereof for all or any part of the tenancy hereby created to any person of colour (such prohibition against a person of colour being

absolute) nor without the previous written consent of the lessor to any other person whomsoever such consent however in the case of any assignment or unfurnished underletting to any person other than a person of colour not to be unreasonably withheld and not to be required in the case of a furnished underletting of the premises for any period not exceeding six calendar months at any one time Provided always that any refusal by the lessor to consent to any particular assignment or unfurnished underletting of the said premises or a furnished underletting thereof for a period exceeding six calendar months shall not be deemed to be an unreasonable withholding of consent by reason only that the lessor at the time of intimating any such refusal may offer to accept from the lessee a surrender of the tenancy hereby created and in the event of any such offer being made by the lessor the lessee within three calendar months after receiving such offer shall either withdraw her [*sic*] application for the lessor's consent to assign or (as the case may be) underlet the said premises or shall surrender to the lessor the tenancy hereby created without prejudice to the liability up to the date of such surrender of either party against the other under any of the covenants on their respective parts herein contained."

On Sept. 26, 1950, the lessee's solicitors wrote to the lessor's solicitors as follows:

"Mr. James B. Millar, at present staying at the Cavendish Hotel, Jermyn Street, is prepared to take an assignment of our client's lease, and we should be obliged if you would therefore ask your client whether she is prepared to consent to this assignment. Mr. Millar has a permanent position at the Colonial Office . . . As Mr. Millar is anxious to have possession as soon as possible, your early reply will oblige."

The lessor's solicitors replied on Sept. 27, 1950:

"Our client is not willing to give her consent for your client to assign his lease to Mr. James B. Millar as therein requested, but offers, in accordance with the provision in that behalf contained in the lease, to accept from your client a surrender thereof."

Whereupon the lessee's solicitors reply:

"We are in receipt of your letter of yesterday's date and note your client refuses her consent to an assignment of our client's lease to Mr. J. B. Millar. Your letter makes it quite clear that your client's only reason for refusal of her consent is because of the proviso in the lease as to a surrender. We have advised our client that in view of the Landlord and Tenant Act, 1927, s. 19, the provision as to surrender is ineffective, and that therefore your client is withholding her consent unreasonably. We are renewing our application to assign, as set out in our letter of the 26th instant, to enable your client to re-consider her decision."

The lessor's solicitors then wrote a letter which refers to the proviso that I have read, and thereupon the solicitors embarked on a correspondence.

It is quite plain, to my mind, on the correspondence that the reason why the lessor refused licence to assign was simply and solely because she desired to have the lease surrendered to her and she deemed herself entitled to require the surrender in lieu of giving her licence to assign, and, if the lease had to be construed without regard to the Landlord and Tenant Act, 1927, that is the broad effect of the stipulation which I have read. Therefore, the sole question for my decision is whether, having regard to the Landlord and Tenant Act, 1927, s. 19, that stipulation is void. Section 19 (1) provides:

"In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or

any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld . . .”

The question is: Can the parties curtail the operation of that statutory provision by postulating in the lease that certain things shall not be deemed unreasonable? In my judgment, the answer is in the negative. First, it must, I think, be in the negative on principle because, if it were possible for the parties to stipulate in the lease that certain things should not be deemed to be unreasonable, they could surely stipulate that nothing should be deemed to be unreasonable and that would be a complete stultification of the Act. Secondly, the matter is, in my view, covered expressly by one decision, and, by implication, by another. Taking the latter first, because it is the earlier in date, in *Balfour v. Kensington Gardens Mansions, Ltd.* (1), the facts as given in the headnote are:

“The lease of a flat . . . contained the following covenant by the tenant: ‘Not to assign, sub-let, or part with the possession of the flat or any part thereof without the previous written consent of the lessors or their agent, such consent to any assignment or sub-lease to an individual not to be unreasonably withheld on proof being furnished of the respectability and financial responsibility of the proposed assignee or sub-tenant. Provided always that the lessors may as a condition of such consent to any assignment or sub-lease require the proposed assignee or sub-lessee to enter into direct covenants with the lessors to perform and observe all the covenants on the tenant’s part herein contained, and non-compliance with such condition shall be deemed to be a reasonable ground for refusing such consent notwithstanding the respectability and financial responsibility of the proposed assignee or underlessee.’ The tenant desired to sub-let the flat to a respectable and responsible tenant at £450 a year, the best rent obtainable, but the landlords refused their consent except on the terms that the sub-tenant should enter into a direct covenant with them to pay the rent of £700 a year reserved by the lease.”

MACNAGHTEN, J., held that in the circumstances the landlords had unreasonably refused their consent to the sub-letting. He does not in his judgment deal in terms with the present point, but he must have been of the opinion that the express proviso could not restrict the ambit of the section because otherwise he could not have reached the conclusion which he reached, since that which the landlords were requiring was something expressly stated in the lease itself to be not unreasonable. Therefore, it seems to me that, by implication, that is a clear decision that the parties cannot restrict the ambit of s. 19 by stipulating that this or that shall not be deemed to be unreasonable.

Then, again, HARMAN, J., in *Creery v. Summersell and Flowerdew & Co., Ltd.* (2) deals shortly and clearly with this point. There the covenant (contained in cl. 5) was

“not to . . . underlet . . . without the consent (not to be unreasonably withheld) of the lessor first had and obtained save that the lessor reserves the right to decline to give his consent if in his opinion the proposed . . . under-lessee is for any reason in his discretion undesirable as an occupant . . . or under-lessee.”

HARMAN, J., said in dealing with this point ([1949] Ch. 759):

“Clause 5 starts in a familiar form, but seeks to reserve to the lessor rights to withhold his consent which are invalid in so far as they go beyond s. 19 (1) (a) of the Landlord and Tenant Act, 1927. Reasonableness is the only touchstone by which the validity of a refusal of consent must be tested.”

Therefore, in my judgment, both on principle and on authority, the parties cannot restrict the ambit of s. 19 by stipulating expressly that this or that shall be deemed to be reasonable. The question is objective: Is it reasonable? That question has to be decided without regard to the interpretation which the parties have put on that expression. If that be so, it has long since been settled that it is not a reasonable ground for refusing consent to an assignment that the landlord desires to obtain possession of the premises for himself, and counsel for the lessor in fact conceded that that was the position if I should take the view that the language which the parties had used about the matter in this particular case was invalid. Accordingly, in my judgment, consent was unreasonably refused. I am asked to make, and I make, a declaration "that on the true construction of the above-mentioned lease and in the events which have happened the refusal of the defendant to grant a licence to assign the said lease to James B. Millar was unreasonable and that notwithstanding such refusal as aforesaid the plaintiff without any licence from the defendant is entitled to assign the said lease to the said James B. Millar."

Order as stated. Lessor to pay the lessee's costs taxed as between party and party.

Solicitors: *Rollit, Sons & Haydon* (for the lessee); *Edwin Coe & Calder Woods* (for the lessor).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

HUNTER v. TOWERS AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 18, 1951.]

Street Traffic—"Articulated Vehicle"—*Breakdown vehicle towing lorry*—*Road Traffic Act, 1930 (c. 43), s. 17 (2)*—*Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 3.*

By the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 3, an "articulated vehicle" is defined as "a heavy motor car or a motor car with a trailer so attached to the drawing vehicle that part of the trailer is superimposed upon the drawing vehicle, and when the trailer is uniformly loaded not less than twenty per cent. of the weight of its load is borne by the drawing vehicle."

A breakdown vehicle was fitted with a crane by means of the cable of which it towed a motor lorry in such a manner as to prevent the front wheels of the lorry from being in contact with the road surface. Not less than twenty per cent. of the weight of the lorry (transmitted through the cable and jib of the crane) was borne by the breakdown vehicle, but no part of the lorry was in physical contact with the breakdown vehicle, the two vehicles being held apart by a rigid tow-bar.

HELD: no part of the lorry was superimposed on the breakdown vehicle, and, therefore, the two vehicles together did not constitute an articulated vehicle within reg. 3.

[FOR THE ROAD TRAFFIC ACT, 1930, s. 17, see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 590, 591.]

CASE STATED by justices for the West Riding of Yorkshire, sitting at Doncaster.

On an information preferred by the appellant, a chief superintendent of police, under the Road Traffic Act, 1930, s. 17 (2), against the respondents, the justices

held that a lorry drawn by a breakdown vehicle constituted an "articulated vehicle" within the Motor Vehicles (Construction and Use) Regulations, 1947, reg. 3, and that, therefore, having regard to reg. 85 of those regulations, s. 17 (2) did not apply.

Withers-Payne for the appellant.

F. W. Gibson for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the West Riding of Yorkshire before whom the respondents were charged under the Road Traffic Act, 1930, s. 17 (2), for that they

"unlawfully did cause a trailer to be drawn by a certain motor vehicle not being a heavy or light locomotive, namely, a motor tractor, there not being carried either on the vehicle or on the trailer for the purpose of attending to the trailer one person in addition to the driver of the vehicle."

The facts show that a breakdown vehicle was sent out by the respondents to tow in a broken-down Bedford motor lorry. The breakdown vehicle was fitted with a crane which extended over its rear, and the cable of the crane was attached to the Bedford lorry in such a manner as to prevent the front wheels of the lorry from being in contact with the road surface. Not less than twenty per cent. of the weight of the Bedford lorry (transmitted through the cable and jib of the crane) was borne by the Fordson motor breakdown vehicle, but no part of the Bedford lorry was in physical contact with the Fordson motor breakdown vehicle, the two vehicles being held a distance apart by a rigid tow-bar. The justices held that the two vehicles should be regarded together as an "articulated vehicle" and so exempt from carrying a second man.

The Motor Vehicles (Construction and Use) Regulations, 1947 (S.R. & O., 1947, No. 670), reg. 3, defines an articulated vehicle as

"a heavy motor car or a motor car with a trailer so attached to the drawing vehicle that part of the trailer is superimposed upon the drawing vehicle, and when the trailer is uniformly loaded not less than twenty per cent. of the weight of its load is borne by the drawing vehicle."

The first thing that has to be shown is that part of the trailer, that is, the Bedford lorry, was superimposed on the drawing vehicle, namely, the breakdown vehicle. The justices' findings show that no part of the trailer was superimposed on the drawing vehicle, and, therefore, quite apart from the question whether the drawing vehicle was a heavy motor car or a motor car—being, in fact, a motor tractor—it is clear that the two vehicles were not an articulated vehicle. Therefore, the justices came to an incorrect decision in law and this matter must go back with an intimation that the case was proved.

HILBERY, J.: I concur.

DEVLIN, J.: I also concur.

Appeal allowed with costs; case remitted with direction to convict.

Solicitors: *Cummings, Marchant & Ashton*, agents for *R. C. Linney*, Wakefield (for the appellant); *Smith & Hudson*, agents for *Laverack, Son & Wray*, Hull (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

ALEXANDER v. SPRINGATE.

[KING'S BENCH DIVISION (Streatfeild, J.), January 18, 1951.]

Rent Control—Notice to quit—Notice given after tenancy referred to tribunal—Validity and effect—Furnished Houses (Rent Control) Act, 1946 (c. 34), s. 5.

A In June, 1950, the tenant of two furnished rooms in a dwelling-house referred her tenancy agreement to a rent tribunal. On July 7 she received a notice to quit the premises, expiring on July 17, which was valid subject to the effect of the *Furnished Houses (Rent Control) Act, 1946, s. 5*. On July 19 the tribunal gave its decision reducing the rent.

B HELD: the notice to quit was not made a nullity by virtue of the provisions of s. 5, but, having regard to that section, was effective to determine the tenancy three months after the decision of the rent tribunal.

[FOR THE FURNISHED HOUSES (RENT CONTROL) ACT, 1946, s. 5, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1089.]

ACTION for possession.

C The defendant was the tenant of two furnished rooms in a dwelling-house of which the plaintiff was landlord. In June, 1950, she referred the tenancy agreement to a rent tribunal under the *Furnished Houses (Rent Control) Act, 1946*. On July 7, 1950, she received notice to quit from the plaintiff. On July 19 the rent tribunal reduced the rent. The tenant claimed that the notice to quit was rendered a nullity by s. 5 of the Act. For the landlord it was contended that the effect of the section was merely to postpone the date of the termination of the tenancy until three months after the date of the decision of the rent tribunal.

D *Weitzman* for the landlord.

C. H. Duveen for the tenant.

E **STREATFEILD, J.:** This is an action for possession of two rooms at the landlord's house at No. 67, Greenfield Gardens, N.W.2, which were let by the landlord to Mrs. Edith Springate in or about March, 1950, at a rent of £2 15s. a week. During the summer of 1950 the tenant began proceedings before a rent tribunal, as a result of which the rent was reduced from £2 15s. to £2 5s. On July 7, 1950, during the pendency of those proceedings, a notice in the following terms was served by the landlord's solicitors on the tenant to quit the premises:

F "We hereby give you notice to quit and deliver up possession of the two rooms on the first floor situate at No. 67, Greenfield Gardens, N.W.2, in the county of Middlesex, which you hold of Mrs. Clara Alexander as tenant, on July 17, 1950, or at the end of the week of your tenancy which shall expire next after one week from the date of the service of this notice."

G It is admitted that that notice was served, and the tenant's case is that it is invalid or a nullity having regard to the provisions of the *Furnished Houses (Rent Control) Act, 1946*. It has not been seriously contested that, apart from s. 5 of that Act, the notice is not a good notice, and I hold that it is.

The question of law for my consideration is one which, as I understand it, has not in terms been decided before, and it arises on the proper construction of s. 5 of the Act of 1946. That section provides:

H "If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for reconsideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months . . ."

The decision of the rent tribunal was given on July 19, 1950, and it is contended by the landlord that that notice became effective on Oct. 19, 1950. Counsel for

the tenant, on the other hand, has contended that the words of the section render the notice completely null so that it is of no effect at all. The words which fall to be considered are the concluding words of the section: "the notice shall not take effect before the expiration of the said three months." The words do not seem to me to be capable of the construction that what otherwise is, on the face of it, a good notice at once becomes a bad notice for all time. What it appears to imply is that the notice is still recognised as being what it was, *viz.*, a good notice, with only the difference that it shall not take effect before the expiration of three months. A

A question appears to have arisen in some correspondence, to which my attention has been drawn, in the SOLICITORS' JOURNAL, vol. 94, p. 797, as to what it meant by a notice to quit "taking effect." It seems to me that that is a simple problem. If one gives notice to terminate the employment of one's servant, the date of the "taking effect" of that notice is that on which the employment terminates, not the date on which the notice is given, in the same way as if in the services one informed a soldier that his demobilisation, *i.e.*, the end of his service, was to take place with effect from next Wednesday, that would mean that the notice would take effect next Wednesday. In the present case it seems to me that the problem is answered by the very phrase "notice to quit." A notice to quit is a notice to the tenant to quit the premises. It does not take effect as a notice when it is given. The effect is the result which the notice seeks to achieve, *viz.*, the termination of the tenancy. So, as it seems to me, the words "take effect" clearly can only apply to the time when that tenancy is to terminate in the words of the notice to quit. Accordingly, in my view, the proper construction of s. 5 of the Act of 1946 is that a notice, which otherwise on the face of it is good, remains a good notice, but its effect is postponed until three months after the decision of the rent tribunal if by its terms it was to take effect at an earlier date. In other words, this appears to be a statutory extension of the notice to quit itself, and I think that the Landlord and Tenant (Rent Control) Act, 1949, in s. 11 recognises that that is the proper construction of s. 5 of the Act of 1946. B C D

In his book on the RENT ACTS, 5th ed., p. 89, Mr. MEGARRY appears to make a contrary submission. He says: E

"If a notice to quit expires during a period of ineffectiveness, the Act appears to render it a nullity and not to postpone its operation until the end of the period, although the Act of 1949 seems to assume the contrary."

With the greatest possible respect to Mr. MEGARRY, I hold the contrary. In my view, the proper construction of s. 5 is that which I have stated, and, accordingly, this was a good notice when it was served. The only effect of s. 5 of the Act of 1946 is that, instead of the tenancy being terminated on the date which is stated in the notice, *viz.*, July 17 or at the end of the week of the tenancy expiring next after the week from the service of the notice, the termination was automatically extended until three months after the decision of the rent tribunal, *i.e.*, Oct. 19, 1950. The notice effectively terminated the tenancy on that date, and it follows that as from that date the landlord has been entitled to possession. F G

Order for possession against the tenant.

Solicitors: *Gale & Phelps* (for the landlord); *Walford & Co.* (for the tenant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re WHITEHOUSE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 23, 1951.]

Criminal Law—Bail—Conviction by court of summary jurisdiction—Committal for sentence to quarter sessions—Notice of appeal to quarter sessions against conviction—Right to apply to High Court for bail—Criminal Justice Act, 1948 (c. 58), s. 29 (1), s. 37 (1) (a).

Where a court of summary jurisdiction convicts a prisoner and commits him to quarter sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1), the High Court has power under s. 37 (1) (a) to grant bail to the prisoner if he gives notice of appeal against his conviction.

Per curiam: the power of the High Court in such cases to grant bail must be exercised with extreme care.

[EDITORIAL NOTE. As pointed out in the judgment in this case, under the Summary Jurisdiction Act, 1879, s. 31, as substituted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1 (amended by the Criminal Justice Act, 1948, sched. IX), justices have power to grant bail to any person who has been convicted before them and has given notice of appeal "against a conviction, sentence, order, determination or other decision." The power to commit "in custody" to quarter sessions for sentence a person convicted by a court of summary jurisdiction first conferred by s. 29 (1) of the Criminal Justice Act, 1948, gave rise to considerable doubt as to the position arising when a person so committed gave notice of appeal against his conviction by the justices and applied for bail. Applications for bail have been made, unsuccessfully, on the ground that the decision to commit for sentence was an "order" or "determination" within the Act of 1879. On the contrary, it was argued that committal for sentence was not in any sense of the word a "determination" of the proceedings, but merely a sort of interim order, and that the trial was not complete until quarter sessions had pronounced sentence, after which a right of appeal lay to the Court of Criminal Appeal against sentence with a further right to apply to the High Court for bail pending the hearing of the appeal under s. 14 (2) of the Criminal Appeal Act, 1907. The present decision of the Divisional Court, therefore, settles a doubtful point by making clear that there is a statutory right to apply for bail under s. 37 (1) (a) after committal for sentence when notice of appeal against conviction has been given, though the granting of bail should be exercised with due regard to the applicant's past record.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 29, see HALSBURY'S STATUTES, Second Edn., Vol. 14, p. 1013, and for s. 37 (1) (a), see Continuation Vol., 1948, p. 180.]

APPLICATION for bail.

On Jan. 9, 1951, the applicant was convicted by the Liverpool stipendiary magistrate of feloniously receiving a postman's uniform and other clothing, the property of the Postmaster-General, well knowing they had been stolen, and was committed to quarter sessions for sentence under the Criminal Justice Act, 1948, s. 29 (1). On Jan. 10 he gave notice of appeal to quarter sessions against his conviction, and applied for bail to the High Court. The application came before BARRY, J., in chambers, and he referred it to the Divisional Court. The applicant contended that the High Court had power to grant bail under the Criminal Justice Act, 1948, s. 37 (1) (a).

G. R. F. Morris for the applicant.

J. G. Burrell for the Postmaster-General.

LORD GODDARD, C.J.: This application raises a question of considerable importance. Under s. 29 (1) of the Criminal Justice Act, 1948, a person convicted by a court of summary jurisdiction can be committed to quarter sessions for

sentence if the justices, after conviction, obtain information as to his character and antecedents and then form the opinion that they are such that greater punishment should be inflicted in respect of the offence than they have power to inflict. It is abundantly clear that where justices think fit to exercise their powers under s. 29 (1) they have no power to grant bail, but it is said that the High Court has power to grant bail because of the provisions of s. 37 (1) (a).

I am bound to say that, contrary to an opinion which I formerly held, but did not express, I think that the argument of counsel for the applicant is right. Section 37 (1) begins:

"Without prejudice to the powers vested before the commencement of this Act in any court to admit or direct the admission of a person to bail—
(a) the High Court may release from custody a person who has given notice of appeal to a court of quarter sessions against a conviction or sentence of a court of summary jurisdiction, on his entering into a recognisance conditioned for his appearance at the hearing of the appeal . . ."

Those words are very wide. Before that sub-section was passed a person who had been convicted and sentenced by a court of summary jurisdiction could serve notice of appeal and apply to the justices for bail under s. 31 of the Summary Jurisdiction Act, 1879, as substituted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1. There was no doubt that if justices refused to admit a defendant to bail he could always appeal to this court, and, therefore, it looks as though the one case in which it was necessary expressly to confer a power on the High Court to release from custody a person who had given notice of appeal against a conviction by a court of summary jurisdiction was where he has been committed for sentence under s. 29 (1) under which the justices have no power to grant bail. On the words of s. 37 (1) (a) it appears to me that the High Court has power to entertain an application in those circumstances. Such an application is obviously one which ought to be exercised with extreme care, and I hope that bail will only be granted in exceptional cases. It is certainly curious that Parliament has given this right of appeal under s. 37 (1) (a) and has not in that sub-section made any reference to s. 29 (1). Inasmuch, however, as the words of s. 37 (1) (a) are so wide, it seems impossible to say that the High Court has not been given power to release a person who has been convicted and committed for sentence under s. 29 (1).

HUMPHREYS, J.: So far as I am concerned, my Lord has given the judgment of the court.

DEVLIN, J.: I agree.

[After counsel had addressed the court on the merits the application was refused.]

Application refused.

Solicitors: *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the applicant); *Solicitor, General Post Office* (for the respondent).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

TAYLOR v. PARRY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 18, 1951.]

Bastardy—"Single woman"—*Married woman living with husband at date of application for affiliation order*—*National Assistance Act, 1948 (c. 29), s. 1, s. 42 (1), (2)*—*Bastardy Laws Amendment Act, 1872 (c. 65), s. 3.*

On Dec. 18, 1948, the respondent, then a widow, gave birth to an illegitimate child of which the appellant was the putative father. The respondent subsequently re-married, and, while living with her husband, she applied for an affiliation order against the appellant. ●

HELD: the alteration in the poor law, made by the National Assistance Act, 1948, s. 1, s. 62 (3), and sched. VII, and the provision of s. 42 (1) (b) and (2) that a woman (and, consequentially, not her husband) should be liable to maintain her illegitimate child, did not affect the law relating to bastardy, and, therefore, the respondent was not a "single woman" within the Bastardy Laws Amendment Act, 1872, s. 3, and was not entitled to an affiliation order under s. 4.

[AS TO REQUISITES FOR JURISDICTION IN AFFILIATION PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 2, pp. 582-584, paras. 802-804; and FOR CASES, see DIGEST, Vol. 3, pp. 387, 388, Nos. 253-269.]

Cases referred to:

- (1) *Jones v. Evans*, [1945] 1 All E.R. 19; [1944] K.B. 582; 114 L.J.K.B. 29; 171 L.T. 138; 108 J.P. 170; 2nd Digest Supp.
- (2) *R. v. Luffe*, (1807), 8 East 193; 103 E.R. 316; 3 Digest 388, 263.
- (3) *R. v. Collingwood*, (1848), 12 Q.B. 681; 17 L.J.M.C. 168; 12 L.T.O.S. 105; 116 E.R. 1025; 3 Digest 388, 264.
- (4) *R. v. Pilkington*, (1853), 2 E. & B. 546; 21 L.T.O.S. 165; 118 E.R. 872; *sub nom., Ex p. Grimes*, 22 L.J.M.C. 153; 3 Digest 388, 265.
- (5) *Jones v. Davies*, [1901] 1 K.B. 118; 70 L.J.Q.B. 38; 83 L.T. 412; 65 J.P. 39; 3 Digest 388, 266.

CASE STATED by Reading justices.

At a court of summary jurisdiction, sitting on July 19, 1950, the appellant was adjudged the putative father of a female bastard child and was ordered to pay 10s. a week for the child's maintenance and education. The respondent, the mother of the child, was first married in December, 1937. In 1945 her husband died, and in January, 1948, she met the appellant, and as a result of her association with him the child was born on Dec. 18, 1948. Later, the respondent married her present husband and was living with him at the time when she laid her complaint against the appellant. The justices were of opinion that since s. 14 (3) of the Poor Law Act, 1930 (re-enacting in substance the Poor Law Amendment Act, 1834, s. 57), had been repealed by s. 1 and s. 62 (3) of, and sched. VII to, the National Assistance Act, 1948, they were entitled to apply the law as it stood prior to the passing of the Act of 1834 and so to hold that, although the respondent was living with her husband at the time of the complaint, she was nevertheless to be regarded as a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872. It was contended for the appellant that the Act of 1948 did not affect the bastardy law, and that, therefore, the respondent was not a "single woman" and the order of the justices could not stand.

Cusack for the appellant.

Widgery for the respondent.

LORD GODDARD, C.J.: The justices have set out in the Case a reasoned opinion which, in their view, entitled them to come to the conclusion that the respondent could be regarded, notwithstanding her re-marriage, as a single

woman, but I am clearly of opinion that this court must allow the appeal.

Under the Bastardy Laws Amendment Act, 1872, an application for an order in bastardy can only be made by a single woman. That conception has gone back in the history of bastardy for a great many years to a time when bastardy orders could be obtained, not by the mother, but only by the parish officers who were, or might be, liable for the maintenance of the bastard, and the courts have for many years decided that where a woman is living in such circumstances that, though she is married, she is, in effect, a single woman because she is living completely apart from her husband, she may obtain a bastardy order as a single woman. The last case on the subject is *Jones v. Evans* (1) in which it was decided that the wife of a soldier serving compulsorily overseas, who during his absence has committed adultery which has not been condoned, is a "single woman" within the meaning of s. 3 of the Act of 1872, and, therefore, entitled to lay a complaint in bastardy. ATKINSON, J., delivering the judgment of the court, referred to *R. v. Luffe* (2), *R. v. Collingwood* (3) and *R. v. Pilkington* (4), and summed up the matter in this way ([1945] 1 All E.R. 23):

"In our view, the facts in the present case constituted the appellant a 'single woman.' There was a *de facto* separation of considerable length and an uncondoned matrimonial offence which had lost for the appellant her title to maintenance by her husband and her right to live with him. The appeal, therefore, succeeds."

The argument of counsel for the respondent comes to this, that the only reason why, in the case of a child born before she married, a wife was not entitled to be regarded as a single woman if she applied for a bastardy order after she married was that by marrying she obtained a husband who by law was bound to maintain her illegitimate child. By the National Assistance Act, 1948, s. 1, s. 62 (3), and sched. VII, the Poor Law Act, 1930, including s. 14 (3) which put the obligation of maintaining a wife's illegitimate child on her husband, was repealed, and by s. 42 of the Act of 1948 it is provided:

"(1) For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children, and (b) a woman shall be liable to maintain her husband and her children."

That Act puts the obligation of maintaining an illegitimate child on the mother, because the child is not the husband's child. But because that Act has been passed, which contains no reference to the Act of 1872 and does not purport to deal with the law relating to bastardy, we cannot hold that a woman living with her husband at the time when she applies for the order is a single woman. It would be a *reductio ad absurdum*. There is nothing absurd in holding that a married woman whose husband has deserted her, or is serving a sentence of imprisonment, or has been sent overseas on military or naval service, is, for the purpose of the Bastardy Acts, a single woman, because she is living entirely by herself, but it would be the strongest possible thing to hold that the Act of 1948 has overruled a long line of authority, including such authority as *Jones v. Davies* (5), which lays down in the clearest possible terms that a married woman, who at the date of the application is living with her husband, cannot obtain an order for the affiliation of her bastard child under the Bastardy Laws Amendment Act, 1872, s. 3.

Had the attention of Parliament been called to the fact that this considerable alteration in the law would, or might, affect the right of a married woman to obtain a bastardy order, Parliament might have inserted some provision in the Act which would deal with the matter, because one can see that it is a hard case. The husband is no longer liable to maintain his wife's illegitimate child which she had at the time he married her and she cannot apply to the justices for an order. Unless, however, we can find something in the Act which deals with that question, we cannot hold that by an alteration of the poor law, the whole of the

law relating to bastardy has been altered and that we are at liberty to read the words "single woman" as meaning a married woman whose husband is not under an obligation to maintain her child owing to this alteration of the law. For these reasons I am of the opinion that the justices came to a wrong determination and the order they made must be quashed.

HILBERY, J.: I am of the same opinion. I think counsel for the appellant was not overstating it when he said that this order could not stand in face of such a decision as *Jones v. Davies* (5).

DEVLIN, J.: I also concur.

Appeal allowed. No order as to costs.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Charsley Leonard & Co.*, Slough (for the appellant); *Torr & Co.*, agents for *Francis & Parkes*, Reading (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

DORMAN, LONG & CO., LTD. v. HILLIER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 18, 1951.]

Factory—Safe means of access—Movement of injured workman during performance of work—Repair of roof—Removal of iron sheets—Workman's fall through unsafe part of roof while removing sheet—Factories Act, 1937 (c. 67), s. 26 (1).

To effect repairs to the roof of a factory of which the appellants were occupiers workmen had to strip corrugated iron sheets off the roof, access to which was by way of a ladder and then by treading on purlin bars. One of the workmen had thus reached part of the roof and had removed a sheet and was standing on a purlin bar in the act of passing it down when he stepped back with one foot on another sheet which was unsafe, fell through it, and was killed.

HELD: the work on which the workman was engaged was to strip as a whole the part of the roof where he was working and he was not performing different branches of the work according to which sheet he was removing at any particular moment; at the time of the accident he had arrived at the place of the work and the unsafe sheet on which he stepped was part thereof and not a means of access thereto; and, therefore, the appellants were not guilty of a failure to provide a safe means of access to the work, contrary to the Factories Act, 1937, s. 26 (1).

Observations of LORD GREENE, M.R., in Hopwood v. Rolls Royce, Ltd. (1947) (176 L.T. 517), applied.

Whitby v. Burt, Boulton & Hayward, Ltd. ([1947] 2 All E.R. 324), doubted.

[FOR THE FACTORIES ACT, 1937, s. 26, see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1018.]

Cases referred to:

- (1) *Whitby v. Burt, Boulton & Hayward, Ltd.* [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556; 111 J.P. 481; 2nd Digest Supp.
- (2) *Hopwood v. Rolls Royce, Ltd.*, (1947), 176 L.T. 514; 2nd Digest Supp.
- (3) *Callaghan v. Fred Kidd & Son (Engineers), Ltd.*, [1944] 1 All E.R. 525; [1944] K.B. 560; 113 L.J.K.B. 381; 170 L.T. 368; 2nd Digest Supp.

CASE STATED by justices for the North Riding of Yorkshire.

At a court of summary jurisdiction, sitting at Redcar, on July 21, 1950, an information was preferred by the respondent, Raymond Hillier, an inspector of factories, against the appellants, Dorman, Long & Co., Ltd., alleging that they, being the occupiers of a factory within the meaning of the Factories Act, 1937, contravened s. 26 (1) of the Act in failing to provide safe means of access to the place on the roof of the factory where persons had to work, and that in consequence of such contravention a workman, Thomas Butterwick, suffered bodily injury. It was contended by the respondent that the place where the accident happened was part of the means of access to the place of the workman's work and that the case was covered by the authority of *Whitby v. Burt, Boulton & Hayward, Ltd.* (1). For the appellants it was contended that the means of access was the means of approaching a place, and that at the time of the accident the workman had reached his place of work and was not going to it, and that his movement in stepping back on to the sheet was taken in the course of his work and not in order to gain access to his work. The justices were of the opinion that *Whitby v. Burt, Boulton & Hayward, Ltd.* (1) was almost identical with the facts of this case, that the sheet through which the workman fell was part of the means of access, that it was unsafe, and that, consequently, there had been a contravention of the statute. They, therefore, convicted the appellants and fined them £50.

G. N. Black for the appellants.

S. B. R. Cooke for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the North Riding of Yorkshire, before whom the appellants were prosecuted for contravention of the provisions of s. 26 (1) of the Factories Act, 1937,

"in that safe means of access were not so far as was reasonably practicable provided to the place on the roof over the forty tons bay at the said factory where persons had to work and that in consequence of such contravention one Thomas Butterwick suffered bodily injury."

The justices convicted and stated this Case.

The facts which the justices find are that the roof of a factory occupied by the appellants was under repair by a firm named Thomas Bell & Co. who were under contract to the appellants. It seems to me that really what has to be decided in this case is whether the responsibility for a breach of the statutory provisions falls on the appellants or whether it falls on Thomas Bell & Co., who were the actual employers of the deceased man. The justices found:

"The said roof consisted of a main roof and of a jack roof, which was a smaller roof, covering the higher part of the main roof. Both the main roof and the jack roof consisted of corrugated iron sheets, supported on purlin bars which were three inches wide and five feet apart. On Feb. 2, 1950, the three men [including Butterwick] started work at about 8.30 or 8.40 in the morning. They were engaged in stripping the sheets off parts of the said roof. For the first hour, until about 9.30 or 9.40 in the morning, they were working upon the main roof. They then went on to the jack roof, where they were to strip off certain sheets. They reached this place by climbing a short ladder to the jack roof, and then walking along the said purlin bars. They were able to see where the said purlin bars lay because their position was indicated by bolts protruding through the corrugated iron sheets. Butterwick safely reached this place. Having reached the said place [the men] began to remove the said sheets, and removed two of them. The said Thomas Butterwick removed a sheet and was standing on a purlin bar in the act of passing it down when he stepped back with one foot on another sheet behind him which had not yet been moved, fell through it, and was killed. The sheet through which he fell was in an unsafe condition."

The section under which the appellants were charged is s. 26 (1) of the Factories Act, 1937, which provides:

"There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work."

The question here is whether there was a failure to provide a safe means of access as distinct from a failure to provide a safe place of work, with which we are not concerned. The justices thought that the case was entirely covered by a decision of DENNING, J., in *Whitby v. Burt, Boulton & Hayward, Ltd.* (1). It was contended on behalf of the appellants that the justices misinterpreted that case, and that the decision of DENNING, J., was not in accordance with other authorities.

When DENNING, J., decided that case there had been decided a week or two before in the Court of Appeal a case which was not cited to the learned judge. That was *Hopwood v. Rolls Royce, Ltd.* (2). The question whether an accident happens owing to the place of access being unsafe or whether the danger is in the place of work is very often a very fine and difficult point, but in *Hopwood v. Rolls Royce, Ltd.* (2) LORD GREENE, M.R., gave this guidance when he said (176 L.T. 517):

"There must be a safe means of access to the particular branch of the man's work on which at the moment he is about to engage himself. That would exclude movements taken while doing one operation or one set of operations, and would confine the section to cases where it can truly be said that if a man is moving from one branch of his work to another branch of his work, his route in doing so is a means of access. I may say at once that the word 'branch' is one that I do not find quite satisfactory, but I do not pause to search for a better word because I think that my meaning is reasonably clear."

He illustrates that by saying (*ibid.*, 518):

"In *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (3), there were two branches of the man's work, one to be carried out on grindstone No. 1 and the other to be carried out on grindstone No. 2, and he was entitled to a safe means of access from the first branch to the second."

In the present case the work which the man was doing was stripping the jack roof, and I think it is too artificial to say that there were different branches of work according to which sheet he was removing at any particular moment. Four sheets had to be removed, and the workman was at the place where he was to remove, not one sheet, but the four sheets. Unhappily he stepped on and fell through one of the four sheets, which was unsafe, but when he did so he had got to the place where he had to work and was actually working. I think it would be altogether too artificial to say that he was proceeding from one piece of work to another piece of work. The facts show that the place where he was working was unsafe, but there is nothing to show that the means of access to that place were unsafe.

The justices thought that the decision of DENNING, J., in *Whitby v. Burt, Boulton & Hayward, Ltd.* (1) was indistinguishable from this case. It is not necessary for us to say whether we are prepared to agree in all respects with the decision of DENNING, J. I think that had *Hopwood v. Rolls Royce, Ltd.* (2) been cited to him he might easily have come to a different conclusion. *Hopwood v. Rolls Royce, Ltd.* (2) is binding on this court, and *Whitby v. Burt, Boulton & Hayward, Ltd.* (1) is not. In *Whitby's* case (1) DENNING, J., held that a man who had to remove a number of nails on a roof, proceeding from place to place on the roof to do it, at the time he crawled along to get at a particular nail was using a means of access, but I think great difficulties arise if that view is right.

As HILBERY, J., put it in the course of the argument, it would seem to follow that, if a man is engaged to strip tiles off a roof, every time he moves from one tile to another, or stretches out his hand to get at another tile, or moves the position of his body, he will be using a means of access. I think that would be too artificial. I think if I employ a man to move some tiles off my roof, *prima facie*, I am providing him with a safe means of access if I provide him with a safe ladder to get to the place where he has to do his work. However, it is not necessary for us to give a concluded opinion whether *Whitby v. Burt, Boulton & Hayward, Ltd.* (1) is right. I prefer to test the present matter by means of the principle LORD GREENE, M.R., suggested in *Hopwood v. Rolls Royce, Ltd.* (2). Applying that principle, it seems to me that the actual operation this man was engaged on was all one so far as these four sheets are concerned. Whether there has been a breach of some regulation by somebody or not, in my opinion, there was no breach of s. 26 (1) of the Factories Act under which the appellants were charged. For these reasons I think the appeal must be allowed.

HILBERY, J.: I concur.

DEVLIN, J.: I agree with what my Lord has said, and with the observations he has made on *Whitby v. Burt, Boulton & Hayward, Ltd.* (1). I would add only one observation to deal with what I understood to be an alternative argument advanced by counsel for the respondent, namely, that a place could be both a means of access and a place of work at the same time, and, therefore, he was entitled to succeed although the workman might be engaged on one set of operations. In my judgment, there is no true alternative there. It may be that a particular vehicle, if I may so put it, may be at one time a means of access to a place of work and at another an appliance actually used in the work. For example, a painter painting the side of a ship may be raised in a cradle which may be a means of access to get to the place where he has to work, and once he gets to that place and moves along with it foot by foot and yard by yard, it may be used as an appliance, but that does not do more than establish that a particular thing may be both a means of access and an appliance at different times. The proposition of counsel for the respondent goes further and is based on a passage in the judgment of LORD GREENE, M.R., in *Hopwood v. Rolls Royce, Ltd.* (2), where it is said that a place may be, as I gather, at one and the same time both a means of access and a place of work. I should like to guard myself against saying that that proposition must now be regarded as authoritatively established. It may have to be considered later on how far it is part of the *ratio decidendi* of the case and how far it commanded the assent of ASQUITH, L.J., who was the other lord justice forming the majority of the court.

The passages relied on are, first, where LORD GREENE, M.R., said (176 L.T. 517):

"It seems to me that, in the case which I put, the pathway from bench No. 1 to bench No. 2 has two aspects. First of all, it is itself a place of work, because his work being to carry the block from bench No. 1 to bench No. 2, he performs that work by walking along the route between the two and the whole route is a place of work. But for the purpose of arriving at bench No. 2 the pathway is a means of access to that place of work, and under the section, in my opinion, the workman is entitled to have that pathway as a safe means of access to bench No. 2."

Later, LORD GREENE, M.R., said, in reference to *Callaghan v. Fred Kidd & Son (Engineers), Ltd.* (3) (*ibid.*):

"In one sense his place of work might be considered to be the grinding area comprising the two grindstones; on one argument it might be said that the obligation of the section extends only to the point when he had reached the grinding area and that, as soon as he had reached that point, he was not

using a means of access to his place of work but was in fact, working in his place of work which he had *ex hypothesi* already reached."

Then he puts the alternative to that argument. But when he came to state the principle which governs the matter he stated it in the passage which has already been quoted by my Lord. From that it seems to me that if it can be held that a place may be at one and the same time a place of work and a means of access, then it is necessary to see for which purpose it is being used, or may require to be used, at the material time. It seems to me to be clear on the facts of the present case that it was being used as a place of work and not a means of access. Accordingly, I think that alternative argument fails.

Appeal allowed with costs; conviction quashed.

Solicitors: *Tarry, Sherlock & King*, agents for *Cohen, Jackson & Scott*, Stockton-on-Tees (for the appellants); *Solicitor, Ministry of Labour and National Service* (for the respondent).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

ROSE v. MATT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Devlin, J.), January 19, 1951.]

Criminal Law—Larceny—"Owner"—Special property in goods—Bailee—Deposit of goods as security—Goods taken away by depositor—Larceny Act, 1916 (c. 50), s. 1 (2) (iii).

A purchaser of goods deposited with the vendor, as security for the purchase price, a travelling clock which belonged to him, it being agreed that, if the purchaser did not pay for the goods within one month from the date of the purchase, the vendor should be entitled to sell the travelling clock. The purchaser then took the goods away. Later, returning to the shop when the vendor was not there, the purchaser took the clock away without paying the price of the goods. He did this to prevent the vendor from selling the clock, but without any intention of charging him with its loss.

HELD: the vendor, as bailee, had a special property in the clock, and, therefore, he was the owner thereof within s. 1 (2) (iii) of the Larceny Act, 1916; the respondent intended to deprive him of his special property, and, consequently, he was guilty of larceny under s. 1 (1).

[AS TO LARCENY BY OWNER OF OWN GOODS NOT IN HIS POSSESSION, see HALSBURY, Hailsham Edn., Vol. 9, p. 506, para. 864; and FOR CASES, see DIGEST, Vol. 15, p. 900, Nos. 9874-9882.]

Case referred to:

(1) *R. v. Wilkinson & Marsden*, (1821), Russ. & Ry. 470; 15 Digest 900, 9877.

CASE STATED by Stamford justices.

At a court of summary jurisdiction sitting on Oct. 7, 1950, the appellant, a superintendent of police, preferred an information under the Larceny Act, 1916, s. 2, charging the respondent with having stolen a travelling clock of the value of £3 from one Simpson. For the appellant it was contended that Simpson, as bailee of the clock, had a special property therein and so was the owner thereof within s. 1 (2) (iii) of the Act. For the respondent it was contended (i) that the travelling clock was lodged by him with Simpson as security, but the property in the clock remained with him and Simpson had only a special interest in it arising from its deposit with him; (ii) that the definition of "owner" in the Act of 1916 did not affect the position between an owner at common law and a

bailee; and (iii) that the owner who had parted with the possession of the property could not be convicted of larceny unless it could be established that the bailee had thereby become chargeable. The justices were of opinion that, although Simpson was the "owner" within the meaning of the definition in s. 1 (2) (iii) of the Act of 1916, the respondent, in taking the clock, did not intend to charge him with its loss and there was no evidence that the taking of the clock had had the effect of so charging him. They, therefore, dismissed the information. The facts are set out in the judgment of LORD GODDARD, C.J. A

T. R. Fitzwalter Butler for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the borough of Stamford, and it raises what appears to be a new point in the law of larceny, although I think that for all essential purposes the matter is to be decided on the same lines as those on which the conviction of larceny was upheld in *R. v. Wilkinson & Marsden* (1). B

The Larceny Act, 1916, is entitled:

"An Act to consolidate and simplify the law relating to larceny triable on indictment and kindred offences." C

We have now only to look at that Act to find what amounts to larceny. The old cases may be of assistance in the construction of the Act, but, if the words of the Larceny Act, 1916, are clear, that Act governs the decisions which this court must give.

The present case is one, it is said, where a man is charged with stealing his own goods. The respondent had bought some goods from one Simpson and had paid a deposit of £1 on them. Wishing to obtain delivery of the goods, he took a travelling clock, which is the article he is charged with stealing, and asked Simpson to accept it as security. Simpson agreed, and informed the respondent that, if he did not bring the money within a month, he (Simpson) would sell the clock. On a later date the respondent returned to the shop when Simpson was not there, and fraudulently took possession of the clock. When interviewed by the police, he said that he had taken the clock away because he did not want Simpson to sell it. Simpson had a special property in that clock. He had the right to hold it as security. By taking it away from Simpson within the month, the respondent was depriving, and he intended to deprive, Simpson of his special property in it, because he intended to prevent him from exercising the right he would otherwise have had of selling the clock. D

The Larceny Act, 1916, s. 1 (1), defines larceny in this way: E

"A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof . . . " F

By sub-s. (2) (iii): G

"the expression 'owner' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen." H

The justices took the view that this was not larceny because, they found, the respondent did not take the clock with the intention of making a fraudulent charge against Simpson of having converted the clock or having refused to return it, for, if a bailee refuses to return goods bailed to him or is unable to produce them and cannot show that he lost them without negligence, the owner can maintain an action against him.

It is clear that many of the old cases dealing with the question whether in these circumstances a man is guilty of larceny have been decided on the ground that the defendant intended to charge the bailee in an action of detinue and that

he had taken the goods fraudulently for that purpose. For instance, in *HALE'S PLEAS OF THE CROWN*, vol. 1, p. 513, one finds this passage:

"... if A bails goods to B and afterwards *animo furandi* steals the goods from B with design probably to charge him for them in an action of detinue, this is felony ..."

The justices in the present case were referred to *R. v. Wilkinson & Marsden* (1), a case which had been reserved for the opinion of all the judges. There the owners of goods, intending to deprive the revenue of duties, put the goods in a boat belonging to Marsh & Co., a firm of lightermen, to have them taken to a ship, and then fraudulently took the goods back out of the custody of the lightermen. It was held (*Russ. & Ry.* 472) by a majority of the judges to be larceny

"... because Marsh & Co. had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will, was a felonious intent as against them, because it exposed them to a suit upon the bond."

It might have exposed them to a suit on the bond, but whether or not the defendants so intended does not seem to have been the governing consideration. Now that the law has been clarified by the Larceny Act, 1916, the owner of the goods who has entrusted them to another person in such circumstances that that other person has a special property in the goods is guilty of larceny if he fraudulently takes them away from that person. There is no question here that the respondent was acting fraudulently and so the justices have found.

This case, therefore, must go back to the justices with an intimation that it is covered by s. 1 (2) (iii) of the Larceny Act, 1916, and that in the circumstances proved the respondent was guilty of larceny and that they must convict.

DEVLIN, J.: I agree.

Appeal allowed with costs.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *T. Norton, Son & Hamilton*, Grantham (for the appellant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

CONWAY v. GEORGE WIMPEY & CO., LTD.

[COURT OF APPEAL (Cohen, Asquith and Birkett, L.JJ.), January 19, 22, 1951.]

Negligence—Negligence of servant—Liability of master—Accident to unauthorised passenger in lorry—Extent of duty to take care.

The defendants, a firm of contractors, were engaged in building work at an aerodrome, and they provided lorries to convey their employees to the various places of their work on the site. In the cab of each lorry was a notice indicating that the driver was under strict orders not to carry passengers other than the employees of the defendants during the course of, and in connection with, their employment, and that any other person travelling on the vehicle did so at his own risk. The driver of the lorry in question in the present case had also received clear oral instructions to that effect. In fact, it was not unusual for men not employed by the defendants to make use of the defendants' lorries as a means of transport, but it was found that the defendants did not know of that practice. The plaintiff, a labourer employed by another firm of contractors engaged on work at

the aerodrome, while on his way to work, was permitted by the driver to ride on one of the defendants' lorries for some distance across the aerodrome. In dismounting the plaintiff was injured owing to the driver's negligence, and he claimed damages from the defendants for the negligence of their servant.

HELD: in the absence of proof that the defendants knew or must have known that persons other than their own employees were carried in the lorries, the plaintiff, while on the lorry on the occasion in question, was a trespasser, and, therefore, the defendants were not under any duty of care to him.

Seemle, the act of the driver in taking the plaintiff as passenger was outside the scope of his employment.

Per ASQUITH, L.J.: "I should hold that taking men other than the defendants' employees on the vehicle was not merely a wrongful mode of performing an act of the class which the driver in the present case was employed to perform, but was the performance of an act of a class which he was not employed to perform at all."

Twine v. Bean's Express, Ltd. (1946) (175 L.T. 131), *applied*.

Decision of SELLERS, J. ([1950] 2 All E.R. 331), *affirmed*.

[AS TO THE DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 571, 572, para. 825; and FOR CASES, see DIGEST, Vol. 36, pp. 12-16, Nos. 33-60.]

Cases referred to:

- (1) *Twine v. Bean's Express, Ltd.*, (1946), 174 L.T. 239; *affd.* 175 L.T. 131; 2nd Digest Supp.
- (2) *Limpus v. London General Omnibus Co.*, (1862), 1 H. & C. 526; 32 L.J.Ex. 34; 7 L.T. 641; 27 J.P. 147; 158 E.R. 993; 34 Digest 129, 939.
- (3) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

APPEAL by the plaintiff from an order of SELLERS, J., made on June 20, 1950, and reported [1950] 2 All E.R. 331.

The plaintiff claimed that the defendants were liable for the negligence of a lorry driver employed by them, as a result of which he suffered physical injury. The case was tried with a jury who found that the driver was equally responsible with the plaintiff for the accident. The question of the defendants' liability was, by agreement between the parties, left to the judge who found that the driver was acting outside the scope of his employment in carrying the plaintiff, and that the defendants were not liable for his negligence. On appeal it was contended for the plaintiff that, although the driver had acted in excess of his actual authority, the defendants must be taken to have known that persons other than their own employees were being carried in the lorries, and that, by allowing this practice to grow up, the defendants had invested the driver with an apparent authority, in excess of his actual authority, to carry men generally, whether or not they were employed by the defendants. The facts appear in the judgment of ASQUITH, L.J.

C. N. Shawcross, K.C., Seuffert and O. J. V. Kitson for the plaintiff.

H. H. Edmunds for the defendants.

COHEN, L.J.: I will ask ASQUITH, L.J., to deliver the first judgment.

ASQUITH, L.J.: For a short time before this accident the plaintiff had been employed as a labourer by contractors other than the defendants on Heath Row aerodrome. The majority of the employees on this site were in the defendants' service, and for the purpose, *inter alia*, of moving their employees from point to point of the site the defendants found it convenient to institute a kind of omnibus service within its perimeter by means of motor lorries driven by

drivers employed by them. These drivers, including the driver who is involved in the present case, received clear oral instructions from the defendants that the men they were to ferry backwards and forwards must be the defendants' employees exclusively. Moreover, in the cab of each lorry a notice was displayed in these terms:

"The driver of this vehicle has strict orders to carry no passengers other than the employees of George Wimpey & Co., Ltd., during the course of, or in connection with, their employment. Any other person travelling on this vehicle does so at his own risk."

The lorry in question was an open lorry designed for the carriage, not of men, but of materials, and access to its platform could only be obtained by scrambling over the back or the sides. It had the word "WIMPEY" in very large letters inscribed on its sides. Notwithstanding the very explicit prohibitions to which I have referred, it became no very unusual thing for men working for contractors other than the defendants to request and to obtain a lift on these lorries. This was precisely what the plaintiff did on May 1, 1948. After travelling a short distance in the lorry, he sustained, while dismounting, the injuries of which he complains and which he attributes to the negligence of the defendants. As a result of those injuries, he had to have one leg amputated below the knee.

The learned judge has found the following further facts which he thought might be material to the issues before him. First, that the plaintiff did not know that he had no right to obtain a lift on the lorry. Secondly, that the defendants' drivers in general did not knowingly carry men who were not the defendants' servants. Thirdly, that this particular driver did not know that the plaintiff was not one of the defendants' employees. Lastly, the learned judge adds this ([1950] 2 All E.R. 332):

"It was not suggested, and certainly it was not established, that the defendants knew that men other than their own were using the lorries in this way."

It is to be noted that in the sentence I have quoted the learned judge was speaking of knowledge on the part of, or imputable to, the defendants themselves, having dealt in the previous findings with knowledge possessed by the driver. In the result, the learned judge concludes that it was outside the scope of the driver's employment to give the plaintiff this lift, and that the defendants were not liable. He reinforces this conclusion by praying in aid the authority of the Court of Appeal in *Twine v. Bean's Express, Ltd.* (1).

In that case the husband of the plaintiff was employed in the Savings Bank Department of the Post Office, and the defendants were contractors employed by the Post Office in general work as carriers. The drivers of the defendants' vans were authorised to carry certain classes of persons as passengers on the vans, but were otherwise forbidden to carry passengers. The plaintiff's husband was not one of the persons whom the drivers were authorised to carry. On the material date the plaintiff's husband, by permission of the driver, but without the knowledge or consent of the defendants, was riding on a van of the defendants when the van collided with an omnibus and he was killed. It was held that in carrying the deceased man as a passenger the defendants' driver was acting outside the scope of his employment, that the deceased man at the time of the accident was a trespasser on the van, that the defendants had not been guilty of any breach of duty towards him, and that the claim, therefore, failed. LORD GREENE, M.R., having referred to the finding of the judge that the deceased man was a trespasser said (175 L.T. 132):

"That being so, it seems to me there is an end of the matter, because if the question is asked: Was the driver, Harrison, in giving a lift to the deceased man, acting within the scope of his employment? The answer is clearly 'No.' He was doing something that he had no right whatsoever to do,

and *qua* the deceased man he was as much on a frolic of his own as if he had been driving somewhere on some amusement of his own quite unauthorised by his employers."

Counsel for the plaintiff sought to distinguish that case from the present case and there was one distinction which might be material to the present phase of the argument, *viz.*, that in *Twine's* case (1) the plaintiff was informed by the driver himself that he (the plaintiff) had no right to travel on the van, whereas in the present case the plaintiff was not told that. The plaintiff in *Twine's* case (1) was not only a trespasser *de facto*, but he never imagined he was anything else. The argument of counsel in the present case appeared at times to assume that the plaintiff could not be a trespasser unless he knew he was one. That assumption is unfounded in law. It was conceded by counsel that, if the plaintiff were, at the material time, in fact a trespasser, he could not recover. No doubt, he had the permission of the driver to come on the lorry, but for him to recover against the defendants, as distinct from the driver, it must appear that he was riding on the lorry at the invitation or with the licence, actual or constructive, of the defendants themselves. If he was as against them a trespasser, then, whatever his rights against the driver, he could no more recover from the defendants than could the plaintiff in *Twine's* case (1). It is elementary that if A, professedly acting on behalf of B, purports to give me leave to enter on B's land, and A has no actual authority to do so, I am a trespasser if I act on this permission, and none the less so because I do not know of A's want of authority. So here, there can be no doubt that the driver had no authority to give any such permission. He was peremptorily forbidden to do so in the plainest terms. The plaintiff, on getting on the lorry, was *prima facie* a trespasser, and to displace this awkward conclusion plaintiff's counsel has had to resort to a number of contentions none of which is, in my view, covered by the pleadings. On the pleadings the plaintiff alleged an invitation by the defendants, but when he was asked for particulars of that invitation, the only particulars he gave consisted of the driver's invitation itself. I think these unpleaded contentions on which the plaintiff is forced to rely amount to this, that, although the driver acted in excess of his actual authority, the defendants had invested him with an apparent authority in excess of his actual authority. The actual authority was admittedly to carry the defendants' men alone; the apparent authority was to carry men who were working on the aerodrome, whether employed by the defendants or not. They had caused or allowed it to appear, so the argument runs, to people like the plaintiff that they had their permission to travel on their lorries, and in these circumstances the defendants must be treated as estopped from relying on the actual limits of the driver's authority.

The steps by which this result is reached must logically be the following, if it is to be reached at all. First, there has to be shown knowledge by the defendants that their lorry drivers had made a practice of disregarding the prohibition; secondly, acquiescence by the defendants in that practice; and, thirdly, acquiescence in such a manner as to represent to the plaintiff that the driver's authority was not limited to carrying the defendants' men. I cannot see how the plaintiff can get over the first of these three hurdles, not to mention the second and the third. The learned judge has expressly found, and there was evidence, in my view, on which he could so find, that it had not been established that the defendants knew that their drivers gave lifts to unauthorised persons. To this awkward finding two answers were attempted. First, it was said that this finding applies only to actual, and not to imputed, knowledge, and that, as four of the defendants' employees gave evidence that they knew of the practice, the defendants must be treated as having known of it. I do not consider that the knowledge of these men, who had nothing to do with the defendants' transport department but were engaged as concrete mixers, can be properly imputed to the defendants, and the point, if not abandoned, was certainly not pressed. The

second answer was that the defendants must have known, given that their lorries plied within the limits of the site and that workmen working for several different contractors were there, that a practice of this kind must inevitably grow up, and that they must be taken to have known that it did grow up, but when there is a clear finding supported by evidence that they did not know, how can it be said that they *must* have known? I do not see how that contention can be substantiated. Unless, at all events, knowledge by the defendants is proved, the whole of this argument based on ostensible authority fails *in limine*. I am, accordingly, of opinion that the plaintiff never ceased to be a trespasser, and that the case is directly covered by *Twine's* case (1). If that is right, it is sufficient to dispose of the appeal.

The case, however, was also argued from a different angle of approach—that of scope of employment. The two approaches, of course, overlap or interlock to some extent. As is pointed out in *Twine's* case (1) by UTHWATT, J., in the court of first instance (174 L.T. 240):

“... it was outside the scope of the driver's employment for him to bring within the class of persons to whom a duty to take care was owed by the defendants, a man to whom, contrary, to his instructions, he gave a lift ...”

Those words seem to me directly in point here. To put it differently, I should hold that taking men other than the defendants' employees on the vehicle was not merely a wrongful mode of performing an act of the class which the driver in the present case was employed to perform, but was the performance of an act of a class which he was not employed to perform at all. In other words, the act was outside the scope of his employment for the same reason that the act complained of in *Twine's* case (1) was held to be outside the scope of the driver's employment there. I am not unaware that a prohibition has been held in some cases not to curtail the scope of employment, as in *Limpus v. London General Omnibus Co.* (2), but I think it does so in the present case. However, on the view I take of this case, it is unnecessary to decide whether this second ground is valid or was established. I would dismiss the appeal.

BIRKETT, L.J.: I agree.

COHEN, L.J.: I agree, and I only want to add a word on a part of the judgment which is somewhat difficult to follow. The learned judge is reported as having said ([1950] 2 All E.R. 332):

“The argument was that the defendants ought to have known what was happening and that the plaintiff and others like him would use the lorries, and, therefore, they owed a duty to such persons as those who might reasonably be anticipated by them to be likely to be injured by the negligent driving of their servant: *Hay (or Bourhill) v. Young* (3). Such considerations are relevant in considering the duty and obligations of the driver of the vehicle, but, in my view, they are not relevant in considering the responsibility of the defendants.”

Counsel for the plaintiff said that, if the argument was as stated, it did concern the responsibility of the defendants. When, however, one looks at *Hay (or Bourhill) v. Young* (3) one sees clearly that that case had nothing to do with the responsibility of employers for the acts of their servants. The only question at issue was whether the executor of a motor cyclist, who had been killed in an accident, could be held responsible to a woman who had heard the noise of the collision with a motor car while standing on a stationary tram car some fifty feet from the point of impact and as a result suffered fright, sustained severe nervous shock and gave birth to a child prematurely. The question whether the employer

of the motor cyclist might be responsible for any damage for which the motor cyclist was responsible did not arise. That is, I think, what the learned judge must have meant when he said that the argument had nothing to do with the responsibility of the defendants. For the reasons that my Lord has given, I entirely agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *J. H. Milner & Son* (for the plaintiff); *Stanley & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

GOULD v. MINISTER OF NATIONAL INSURANCE AND ANOTHER.

[KING'S BENCH DIVISION (Ormerod, J.), December 11, 12, 1950, January 11, 1951.]

National Insurance—"Self-employed person"—*Music-hall artist*—*National Insurance Act, 1946* (c. 67), s. 1 (2) (a) (b).

The appellant, a music-hall artist, entered into a written contract with the second respondent to appear in a variety "act" at a theatre for one week. The contract, *inter alia*, provided that the appellant might be transferred to other theatres of the same management, prohibited his appearance at certain other theatres, specified penalties for non-appearance in accordance with the contract, provided for his acting as deputy at other theatres in an emergency, and contained an undertaking that his performance would not be dangerous. Rules attached to it required him to attend rehearsals at times stipulated by the management, stipulated the times of performance, dealt with illness and provided that, if required, the appellant should submit to medical examination, dealt with the use of improper words and gestures, authorised a fine or cancellation of the agreement if the appellant was in the theatre when intoxicated, empowered prohibition of the whole or part of his performance if it was considered unsuitable or unpleasing, prohibited variation from the words of songs or dialogue previously approved, and required the appellant to produce a new or revert to an old "act" on request.

HELD: (i) although the second respondent was empowered under the contract to prohibit an objectionable part of the appellant's performance and to require him to produce a new "act" or revive an old one, those and the other provisions of the contract and rules were necessary for the proper working of the theatre, and the performance of the appellant depended on his skill, personality, and artistry with which the contract gave the second respondent no right to interfere; the contract, therefore, was one for services and not of service; and the appellant was a "self-employed" person within the meaning of the *National Insurance Act, 1946*, s. 1 (2) (b), and not an "employed person" within s. 1 (2) (a).

(ii) the question, being one of the construction of the contract, was one of law, and, therefore, under s. 43 (4) of the Act and the *National Insurance (Determination of Claims and Questions) Regulations, 1948*, made thereunder the appellant was entitled to appeal to the High Court against a decision of the Minister of National Insurance that the appellant was not an "employed person."

[FOR THE NATIONAL INSURANCE ACT, 1946, s. 1 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 16, p. 673.

FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, s. 1, and sched. I, see *ibid.*, pp. 801 and 895, respectively.]

Cases referred to:

- A (1) *Re Winter German Opera, Ltd.*, (1907), 23 T.L.R. 662; 42 Digest 909, 58.
 (2) *Short v. Henderson, Ltd.*, (1946), 115 L.J.P.C. 41; 174 L.T. 417; 39 B.W.C.C. 62; 2nd Digest Supp.
 (3) *Binding v. Great Yarmouth Port & Haven Comrs.*, (1923), 92 L.J.K.B. 377; 128 L.T. 743; 16 B.W.C.C. 28; 34 Digest 260, 2220.

B CASE STATED by the Minister of National Insurance under reg. 4 of the National Insurance (Determination of Claims and Questions) Regulations, 1948 (S.I. 1948, No. 1144) (made under s. 43 of the National Insurance Act, 1946), and under R.S.C., Ord. LV(B) as amended by R.S.C. (No. 2) 1948 (S.I. 1948, No. 1439 (L.16)).

C The appellant was a music-hall artist who had entered into a written contract with the second respondent, acting on behalf of several companies, under which he undertook to appear in a variety "act" at a theatre for one week from Sept. 6, 1948. The first respondent, the Minister of National Insurance, had decided that during that week the appellant was not an "employed person" within the meaning of the National Insurance Act, 1946, s. 1 (2) (a), but was a "self-employed person" within the meaning of s. 1 (2) (b) of the Act. For the appellant it was contended that he was a servant of the management by reason of the degree of control it exercised over his performance. The respondents contended
 D that the degree of control was only such as was necessary for the proper running of the theatre and compliance with the licensing regulations, and did not permit the management to direct the manner in which the appellant's performance was to be given.

Sir Charles Doughty, K.C., and *Doughty* for the appellant.

E *J. P. Ashworth* for the Minister of National Insurance, the first respondent.
Beney, K.C., and *E. V. Falk* for the second respondent.

Cur. adv. vult.

Jan. 11, 1951. ORMEROD, J., read the following judgment. This is an appeal by Mr. Frederick A. Gould, professionally known as Nat Hope, under the regulations made under s. 43 of the National Insurance Act, 1946, against
 F the decision of the Ministry of National Insurance that the appellant was not, during the period between Sept. 6, 1948, and Sept. 11, 1948, an employed person within the meaning of s. 1 (2) (a) of the Act, but was a self-employed person within the meaning of sub-s. (2) (b).

G The facts which came before the court by way of Case stated by the Minister under the provisions of the regulations are that the appellant, who is a music-hall artist, entered into a contract in writing dated Aug. 31, 1948, with one Prince Littler, the second respondent, acting on behalf of a number of companies set out in a schedule to the contract, to appear with a female partner in a variety act described as a comedy duo at a certain specified theatre for one week from Sept. 6, 1948. The contract was in the standard form in general use by music hall artists and known as the "Arbitrator's Award 1919
 H Contract," and a copy of the contract and conditions thereto are attached to and form part of the Case Stated. The appellant and his partner, in pursuance of the contract, duly performed the variety act at the Grand Theatre, Derby, for a week from Sept. 6, 1948. On these facts the Minister decided: (i) that during the period in question the appellant was a person gainfully employed in Great Britain; (ii) that the said contract was not a contract of service; and (iii) that during the said period the appellant was included in the class of self-employed persons for the purposes of the National Insurance Act, 1946.

On Jan. 10, 1950, the Minister gave notice in writing of this decision to the parties concerned. There is no question about the first of these three findings, and in effect, this appeal is against findings (ii) and (iii).

By s. 1 (2) (a) of the National Insurance Act, 1946, an employed person is defined as a person

“ . . . gainfully occupied in employment in Great Britain, being employment under a contract of service.”

The question for decision in this appeal is whether the contract should be regarded as a contract of service or whether it is nothing more than a contract for services, to use words which have been used by the courts in many of the decisions to which I was referred in the course of the argument. It is necessary, therefore, to refer to the terms of the contract and to the attached rules and regulations, which by cl. 19 are to be read and construed as forming part of it. Clause 4 provides that with the consent of the artist, not to be unreasonably withheld, he may be transferred during the whole or any part of the agreement to any other theatre owned or controlled by the management. Clause 5 prohibits him from appearing at other theatres within certain prescribed distances and times. Clause 7 provides for penalties to be paid by the artist if he fails to appear at any performance except through illness or accident. Clause 8 provides for his acting as deputy in an emergency at other theatres owned or controlled by the management in the same town. Clause 9 is an undertaking by the artist that his performance will not be dangerous to the audience, other artists, or the theatre employees. By cl. 15 the artist may be obliged to perform at the theatre in certain circumstances if there has been a change of management, and by cl. 19 the artist agrees to abide by all reasonable rules which may from time to time be made by the management for the good and orderly conduct or special requirements of their theatres. There are other clauses, but the ones that I have mentioned are those which appear to be relevant to the question in issue.

Emphasis in the argument was laid more particularly on the rules and regulations attached to the contract. Of these, r. 1 stipulates that the artist shall attend rehearsals with band parts at times stipulated by the management. Rule 2 stipulates the time at which the artist shall be at the theatre ready to perform. Rule 3 sets out the procedure to be adopted in case of illness, and provides that the artist shall, if required, submit to medical examination. Rule 4 deals with the use of improper words or gestures. Rule 5 provides that the artist may be fined one week's salary or his engagement may be cancelled if he is in the theatre in a state of intoxication. Rule 7 gives the management power to prohibit the whole or any part of the performance which they may reasonably consider unsuitable or unpleasing to the audience, and prohibits any variation from the words of songs or dialogue previously approved. By r. 8 the artist agrees to produce a new or to revert to any old song, sketch, or act at the reasonable request of the management. Rule 9 provides that the artist shall respond to encores as the management shall reasonably direct, and r. 11 prohibits smoking in the dressing-rooms or in close proximity to the stage. There are other rules, but they do not appear to affect the question that I have to consider.

It was contended on behalf of the appellant that the terms of the contract, when read with the rules and regulations, are such as to establish such a degree of control over the appellant that he must be regarded as a servant. The requirement to attend for rehearsal and to submit himself for medical examination if necessary, and the provisions with regard to appearing at other theatres owned by the management and being barred from appearing at theatres not owned by them, were all urged as instances of control going beyond that which would constitute the contract one for services only, and particular emphasis was laid on r. 7 and r. 8, which deal respectively with the right of the

management to prohibit the whole or any part of a performance, and to require the appellant to produce a new or revert to any old song, sketch, or act. For the respondent it was contended that the degree of control which is imposed by the contract is only such as is necessary for the proper running of the theatre and compliance with the licensing regulations, and in no way gives the management the right to direct the manner in which the performance should be given.

- A A large number of cases was referred to in the course of the argument where a similar question had arisen in the administration of other statutes, and, particularly, the Workmen's Compensation Acts, but, as WARRINGTON, J., said in *Re Winter German Opera, Ltd.* (1) (23 T.L.R. 662), the question in this and similar cases must turn on the particular facts of each particular case, and the authority of other cases, and particularly of cases based on different statutes, is of very little assistance. It is easy in some cases to say that the contract is a contract of service and in others that it is a contract for services, but between these two extremes there is a large number of cases where the line is much more difficult to draw. Although the authority of cases based on different statutes may be of very little assistance in deciding any particular case, it is possible to extract from these authorities a common principle on which the decisions are founded. It is clear that the real question is one of the degree of control exercised by the person employing the artist, and this, as I see it, means not only the amount of control but the nature of that control and the direction in which it is exercised. In *Short v. Henderson* (2), a case in the House of Lords under the Workmen's Compensation Acts, LORD THANKERTON (115 L.J.P.C. 47) recapitulates with approval the four *indicia* of a contract of service derived by the Lord Justice-Clerk from the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal. He goes on to say that the particular requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

- It is clear in this case that the management had the power to select the artist, that the artist was paid a remuneration which in the agreement is called a salary, and that in certain circumstances the management reserved the right to cancel the contract. There were, in addition, other conditions in the contract by which the appellant agreed to be bound. In my view, however, they were simply conditions necessary to the proper working of the theatre. Indeed, they were conditions by which, in a suitably modified form, modified in a way that would not affect the issue, any concert artist who was appearing at a concert for a single night might reasonably agree to be bound, and I cannot imagine that in such circumstances anyone would argue that the contract was a contract of service. As I see this contract, there is nothing which imposes on the appellant any control over the method in which he performs his act. It is true that the management has the right to prohibit any part of the performance which they think may offend the audience, and that the right is reserved to require the appellant to produce a new song or sing an old one, and so on, but the performing of the act depends entirely on the skill, the personality, and the artistry of the appellant, and this is a matter with which the contract gives the management no right to interfere. I am, therefore, of the opinion that the contract in question in this case is a contract for services only, and not a contract of service, and that the Minister was right in treating the appellant as a self-employed person.

It was submitted by counsel for the second respondent, that as the appellant's right to appeal was restricted to an appeal on matters of law this appeal must

be dismissed if on the contract it could be said that there was evidence by which the Minister could find that the contract was one for services only. In support of his submission he cited a number of decisions of the Court of Appeal in cases under the Workmen's Compensation Acts where the question had been treated as a question of fact. I note, however, that in the one case under the Workmen's Compensation Act cited to me where the contract was contained entirely in a written document—*Binding v. Great Yarmouth Port & Haven Comrs.* (3)—ATKIN, L.J., said (92 L.J.K.B. 381):

"The question before us . . . seems to me to be a question of pure law, namely, the construction of a written agreement."

In view of the opinion that I have expressed it is not necessary for me to decide this point, but I think I should say that as this case depends entirely on the construction of a written agreement I should regard it as a question of law, and, therefore, one which can be the subject of appeal under the appropriate section of the statute. It follows from what I have said that the appeal will be dismissed.

Appeal dismissed.

Solicitors: *Clare & Clare* (for the appellant); *The Solicitor, Ministry of National Insurance* (for the first respondent); *Hall, Clark, Goldhawk and Jutsum & Co.* (for the second respondent, Mr. Prince Littler).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re SMALLWOOD (*deceased*). SMALLWOOD *v.* MARTINS BANK, LTD. AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 17, 18, 19, 22, 1951.]

Family Provision—Evidence—Intention of testator—Statement, not in writing, made by testator to deponent—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (7).

In an application by a widow for provision to be made for her under the Inheritance (Family Provision) Act, 1938, s. 1 (1), it was sought to put in evidence a statement by a son of the testator in which he said: "The testator on many occasions told me that the plaintiff was drinking too much and that he had found bottles of whisky and gin hidden in her wardrobe . . . These matters much distressed the testator. In 1929 the plaintiff left the testator for a short time, and in 1930 they entered into a deed of separation, but they were reconciled in the following year. The testator also told me that in 1933 the plaintiff had an affair with [a person named] and that he had forgiven her. From 1931 onwards the relations between the plaintiff and the testator steadily deteriorated. The plaintiff's main interest was indulging in a social life and in endeavouring to obtain an entry into a higher social circle, and these matters did not interest the testator. The testator told me frequently that the plaintiff was continually nagging and quarrelling with him, that she was frequently the worse for drink, and that in 1947 she had seriously assaulted him. During the war, the testator travelled to London nearly every week and came and saw me. On these occasions he complained to me most bitterly of the plaintiff's conduct. The testator was also in the habit of spending week-ends either with me or my sisters in order to escape from the plaintiff, and I know that he dreaded going back to her. In 1947 the testator's health was bad and he was so

unhappy with the plaintiff that he felt it was essential that there should be a separation."

HELD: section 1 (7) of the Act was not confined to evidence of the reasons given by the testator for making the dispositions made by his will, or for not making any provision, or any further provision, as the case might be, for a dependant, but extended to evidence of facts from which the court could infer the reasons of the testator for making the dispositions made by his will, or for not making any provision, or any further provision, as the case might be, and, therefore, the son's statement was admissible.

Re Vrint ([1940] 3 All E.R. 470), *applied*.

[FOR THE INHERITANCE (FAMILY PROVISION) ACT, 1938, s. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 795-797.]

B Cases referred to:

(1) *Re Vrint*, [1940] 3 All E.R. 470; [1940] Ch. 920; 109 L.J.Ch. 431; 163 L.T. 306; 2nd Digest Supp.

(2) *Re Pugh*, [1943] 2 All E.R. 361; [1943] Ch. 387; 112 L.J.Ch. 311; 169 L.T. 284; 2nd Digest Supp.

C ADJOURNED SUMMONS by which application was made by the widow of the testator for provision to be made for her out of the testator's estate under the Inheritance (Family Provision) Act, 1938, s. 1 (1). Objection was taken to certain evidence on the ground that (it being otherwise inadmissible) s. 1 (7) of the Act of 1938 did not render it admissible. The relevant part of the evidence is set out in the judgment and in the headnote.

D *Ungoed-Thomas, K.C.*, and *W. G. H. Cook* for the plaintiff, the widow.
Lodge for the first defendant, the executor.

R. W. Jennings, K.C., and *B. S. Tatham* for the second, third and fourth defendants, annuitants under the will.

M. J. Albery for the fifth and sixth defendants, residuary legatees.

E **ROXBURGH, J.:** This is an application under the Inheritance (Family Provision) Act, 1938, s. 1 (1), by the testator's widow. A statement by one of the testator's sons, parts of which are said to be inadmissible in evidence, contains the following paragraph:

"The testator on many occasions told me that the plaintiff was drinking too much and that he had found bottles of whisky and gin hidden in her wardrobe ... These matters much distressed the testator. In 1929 the plaintiff left the testator for a short time, and in 1930 they entered into a deed of separation, but they were reconciled in the following year. The testator also told me that in 1933 the plaintiff had an affair with [a person named] and that he had forgiven her. From 1931 onwards the relations between the plaintiff and the testator steadily deteriorated. The plaintiff's main interest was indulging in a social life and in endeavouring to obtain an entry into a higher social circle, and these matters did not interest the testator. The testator told me frequently that the plaintiff was continually nagging and quarrelling with him, that she was frequently the worse for drink, and that in 1947 she had seriously assaulted him. During the war, the testator travelled to London nearly every week and came and saw me. On these occasions he complained to me most bitterly of the plaintiff's conduct. The testator was also in the habit of spending week-ends either with me or my sisters in order to escape from the plaintiff, and I know that he dreaded going back to her. In 1947 the testator's health was bad and he was so unhappy with the plaintiff that he felt it was essential that there should be a separation."

In fact, there was a deed of separation on Oct. 22, 1947. The testator made the will in question on Apr. 3, 1948, and died on Oct. 9, 1948. Now some portions

of this paragraph are obviously inadmissible unless they are admissible under s. 1 (7) of the Act of 1938, but I think it is necessary to treat the paragraph, or that part of it which I have read, as a whole.

Counsel for the widow takes two points. First, he says that this paragraph is not a statement of the testator's reasons, and that, therefore, it does not come within the sub-section. Alternatively, if it is, he says it is not within the ambit of the section because it is not a statement in writing by the testator. I must confess that at first sight I should have thought that counsel's first point was a good one. I should have thought that this sub-section was directed to statements by the testator of his reasons, and did not extend to statements by the testator of facts which the court may hold to have constituted his reasons. I find it impossible, however, to reconcile that *prima facie* view with the decision in *Re Vrint* (1), which has stood unchallenged since 1940. In that case the plaintiff widow had taken proceedings for maintenance against the testator in a petty sessional court, and an order had been made thereon on Sept. 10, 1935. In contemplation of the hearing, the testator's solicitor had prepared in the ordinary course of business, on his oral instructions, a proof of the evidence which he was ready to give. It had been dictated by the solicitor to a typist, by whom it was transcribed, and had then been sent to the testator, who had returned it without correction, but unsigned and without any covering letter. "Counsel for the defendant tendered it in evidence to enable the court to ascertain what were the testator's reasons for the provisions he made in his will". I think that must be an accurate statement of what counsel was trying to do. It is almost unthinkable that that proof contained any statement in terms about the testator's testamentary intentions, and, if it had contained any such statement, I feel sure that it would have been mentioned either in the report or in the judgment. It seems to me certain that the documents must have contained statements about the widow from which the court could infer what were the testator's reasons for making no provision for her, and I think that the sentence which I have quoted shows that that is what counsel was trying to do. Counsel tendered the document in evidence, not to show what reasons the testator gave, but to enable the court to ascertain what were the testator's reasons. I think that follows from the way BENNETT, J., stated the problem himself. He said ([1940] 3 All E.R. 472):

"The question is whether the court is entitled to look at that document [the proof] for the purpose of ascertaining the testator's reasons for making the disposition he did make in his will."

It is to be noted that he does not say "in order to find a statement of the testator's reasons." Having thus posed the problem himself, the learned judge held that the document was admissible. Therefore, I feel no doubt that I ought to follow BENNETT, J., in what is, on any view, a difficult point, and I feel that I ought to hold that the section is not confined to evidence of the reasons given by the testator for making the dispositions made by the will or for not making any further provision, as the case may be, but extends to evidence of facts from which the court can infer the reasons of the testator for making the dispositions made by his will, or for not making any provision, or any further provision, as the case may be.

The second point made by counsel for the widow is founded on a passage in MORTON, J.'s judgment in *Re Pugh* (2). MORTON, J., said ([1943] 2 All E.R. 364):

"I am prepared to assume in favour of the widow without deciding it that verbal statements alleged to have been made by the testator to the widow in his lifetime come within the terms of the sub-section, although the inclusion of the words 'including any statement in writing signed by the testator and dated' may possibly throw some doubt on that point."

I have to decide what MORTON, J., was able to assume without deciding. He does throw some doubt on the point, but he certainly does not say that he thinks it is an assumption that ought not to be made.

A I cannot myself see on this point any real distinction between the present case and *Re Vrint* (1), because in *Re Vrint* (1) though the statement was in writing, it was not a statement which the testator had written nor a statement which he had signed. The testator gave oral instructions to the solicitor and the solicitor dictated the statement to a typist, who transcribed it, and it was then sent to the testator who returned it. I cannot see any substantial difference between such a document and a statement by the testator to another person. The only difference is that in one case the statement had been recalled to the mind of the testator, and in the other case, no doubt, it was not. I do not, therefore, think that the point is open in view of *Re Vrint* (1). If, however, it is open, I must confess that the words of the section are "such evidence . . . as it considers sufficient," which are as wide as they could be, and, though it is rather surprising that there should, in those circumstances, have been added the words "including any statement in writing signed by the testator and dated," having regard to the word "including" it cannot, I think, possibly be that by reason of those words the generality of the words "such evidence of those reasons as it considers sufficient" has to be curtailed. Therefore, in my judgment, this second point fails also, and the evidence is admissible.

Solicitors: *Gibson & Weldon*, agents for *Berry & Berry*, Tunbridge Wells (for the plaintiff); *Jordan & Lavington* (for all the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

D

E

applied. Re SPENSLEY'S WILL *ceased*. WRAY v. WRAY AND OTHERS.
RUSTS. [1952] 2 All E.R. 49.
HOUSE OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
January 18, 19, 1951.]

Will—Revocation—Principles of construction of revocatory clause—Partial revocation by codicil.

F

By her will, made in April, 1945, H. appointed C., G. and E. to be her executors and trustees and gave to each of them who accepted the office a legacy of £50. She bequeathed certain other legacies, gave directions with regard to her dwelling-house and other real property, and gave her residuary estate to her trustees on the usual trusts for sale and conversion and investment and on trust to apply the income for the benefit of F. during her life "and after her death my trustees shall hold the capital and income from such investments in trust for [C.] absolutely Provided that if [C.] shall die in my lifetime . . . I direct that the same shall be dealt with as if [C.] had survived me . . . and be transferred and paid to his personal representatives and form part of his estate and be treated as directed by his will." On Dec. 20, 1945, C. made his will and gave his residuary estate on trust to pay the income to G. for her life and subject thereto to his four children absolutely. On Nov. 12, 1948, H. made a codicil to her will making certain further pecuniary bequests (including a legacy of £100 to G.) and provided by cl. 4: "I revoke the appointment of [G.] in cl. 2 of my will as executrix and direct that my said will shall take effect as if her name was omitted from my will and as if she were dead." On Jan. 27, 1949, H. died, C. having predeceased her.

G

H

HELD: on the true construction of cl. 4 of the codicil (bearing in mind the tendency of the court in construing such revocatory clauses not to be too strict in giving full effect to all the words used) the testatrix did not intend thereby to exclude G. from benefiting under the referential trusts of her residuary estate, and, therefore, G. was entitled to receive the income of the said residuary estate during her life.

Re Freeman ([1910] 1 Ch. 681) and *Re Percival* (1888) (59 L.T. 21), applied. A

[AS TO PARTIAL REVOCATION OF A WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 78-80, paras. 110, 111; and FOR CASES, see DIGEST, Vol. 44, pp. 324-330, Nos. 1560-1609.]

Cases referred to:

(1) *Re Cousen's Will Trusts*, [1937] 2 All E.R. 276; [1937] Ch. 381; 106 L.J.Ch. 261; 157 L.T. 32; Digest Supp. B

(2) *Re Percival*, (1888), 59 L.T. 21; 44 Digest 328, 1595.

(3) *Re Freeman*, [1910] 1 Ch. 681; 79 L.J.Ch. 678; 102 L.T. 516; 44 Digest 330, 1608.

APPEAL by the first defendant, Gladys May Wray, from an order of VAISEY, J., dated Oct. 26, 1950, holding that, on the true construction of cl. 4 of the codicil to the will of Hetty Wray, deceased, the first defendant was by that clause excluded from benefiting under certain trusts incorporated by reference into the said will. The facts appear in the judgment of SIR RAYMOND EVERSHED, M.R. C

Pennyquick, K.C., and *Mendel* for the first defendant, Gladys May Wray.

McMullen for the plaintiff, the trustee of the will of Hetty Wray.

Cross, K.C., and *Raymond Walton* for the remaining defendants, interested (subject to the interest, if any, of the first defendant) in the corpus of the residuary estate of Hetty Wray. D

SIR RAYMOND EVERSHED, M.R.: The question in this case is whether a short paragraph in a codicil has the effect of excluding the first defendant from an interest for life which she otherwise would take, not by direct gift in the will, but by the operation of the will of another person, the trusts of that other person's will being made applicable to this testatrix's estate by reference in the manner with which I will proceed to deal. E

We are concerned with the will and codicil of Hetty Wray, who died on Jan. 27, 1949. By that will Miss Wray appointed, in cl. 2, her brother Charles, her sister-in-law, Charles' wife, Gladys May Wray (who is the first defendant and the appellant before us), and her nephew, the plaintiff in the action, Edward Geoffrey Wray (who was the son of Charles by a first marriage), executors and trustees, and she gave to each such executor who accepted the office a £50 legacy free of duty. In cl. 3 she gave two legacies. One was a pecuniary legacy to a sister, Frances, and the other was a substantial gift to the brother, Charles, already mentioned, whom failing the gift was to go to a nephew, Charles' son. There was then a provision as to her dwelling-house in favour of Frances, and another provision in regard to some other real property, also in favour of Frances. She then proceeded to deal with her residue. There were the usual provisions for sale and conversion, and the operative trusts were that the trustees were to hold the investments on trust to apply the income for the benefit of the sister Frances. Then there was a provision to which I will not refer, and the clause (cl. 6) proceeds: F

"and after her [Frances'] death my trustees shall hold the capital and income from such investments in trust for my said brother Charles Wray absolutely Provided that if the said Charles Wray shall die in my lifetime [as he did] or in the lifetime of my said sister Frances Wray [she also predeceased the testatrix] I direct that the same shall be dealt with as if the said Charles Wray had survived me and my said sister Frances Wray and be transferred and paid to his personal representatives and form part of his estate and be treated as directed by his will." G

H

Before I come to the codicil, it will, I think, be convenient if I explain what is the relevant law as appearing in *Re Cousen's Will Trusts* (1), the validity of which decision counsel for the first defendant has not challenged.

A On the face of it it might have been supposed that such a gift would produce the result that the fund disposed of was simply transferred for all purposes to the estate of the other named person and would go to the persons benefited by that other person, or, if those beneficiaries had died, to their estates, but *Re Cousen's Will Trusts* (1) laid it down that, notwithstanding such a formula as "and form part of his estate," and so on, the result of such a provision is that the persons who may be specified (in this case) by Charles take Hetty's estate as direct beneficiaries of Hetty, with the further consequence that to be entitled so to take those beneficiaries must survive Hetty herself. To illustrate the point by a simple example, if it be supposed that Charles, who did predecease B the testatrix, had left the whole of his estate to his wife, Gladys, and if it be supposed that Gladys herself had also predeceased Hetty, then this provision would be wholly ineffective, for Gladys, not having survived Hetty, would take nothing, and her estate could take nothing, albeit that she was the universal legatee and devisee under Charles' will.

C I have stated that the validity of that decision is not challenged, and I am not to be taken as suggesting that it could be challenged, but, as JENKINS, L.J., observed during the argument, to the lay mind it is, perhaps, a somewhat technical legal rule. It would, or it might, appear to an inexperienced person that by a provision such as that with which we are concerned you are simply saying that in the event supposed you hand over your estate to the personal representatives of somebody else, and those personal representatives treat what they D receive for all purposes as an accretion to their own estate. For the reasons that I have indicated, that is not so.

E Hetty's will was dated April, 1945. Frances died not long afterwards, but at that time the material will of Charles, which has given rise to the present problem, had not been made. On Dec. 20, 1945, Charles made his will and gave his residue on trust to pay the income to his wife, the first defendant, Gladys May Wray, for life, and subject thereto the capital was divided amongst his four children by his former marriage, namely, the plaintiff and the remaining three defendants, all married women. On Nov. 12, 1948, Hetty Wray, the testatrix, made the codicil, cl. 4 of which gives rise to the point which we have to determine. By cl. 1 she gave a number of pecuniary legacies, the first of F which was in favour of the nephew whom I have already mentioned. The next is in favour of his wife, and there were others in favour of the stepchildren. The last but one was in favour of the first defendant, Gladys May Wray, to whom the testatrix gave £100 which was not, in point of fact, larger than some of the other legacies in the same clause. In cl. 2 of the codicil the testatrix dealt with the provision that she had made in cl. 4 of the will in favour of Frances, and that G she did because, as she said by recital, her sister Frances was dead. Although the rest of the document is in typescript, cl. 4 was inserted in manuscript by the solicitors' clerk who was advising the testatrix and was an attesting witness. I mention that fact because in some way counsel for the first defendant relied on that circumstance, but I myself have been unable to see any sound argument which can be rested on it, and, therefore, I will take no further time in dealing H with that point.

Clause 4 is:

"I revoke the appointment of Gladys May Wray in cl. 2 of my will as executrix and direct that my said will shall take effect as if her name was omitted from my will and as if she were dead."

The question is whether, having regard to the rule in *Re Cousen's Will Trusts* (1), which I have stated, that provision has the effect that Charles' testamentary disposition giving a life estate to his widow must now be treated *quoad* Hetty's

estate as ineffective, so as to make Hetty's residue go by virtue of Charles' disposition shorn of the life estate direct to the plaintiff and the last three defendants. VAISEY, J., held that it had that effect.

On a matter of this sort, turning on the language of a will, I always feel reluctant to differ from the judge of first instance, and no one can doubt that the problem does present difficulties, but after listening to the argument I confess that I have come to a clear conclusion that this cl. 4 was not intended by the testatrix to have so far-reaching an effect. If the matter were free from authority I am not sure that I should not be compelled, in spite of the impression that this codicil has had on my mind, to come to the contrary view, for without any authority I might, I think, be constrained to say that the duty of the court was to give effect so far as possible to all the words used, including the last few words of this clause, "and as if she were dead," and that to give true effect to that formula, *i.e.*, to make it do something which had not already been done by the preceding words, you would have to say that these referential trusts were limited in their effect. The matter is not, however, free from authority.

We have been referred to two cases, the first of which is *Re Percival* (2) and the second of which is *Re Freeman* (3). Both were decisions of this court. Both were cases in which a clause in a codicil containing language perfectly general *prima facie* in its effect was held, nevertheless, to be restricted to the particular subject-matters with which the clauses by their opening words were introduced to deal. It is a truism to observe that every case must obviously depend on its own particular facts. The language in the present case is quite different in certain respects, to some of which I shall advert in a moment, from the language in either of the two cases cited. That I fully appreciate. Counsel for the last three defendants, the step-daughters, said, as the learned judge said, that *Re Freeman* (3) ought to be regarded as having reached a high watermark in matters of this kind, and that the tide should not be allowed further to encroach. I am not sure that I fully understand what is meant by that phrase. I think that these cases do show a disposition on the part of the court in cases of revocations in codicils to depart somewhat from the general rule that I have indicated of giving effect where possible to all the words used and to confine such revocatory clauses to the particular subject-matter with which they are introduced to deal. Put otherwise, they emphasise in cases of this kind that that which has by a will been clearly given should not be treated as taken away by a codicil unless that intention is quite clearly expressed.

Re Percival (2) will, I think, illustrate what I have tried to express. That was a case in which a testatrix bequeathed to a grand-daughter a watch and to another grand-daughter a brooch. Later in the will the first grand-daughter was given a legacy of £200. Then came the codicil, which was, so far as material, as follows:

"Whereas by my said will I have bequeathed my watch to my grand-daughter, Mary Emma Maude Dutton, and my brooch, containing a portrait of my late husband, to my grand-daughter, Jane Beatrice Margaret Boote ... Now I hereby revoke and make void the said legacies and bequests in my said will contained in favour of the said Mary Emma Maude Dutton and Jane Beatrice Margaret Boote ..."

who were the named grand-daughters. So far the matter is obvious and simple. Then the clause goes on:

"... and declare that my said will shall be read and construed in all respects as if the names of the said Mary Emma Maude Dutton and Jane Beatrice Margaret Boote had not been inserted therein, and in all other respects I confirm my said will."

The question obviously was whether the second part of that clause revoked the pecuniary legacy of £200 to the first of the grand-daughters. If effect were given to the words used in their ordinary sense that must have been the result, for not

otherwise could the will be read and construed "in all respects" as if her name had not been inserted therein, but this court held that, looking at the clause in its context and in the light of the whole testamentary dispositions, it could not have been in the mind of the testatrix to deal with anything more than the specific gifts of the watch and the brooch. That was, I think, a strong case. It is true, and this is a very forcible point, that that result was much assisted, as counsel for the step-daughters has observed, by the circumstance that the clause was introduced by a recital, and a recital is a strong indication that what follows in the operative part deals with what is intimated by the recital and nothing more. Counsel makes the same point with regard to *Re Freeman* (3). At the risk of taking a little time I will state, as briefly as I can, the facts in *Re Freeman* (3). There was there, as in this case, the appointment of three persons, one of whom was a Mr. Bowyer Nichols, to be executors and trustees, and there was a specific legacy to each executor proving. Then legacies were given to various persons, including Mrs. Bowyer Nichols, and the residue was ultimately to be divided equally between three persons, viz., Lady Duckworth, Mr. Bowyer Nichols, and Mr. G. F. Leverson, or such of them as should survive. The name "Bowyer Nichols" (except as being also his wife's name) occurred only at the beginning where the appointment of executors was to be found, and in the residuary clause. The relevant part of the codicil was as follows:

"Secondly by my said will I have appointed Bowyer Nichols to be one of the executors thereof and I have given him a legacy of £1,000 for his trouble in acting as such executor Now I hereby revoke the appointment of the said Bowyer Nichols as such executor and also the said legacy of £1,000 given to him as aforesaid And I appoint Harry Freeman of 26 Carlisle Terrace Plymouth in the county of Devon to be an executor of my said will in the place of the said Bowyer Nichols, and I give to the said Harry Freeman a legacy of £200 free of legacy duty for his trouble in acting as such executor . . ."

As JOYCE, J., observed, there is no punctuation, but starting with a capital letter the codicil then said:

"And I declare that my said will shall be construed and take effect as if the name of the said Harry Freeman were inserted in my said will throughout instead of the name of the said Bowyer Nichols and in all other respects I confirm my said will."

There the question was whether effect could be given to that language, and, in particular, to that final passage, save by substituting for the name of Bowyer Nichols in the only other place in which it did occur in the will the name of Harry Freeman, namely, with regard to the residue? Again, the Court of Appeal—although KENNEDY, L.J., expressed his own doubts on the matter—came to the conclusion that, as in *Re Percival* (2), the clause, truly construed in its context, related and was intended to relate only to the appointment of executors.

As I have indicated, counsel for the step-daughters relies strongly on the absence in the present case of opening recitals, and it might also be said that it is one thing to strike a name out and it may be another thing to substitute by so oblique a method one person for another as residuary legatee. However, those two cases, although the words are obviously different from those in this case, show, I think, a tendency for the court in revocatory clauses of this kind not to be too strict in trying to give full effect to all the words used.

Let me come to the clause here in question, for this is plainly a matter of the meaning of the words that this testatrix has used. I note that there is here no recital. To that extent, perhaps, counsel for the step-daughters has an easier case than he would have had if there had been here a recital. The clause is all one sentence, not a long one, occupying only just over three lines: "I revoke

the appointment of Gladys May Wray in cl. 2 of my will as executrix and direct " etc. It is conceded that some of this language is tautologous, but it is a point in this case that merely stating that the will "shall take effect as if her name was omitted from my will" would not have had any effect as regards this residual gift, because the right of Gladys May Wray to take by virtue of the referential trusts did not depend on her name being mentioned in this will at all and it was not mentioned in cl. 6 of the will. Therefore (said counsel for the step-daughters), the point of adding "and as if she were dead," is to make this clause apply to cl. 6 of the will. Of course, *per contra* if the words "and as if she were dead" had been put in it was not necessary to say anything more. There is some tautology, on any view of the case. Counsel for the step-daughters said that, if this clause was intended only to have the limited effect for which the first defendant contends, it should have gone on, after the reference to the revocation of the appointment in cl. 2, to direct that "the said cl. 2" should have effect, whereas in fact it says "my said will shall take effect." That is after all no more strong language than using such words as "in all respects," or "throughout," which were the words in *Re Percival* (2) and *Re Freeman* (3).

In the end, as counsel for the step-daughters rightly said, this is a question of the impression made on the mind of the reader, and further elaboration will not, I think, assist. Bearing in mind the tendency which I think is to be discerned from the two cases that I have cited, I conclude, and it is clear to my own satisfaction, that this clause, "I revoke the appointment of Gladys May Wray" etc., was not intended to have any effect on, or to be related in any way to, these referential trusts. I must say that I think it very unlikely that a testatrix, who had provided, as this testatrix had provided, that in the specified events which occurred it was for her brother, Charles, to determine by his will how her estate was to go, should choose this very oblique way of providing that his selection should be subject to the limitation that Gladys should not take under it, particularly as she could have chosen this roundabout way of doing it only if she had absorbed the lesson of *Re Cousens* (1), or if her advisers had and had explained it to her. It is, perhaps, rather a peculiar feature of the case that we have no evidence whether, when she made this codicil, she had any knowledge of what Charles' will was. It might have been an easier question to answer if that fact had been known, but in the absence of evidence we must assume that she was still prepared to leave it to Charles to decide, and he might, of course, alter his mind from time to time as to how, in the events supposed, his estate would go.

It seems to me that there are also other considerations. It will be observed that if Charles survived he took absolutely. Hetty's estate would be added to his own, and, if Charles then died and left a will in the form which his will actually took (which was probable), then Gladys would take, in effect, a life interest in Hetty's estate after Charles had enjoyed it. If the testatrix was anxious that Gladys should in no circumstances take anything of hers, it is a little odd that it was left to the accident whether Charles did or did not survive Hetty. I think also, on the whole, that it would be odd, if we are to suppose that cl. 4 had so wide a disinheriting effect as counsel for the step-daughters argued, that in the earlier part of the same codicil she gave Gladys a legacy of £100. That gift might, no doubt, be a solatium for other losses, but, then, she did not know that Gladys was losing anything. She did not know when this codicil was made what interest Gladys might take under Charles' will. At least the gift shows that cl. 4 was not actuated by a desire that Gladys should take nothing in any circumstances.

I have referred to the fact that there is here a dual formula, "as if her name was omitted from my will," and, "and as if she were dead." Those circumstances were absent from *Re Freeman* (3) and *Re Percival* (2), but it is to be noted that this use of the phrase "and as if she were dead" has its ancestry in one of the well-known conveyancing books of precedents, PRIDEAUX'S PRECEDENTS IN

CONVEYANCING, 22nd ed., and is a form recommended for use in a clause in terms intended only to operate to revoke the appointment as executor, although, of course, if its terms are given full effect it would wholly eliminate the person in question from any benefit under any part of the will. I will not, however, pursue the matter further. I agree that, taking the view I do, and as things have turned out, Gladys May Wray takes a life interest under Hetty's will, although Hetty said that her will was to be construed as though Mrs. Wray were dead.

A The apparent anomaly, I think, overlooks the technicality of *Re Cousens* (1). The truth is that in the events which have happened Hetty Wray's estate went over to her brother Charles' estate, and Gladys takes an interest, in strictness under Hetty's will but by reason of the fact that she was the life tenant under Charles' will and not because she was given any life tenancy or other interest in terms under Hetty's will at all. For these reasons, with due diffidence as I
B am differing from the opinion of VAISEY, J., I conclude that by this phrase this testatrix did not intend to prevent the terms of Charles' will having the effect which otherwise they would have, *viz.*, conferring on the first defendant a life interest in the residue of Hetty's estate.

C JENKINS, L.J.: I agree. The principle to be applied in a case such as this is, I apprehend, that an interest clearly given by a will is not to be held revoked in the absence of clear words of revocation. That comes to this, that, if there is a gift under a will and an ambiguous clause in a codicil which may or may not be intended as a revocation, the gift in the will should be allowed to stand. Illustrations of that principle are to be found in *Re Percival* (2) and *Re Freeman* (3), to which my Lord has referred. Those cases show that in pursuance
D of that principle in a will in which there is a clause containing an express revocation of a particular disposition followed by superadded words in the same clause capable of being given a wider import so as to revoke other dispositions to which the clause in its inception was not directed, the court will lean to the view that the words of revocation, which, taken alone, would appear to be of general import, are to be regarded as restricted to the particular matter to which the clause is directed. The question in each case where the point arises must be
E whether, on the true construction of the relevant clause in conjunction with the remainder of the testamentary disposition, it is proper to hold that the words of revocation are so limited. As I have said, the leaning of the court is to limit them in that way if it is reasonably possible to do so as a matter of construction.

F In the present case cl. 4 of the codicil, as my Lord has pointed out, is one single sentence:

"I revoke the appointment of Gladys May Wray in cl. 2 of my will as executrix and direct that my said will shall take effect as if her name was omitted from my will and as if she were dead."

G It is one continuous sentence. It begins by directing itself to a particular clause and to a particular matter, *viz.*, the appointment of Gladys as executrix, and it finishes with superadded words which, if taken alone, might be held to be of more general import. The question is on which side of the line that clause should be regarded as falling, having regard to the leaning of the court to which I have already referred. I agree with my Lord that the difficulty is wholly occasioned by the use of the concluding words "as if she were dead." If the
H clause had stopped with the provision "as if her name was omitted from my will," it would automatically have been limited to the provisions of cl. 2 of the will appointing her executrix and giving her a legacy of £50, because that is the only place in the will in which her name is mentioned, but the words "as if she were dead" are *prima facie* of wider import, and would in themselves be apt to take away any interest to which they applied, even although it was an interest given to Gladys otherwise than by name. The question is whether they are to be construed in that unrestricted fashion.

In my view, as my Lord has held, the answer to that question should be, "No." My reasons for so holding as a matter of construction of this will and codicil are these. It is to be observed that, in the very codicil in which cl. 4 occurs, the testatrix gives Gladys a sum of £100. Clearly she is meant to take that sum of £100 provided she survives the testatrix. If the testatrix meant the words "and as if she were dead" to be given the wider effect which is attributed to them by the learned judge, it seems to me hardly conceivable that she would, without further explanation or clarification, have given by the very same instrument this legacy to Gladys. The result of the construction adopted by the learned judge is that, while Gladys obviously is to be treated as surviving the testatrix, if she in fact survives her, for the purposes of the legacy given her by the codicil, she must nevertheless be treated for the purposes of the will as having predeceased the testatrix, and, indeed, as having been actually dead at the date of the codicil. That anomaly, if I may so describe it, seems to me to point strongly to the view that the words "and as if she were dead" must be given a limited construction.

Next, one finds in cl. 2 of the codicil that, the testatrix's sister, Frances, having died, the testatrix thought it advisable to revoke the interest given to her, which she does in these words:

"My sister Frances Wray being now deceased I do hereby revoke cl. 4 and all other provisions of my said will in her favour And also I do hereby revoke the bequest of the said shares in Humber Fruit Brokers Ltd. contained in cl. 3 of my said will."

That shows that when the testatrix is minded to revoke a gift she, or those advising her, know the proper formula, and the specific expressions to use for that purpose. In my judgment, that, too, supports the view that the words "and as if she were dead" in cl. 4 should not be given the wide meaning. Then, I think, an important circumstance is to be found in the character of the gift which is said to be revoked. I have already adverted to the effect on the construction of these documents of the legacy given to Gladys by the codicil, and, as I have already mentioned, I regard that as a strong indication in favour of limiting the application of the words "and as if she were dead."

With that in mind one examines the character of the gift said to be revoked. It is not as a matter of language a gift taken under the testatrix's will at all. As a matter of law, no doubt, it is an interest taken under the testatrix's will, and it is an interest which can only be taken by a beneficiary who survives the testatrix. That is clear, but it is nevertheless an interest given by reference to the will of another person, the testatrix's brother, Charles, who was alive and thus capable of making a new will in any terms he chose at the date when the codicil was penned. It seems to me that the view taken by the learned judge has less to support it when the gift is in that referential form than it would in the case of an express and direct gift made in the ordinary way by the will. This is something which is not within the four corners of the testatrix's will at all. It is a gift which depends entirely on the testamentary dispositions of Charles. Having regard to its peculiar character, speaking for myself, I should find great difficulty indeed in holding, and I am not prepared to hold, that the mere occurrence of the words "and as if she were dead" in cl. 4 of the codicil can be said to operate with sufficient clarity, or at all, as a revocation of a gift of this peculiar referential character.

Finally, one must bear in mind that the testatrix ends her codicil with the words: "Subject as aforesaid I confirm my said will." One of the provisions of the will was that, if Charles should die in the lifetime of Frances or in the testatrix's lifetime, the residuary estate should be dealt with as if Charles had survived the testatrix and Frances and be paid to his personal representatives and form part of his estate and be treated as directed by his will. That provision is confirmed. It is true that it is confirmed "subject as aforesaid," but it is a strong thing, in my view, to construe the words "and as if she were dead"

in cl. 4 of the codicil as abridging or curtailing the effect of that disposition so as to read into it a stipulation to the effect: "Provided always that Gladys shall be disqualified from participating by virtue of this referential trust under any testamentary disposition of Charles in any part of my residuary estate." I think it would be extremely difficult on the strength of cl. 4 of the codicil to treat the disposition in favour of Charles' estate as modified in this way.

- A Accordingly, ending where I began, it seems to me that the question of revocation or no revocation should be resolved in favour of the first defendant in accordance with the leaning of the court disclosed by the cases, and that cl. 4 of the codicil, notwithstanding the difficulties of construction which have been properly pointed out by counsel for the step-daughters, should be construed as limited in its operation to the appointment of Gladys as executrix and the concomitant legacy to her of £50. Accordingly, I agree that the appeal should be allowed.

B **HODSON, L.J.:** I agree with VAISEY, J., that on the first reading of the revocatory cl. 4 in the codicil the conclusion at which he arrived seems to be the obvious one. The clause reads as follows:

- C "I revoke the appointment of Gladys May Wray in cl. 2 of my will as executrix and direct that my said will shall take effect as if her name was omitted from my will and as if she were dead."

The last part of that clause directing that the will shall take effect as if her name was omitted from the will and as if she were dead seemed to me at first sight as plain as possible, and an indication that the testatrix intended that the first defendant, Gladys May Wray, should take no interest whatever in her estate, but, in the first place, it has to be recognised that Gladys May Wray was not named in the clause of the will under which she benefits in the events which have happened. She takes a benefit under the will, apart from cl. 2, having been placed in that position by the will of her husband, but under that part of the will of the testatrix she takes only under a referential trust in which her name does not appear at all.

- E Having heard the arguments addressed to the court and considered *Re Percival* (2) and *Re Freeman* (3), to which reference has been made, and the arguments which were accepted in those two cases, I am led to the same conclusion in this case. In other words, cl. 4 of the codicil must be read as dealing with its particular subject-matter only, so that, in order that it may be properly understood, some such words as "for this purpose" must be implied before the word "direct." The clause then reads: "I revoke the appointment of Gladys May Wray in cl. 2 of my will as executrix and for this purpose direct that my said will shall take effect as if her name was omitted from my will and as if she were dead."

- G The argument addressed to the court in *Re Percival* (2) and *Re Freeman* (3), which led the court to come to the conclusion which it did, was, no doubt, supported by the fact that in each case the recital directed the attention of the testatrix to the subject-matter of the particular bequest which was treated as being the only part of the document to be revoked. As counsel for the step-daughters has pointed out, in the present case there is no recital and there is nothing to emphasise the particular nature of the subject-matter, and, therefore, the less reason to depart from the plain meaning of the words in their unqualified construction. On the other hand, there are features in the two cases which seem to me to point the other way. For example, in one case the words "in all respects" appear together with the word "will," and in the other case the word "throughout," as emphasising the unqualified nature of the revocation on the face of it. Notwithstanding those strong words, the court found that the revocation was limited to the particular subject-matter. Moreover, in each of those cases the names of the persons affected appear in the will itself, so that it was stronger, as it seems to me, to ignore the plain words or to construe the plain words in a

limited manner than it is in this case, where the name of the first defendant does not appear in the will itself; and indeed, as it seems to me, on construction of this particular document the words of revocation in the codicil are inapt to refer to this referential trust. The use of the word "name" in itself is inapt, because there are no names in the referential trust except the name of the person by reference to whom the trust is to be ascertained.

Moreover, there is another special reason in this case why I think that the words of revocation ought to be cut down in their meaning, in that the first defendant did receive a legacy of £100 under the codicil. That seems to me, at any rate, to be a pointer indicating that those wide words should not be construed to their fullest extent and should not carry their greatest weight. I think that the language of cl. 4 of the codicil, taken as a whole, can lead to only one conclusion, *i.e.*, that the testatrix was directing her mind to the revocation of the appointment of the first defendant as executrix and the legacy attached thereto, and had no effect to disinherit her so far as the referential trust was concerned. I agree, therefore, that the appeal should be allowed.

Appeal allowed. Declaration accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate.

Solicitors: *Russell Jones & Walker*, agents for *Pearlman & Rosen*, Hull (for the first defendant); *Smith & Hudson* (for the plaintiff and all other defendants).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

JELLIFF *v.* HARRINGTON.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 22, 1951.]

Street Traffic—General trade licence—Motor car used for towing caravan—Caravan not a mechanically propelled vehicle—Road Vehicles (Registration and Licensing) Regulations, 1949 (S.I. 1949, No. 1618), reg. 29, art. D (4).

The respondent, a garage proprietor, carried on business as a repairer of and dealer in mechanically propelled vehicles and also as a repairer of and dealer in caravans which were not mechanically propelled. He was summoned under reg. 29, art. D (3), of the Road Vehicles (Registration and Licensing) Regulations, 1949, for using a motor car under a general trade licence to tow for delivery to a purchaser a trailer caravan which was not mechanically propelled.

HELD: under reg. 29, art. D (4), authority to use a general trade licence was confined to that part of the business of the licence holder which was directly "connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles," and such a licence could not be used in connection with the separate business of dealing in trailer caravans which were not mechanically propelled vehicles.

Dark v. Western Motor & Carriage Co. (Bristol), Ltd., ([1939] 1 All E.R. 143), referred to.

[AS TO GENERAL TRADE LICENCES, see HALSBURY, Hailsham Edn., Vol. 28, pp. 426, 427, paras. 924, 925; and FOR CASES, see DIGEST Supp. Street and Aerial Traffic, 188a, 188b.]

Case referred to:

(1) *Dark v. Western Motor & Carriage Co. (Bristol), Ltd.*, [1939] 1 All E.R. 143; Digest Supp.

CASE STATED by Great Yarmouth borough justices.

On Sept. 15, 1950, at a court of summary jurisdiction sitting at Great Yarmouth, an information was preferred by the appellant against the respondent under reg. 29, art. D (3), of the Road Vehicles (Registration and Licensing) Regulations, 1949, alleging that the respondent had used a vehicle on a public road under a general trade licence for a purpose, *viz.*, the towing of a caravan, other than a purpose for which such vehicle was authorised by reg. 29, art. D (4). It was proved or admitted that on May 12, 1950, the respondent was driving a motor car and was towing behind it a two-wheeled caravan which was not fitted with any means of mechanical propulsion. The car was being used under a valid general trade licence, issued to the respondent as proprietor of a garage. He had sold the caravan to a customer and was towing it to a site under the contract of sale. He was a dealer in and repairer of mechanically propelled vehicles and also a dealer in and repairer of trailer caravans. It was contended for the appellant that towing a caravan in such circumstances was not an authorised user. The justices dismissed the information.

Southall for the appellant.

Boileau for the respondent.

LORD GODDARD, C.J.: This is a Case stated by Yarmouth borough justices, before whom the respondent was charged with using

“a vehicle upon a public road under a general trade licence for a purpose, to wit, the towing of a caravan, other than a purpose for which such vehicle was authorised by art. D (4) of the said reg. 29 to be used under such licence . . .”

The justices dismissed the summons after reading a circular from the Ministry of Transport, and I am inclined to think that we can assume that they thought that, if the selling of the caravan was in the ordinary course of a motor dealer's trade, that was enough.

Regulation 29, art. D (4) provides as follows:

“Subject to the provisions of para. 1 and para. 2 of this article a mechanically propelled vehicle . . . may be used upon a public road under a general trade licence . . . with or without a trailer for any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles of the holder of the licence . . .”

I cannot hold that the sale and delivery of a caravan is connected with the business of a manufacturer or repairer of, or dealer in, mechanically propelled vehicles. It may be that a manufacturer or repairer of, or a dealer in, mechanically propelled vehicles deals in caravans, but so may many people. In my opinion, this regulation means that the use to which the general trade licence is being put must be in connection with mechanically propelled vehicles. I think that that is the true *ratio decidendi* of *Dark v. Western Motor & Carriage Co. (Bristol), Ltd.* (1). It is true that what was being used there was a motor car with a trailer attached, and there is no reason why a trailer should not be attached, but on the trailer there was loaded a motor boat. It was apparently a part of the business of the garage to overhaul the engines of motor boats, but it was held that, as the motor boat was not connected with the business of the manufacture or repair of mechanically propelled vehicles, because a boat is not a vehicle for the purpose of this regulation, an offence had been committed.

A garage proprietor may deal in caravans which are not mechanically propelled vehicles, but I think this regulation is meant to confine the user of trade licences to that part of the business of the person using them which is connected with mechanically propelled vehicles. Therefore, I think that the justices came to a wrong determination in point of law. I understand why they came to it. They were shown a letter from the Ministry of Transport which they ought not, strictly speaking, to have looked at, expressing an opinion as to the scope of this regulation. The court takes a different view. If the Minister

thinks it desirable that what was done here should be permitted under trade licences, it will be easy for him to prepare, issue, and lay before Parliament regulations to that effect. The present regulation does not have that effect, and this case must go back to the justices with an intimation that the offence was proved. In assessing the penalty, however, they can take into account the fact that the respondent was misled by the letter from the Ministry.

HUMPHREYS, J.: I am of the same opinion. I think in para. 5 of the Case the words "the respondent is a dealer in and repairer of mechanically propelled vehicles and also a dealer in and repairer of trailer caravans" are sufficiently clear to enable the court to say that the respondent had two separate businesses. One was the business of a dealer in and repairer of mechanically propelled vehicles, and the other was that of a dealer in and repairer of trailer caravans. To hold otherwise would support an argument that, if a garage proprietor had any other business which he was carrying on at the garage, he might use his trade plates for the purposes of that business. I agree that the natural meaning of this regulation is that a person must not use his trade plates except in direct connection with the mechanically propelled vehicles in connection with which he has the business of manufacturing, repairing, or dealing in mechanically propelled vehicles.

DEVLIN, J.: I have reached the same conclusion substantially on the same ground as that which has just been expressed by HUMPHREYS, J. It is for the respondent to show that he was using the vehicle at the material time

"for any purpose connected with the business as a manufacturer or repairer of or dealer in mechanically propelled vehicles of the holder of the licence."

The only finding in the Case which appears to me to be relevant to that is the paragraph which appears on the face of it to say that the respondent carried on two businesses, one as a repairer of mechanically propelled vehicles and the other as a dealer in and repairer of trailer caravans. If that be not the right construction of the paragraph, it still leaves the respondent without any other finding on which he could rely. It was for him to obtain a finding that he was carrying on one business only, and that it was as a part of that business that he was taking this caravan to the place where he was taking it. There was certainly no finding that it was part of the respondent's business, or part of the ordinary business, of a garage keeper to repair trailer caravans. I have not to consider what the position would be if the justices had made such a finding—whether it would be one that could be supported as a matter of ordinary knowledge or not. It is sufficient to say that there was no evidence in the Case to justify such a finding, and no such finding. It is said that in those circumstances we ought to remit the case to the justices to consider such a finding. I do not think that would be the proper course. The position is that, it being for the respondent to prove the necessary facts to bring himself within the exception to the clause, he called no evidence with regard to it. If the justices have rightly set out the contentions before them, he did not even contend that on the facts he proved he came within the words of the regulation. All he did was to put before the justices some documents issued by the Minister of Transport which were said to interpret the regulation and to say that he came within it. I do not think it would be right, that having been the line taken in the court below, to remit the case for further findings of fact on which the respondent could have called evidence had he been so minded. For these reasons I agree with the conclusions my Lord has expressed.

Appeal allowed with costs; case remitted with direction to convict.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *F. R. A. W. Conway*, town clerk, Great Yarmouth (for the appellant); *Piesse & Sons*, agents for *Russell Steward & Stevens*, Norwich (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

WHINCUP v. JOSEPH WOODHEAD & SONS (ENGINEERS), LTD.,
AND ANOTHER.

[LEEDS AUTUMN ASSIZES (McNair, J.), November 24, 1950.]

Factory—Building operation—Safe means of access—Operation in factory by independent contractor—Duty of occupier—Factories Act, 1937 (c. 67), s. 26 (1), s. 107 (1), (2)—Factories Act, 1948 (c. 55), s. 14 (4) (a).

A The plaintiff, who was employed by the first defendants, a firm of independent contractors, to repair some glass in the roof of a factory occupied by the second defendants, fell through the roof to the floor and was injured. On the question of the liability to the plaintiff of the second defendants for a breach of s. 26 (1) of the Factories Act, 1937,

B HELD: section 107 of the Act of 1937, which provides that certain provisions of the Act (not including s. 26 (1)) shall apply to building operations, deals only with building operations which are not conducted in a factory and is not intended to relieve the occupier of a factory from the obligations imposed on him by the main body of the Act, and the whole of the Act of 1937, including s. 26 (1), applies to the occupier of a factory in respect of an accident occurring in the course of building operations
C which are conducted in the factory, even though the building operations are carried out by an independent contractor: *Whitby v. Burt, Boulton & Hayward, Ltd.* ([1947] 2 All E.R. 324), *followed*; that position was not altered by s. 14 (4) (a) of the Factories Act, 1948, the effect of which was that where, on its proper construction, s. 26 (1) of the Act of 1937 applied
D to the factory in question and imposed an obligation on the occupier of providing a safe means of access, its application was not to be prejudiced by the fact that, by virtue of s. 107 of the Act of 1937, that Act also applied to building operations in that factory carried on by building operators. The second defendants were, therefore, liable to the plaintiff.

[FOR THE FACTORIES ACT, 1937, s. 26 (1), s. 107 (1), (2), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 1018, 1085, 1086, respectively; and
E FOR THE FACTORIES ACT, 1948, s. 14 (4), see *ibid.*, p. 1145.]

Cases referred to:

- (1) *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] 2 All E.R. 324; [1947] K.B. 918; [1947] L.J.R. 1280; 177 L.T. 556; 111 J.P. 481; 2nd Digest Supp.
F (2) *Lavender v. Diamints, Ltd.*, [1949] 1 All E.R. 532; [1949] 1 K.B. 585; [1949] L.J.R. 970; 2nd Digest Supp.

ACTION for damages for breach of statutory duty and negligence.

The second defendants, J. W. Harrison, Ltd., who were the occupiers of a factory, engaged the first defendants, a firm of building contractors, to repair some panes of glass in the roof of the factory. The roof on which the work was
G required to be done was that of one of seven bays of which the factory consisted. The roof was constructed of slopes of asbestos sheets with glass panels let into them. The roofs of two contiguous bays sloped down to a gutter over which the lower edges of the asbestos sheets protruded, leaving a gap of about seven inches between their edges. To repair the glass a workman had to walk along this gutter. There was no handrail to assist him when doing so. Originally above
H each of the gutters in the bays duckboard pathways had been constructed, but these had become rotten and had been removed. The plaintiff, an employee of the first defendants, who had been sent to carry out the repairs to the glass panes, was walking along the gutter when he stumbled and fell through the asbestos sheeting to the floor some thirty feet below, suffering injury. The judge found that the gutter without the duckboards was dangerous and did not provide a safe means of access to the work, and that the plaintiff's accident resulted from the absence of a safe means of access. The factory was one to which

the Factories Act, 1937, applied, and the operation was one to which the Building (Safety, Health and Welfare) Regulations, 1948, applied. The learned judge found that the first defendants were liable to the plaintiff for a breach of reg. 5 of the regulations of 1948. On the question of the liability of the second defendants under s. 26 (1) of the Factories Act, 1937, it was contended that the sub-section did not apply to the occupier of a factory in respect of an accident occurring in the course of a building operation.

J. Charlesworth for the plaintiff.

McKee for the first defendants.

R. W. Payne for the second defendants.

McNAIR, J.: The first defendants claim contribution from the second defendants under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935. For the purpose of this claim they seek to establish, as does the plaintiff, that the second defendants are liable under the Factories Act, 1937, or at common law.

The case against the second defendants is based on a breach of the obligation imposed on them as occupiers of the factory by s. 26 (1) of the Factories Act, 1937, which is in substantially the same terms as reg. 5 of the Building (Safety, Health and Welfare) Regulations, 1948, in respect of the provision of a safe means of access. The second defendants' answer to this claim is two-fold. They rely, first, on s. 107 of the Factories Act, 1937, and, alternatively, on s. 14 (4) of the Factories Act, 1948.

Section 107 of the Act of 1937 provides as follows:

" (1) Subject as hereinafter in this section provided, the provisions of this Act hereinafter in this sub-section mentioned shall apply to building operations undertaken by way of trade or business . . . that is to say: . . .

(b) the provisions of Part II, with respect to steam boilers and air receivers . . . "

It is said that, as the provisions of Part II, which are so applied do not include s. 26, that section has no application in the case of occupiers in respect of an accident occurring in the course of a building operation, which, by definition, includes the operation in question. This contention was rejected by DENNING, J., in *Whitby v. Burt, Boulton and Hayward, Ltd.* (1). I should respectfully follow this decision even if, unaided, I should not have reached the same conclusion, but the decision seems to me to be clearly correct. Section 107 is not, in my view, a limiting section. It is an extending section intended to embrace within the scope of the obligation imposed by the Act persons carrying on building operations in relevant places as if they were occupiers, and it is not intended to relieve persons who are occupiers from the obligations imposed by the main body of the Act. Furthermore, I do not read the reservation on this point of TUCKER, L.J., in *Lavender v. Diamints, Ltd.* (2) ([1949] 1 All E.R. 535) as expressing any real doubt as to the correctness of DENNING, J.'s decision.

Counsel for the second defendants, however, while reserving the question of the correctness of the decision in *Whitby's* case (1), argued that the position had been altered by s. 14 (4) of the Factories Act, 1948. He argued that the object of s. 14 (4), read together with the Building (Safety, Health and Welfare) Regulations, 1948, which came into force on the same day as s. 14 (4), namely, Oct. 1, 1948, was to provide for building operations a separate and distinct code in which the obligation was imposed on the operators, whether operating in a factory or not, while leaving the code provided by the Factories Act, 1937, itself to apply to operations other than building operations. He argued that any other construction involved serious duplication and inconsistency. He relied in support of this contention in particular on s. 64, s. 66, s. 67 (2), s. 77 and s. 151 (6) of the Act of 1937.

I have considered s. 14 (4) with care, and I am unable to find that there is any such duplication or inconsistency. It was said that the effect of the other

construction was to involve that two persons were deemed in law to be in occupation of the factory, but it seems to me that s. 107 (2) is at pains to provide to the contrary, because it says:

"The provisions of this Act in their application to building operations shall have effect as if any place where such operations are carried on were a factory, and any person undertaking any such operations to which this Act applies were the occupier of a factory . . ."

That, in my view, means, not that the building operator is deemed to be in occupation, but merely that the relevant provisions of the Act are to apply to him as if he were in occupation. It is merely a draftsman's device of attracting to the building operator obligations which under the Act are imposed on occupiers. Furthermore, it seems unreasonable to suppose that in 1948 Parliament designedly relieved the occupiers of obligations already imposed on them, if the decision of DENNING, J., is correct, in connection with building operations. However that may be, the express words of s. 14 (4) of the Act of 1948 seem to mean that, if s. 26 (1) on its proper construction applies to the premises in question and imposes the obligation on the occupier of providing safe means of access, its application is not to be prejudiced by the fact that, by virtue of s. 107, the Act is also applied to building operations on those premises carried on by building operators. I regard s. 14 (4) of the Act of 1948 in this respect as declaratory of the law as laid down by DENNING, J., in *Whitby's* case (1). I accordingly hold that the second defendants were also liable to the plaintiff for breach of statutory duty in failing to provide safe means of access. Having reached this conclusion, it is unnecessary for me to state whether there was any liability at common law.

As regards contribution *inter se*, I can see no reason for making any distinction between the two defendants. I hold that the contribution *inter se* should be limited to fifty per cent. of the liability of each.

Judgment for plaintiff against both defendants for £833, with costs.

Solicitors: *W. H. Thompson* (for the plaintiff); *Bromley & Walker*, Leeds (for the first defendants); *Wiley Hargrave & Co.*, Leeds (for the second defendants).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

ROE v. HEMMINGS AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 24, 1951.]

Customs—Illegal export—Goods brought to "quay or other place"—"Other place"
—Residence of defendant—Import, Export and Customs Powers (Defence) Act, 1939 (c. 69), s. 3 (1) (b).

The respondent was charged under s. 3 (1) (b) of the Import, Export and Customs Powers (Defence) Act, 1939, with having brought to a "place," namely, his residence, certain prohibited goods for the purpose of being exported.

HELD: the word "place" in para. (b) was not to be construed *ejusdem generis* with the word "quay" which immediately preceded it, and, therefore, the residence of the first respondent was a "place" within the meaning of s. 3 (1) (b).

Emerson v. Woods ([1942] N.I.R. 118) and *A.-G. for Palestine v. Fakhry Ayyas* ([1947] A.C. 332), applied.

[FOR THE IMPORT, EXPORT AND CUSTOMS POWERS (DEFENCE) ACT, 1939, s. 3, see HALSBURY'S STATUTES, Vol. 32, 1939, p. 960.]

Cases referred to:

- (1) *Emerson v. Woods*, [1942] N.I.R. 118.
- (2) *A.-G. for Palestine v. Fakhry Ayyas*, [1947] A.C. 332; [1947] L.J.R. 879; 2nd Digest Supp.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Thames Magistrate's Court on Sept. 26, 1950, the appellant, an officer of customs and excise, preferred an information against the first respondent, Percy Alfred Hemmings, a night-watchman employed in Swedish ships in London docks, charging him with having brought to his residence a quantity of coffee for the purpose of its export, contrary to s. 3 (1) (b) of the Import, Export and Customs Powers (Defence) Act, 1939. The second respondent, William George Rowell, a grocer, was summoned for aiding and abetting in the commission of the offence.

It was proved or admitted that during May, 1950, the second respondent delivered to the first respondent at his house 666 pounds of coffee. No money passed between the respondents at the time of delivery. The first respondent sold the coffee to Swedish or other seamen who exported it. Both respondents knew that the coffee was to be sold to seamen and would be taken to their ships and either consumed there or taken to Sweden. At all material times the export of coffee from the United Kingdom without a licence was prohibited. On behalf of the respondents it was contended that the words "or other place" in s. 3 (1) (b) must be construed *ejusdem generis* with the preceding word "quay," and that the first respondent's residence was not such a place. The magistrate, being of the opinion that the first respondent's residence was not a place *ejusdem generis* with a quay, dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

The first respondent, Hemmings, did not appear and was not represented.

Fearnley-Whittingstall, K.C., and *H. E. Myers* for the second respondent, Rowell.

LORD GODDARD, C.J.: This is a Case stated by the Metropolitan magistrate sitting at the Thames Magistrate's Court. The first respondent, Hemmings, was charged with bringing to a certain place for export certain prohibited goods, and the second respondent, Rowell, was charged with aiding and abetting him. The magistrate dismissed the summons on these grounds.

"I was of opinion that both respondents knew perfectly well that the second respondent was selling coffee so to speak through the hands of the first respondent to Swedish and other seamen. It was proved that over a period of one month six hundredweights of coffee were sold in that way by the second respondent to the first respondent and that on May 16, 1950, there were only one hundred and fifty-four pounds of coffee left. Nevertheless, I was of opinion that the contention on behalf of the respondents was correct, and that the first respondent's residence at 187, West Ferry Road was not *ejusdem generis* with a quay. Accordingly, I dismissed all the said informations."

Section 3 (1) of the Import, Export and Customs Powers (Defence) Act, 1939, under which the respondents were summoned, provides:

"If any goods—(a) are imported, exported, carried coastwise or shipped as ships' stores in contravention either of an order under this Act or of the law relating to trading with the enemy, or (b) are brought to any quay or other place, or waterborne, for the purpose of being exported or of being so carried or shipped in contravention either of an order under this

Act or of the law relating to trading with the enemy, those goods shall be deemed to be prohibited goods and shall be forfeited . . .”

A serious penalty is imposed which, in addition to other penalties under other Customs Acts, may amount to £500. The magistrate dismissed the summons entirely on the ground that the first respondent's place of residence was not *ejusdem generis* with a quay, since he held that the words “or other place” must be construed as *ejusdem generis* with “quay.” That point was dealt with in Northern Ireland in *Emerson v. Woods* (1) where ANDREWS, C.J., held, for reasons with which I entirely agree, that the words “or other place” are not to be confined to something *ejusdem generis* with “quay.” That case was cited to the Judicial Committee of the Privy Council in *A.-G. for Palestine v. Fakhry Ayyas* (2), and the advice their Lordships there tendered to His Majesty was to the same effect. It is, therefore, clear that the magistrate, to whom, it is fair to say, these two cases were not cited, was wrong in holding that the words “or other place” must be construed as *ejusdem generis* with “quay.” The case will go back to the magistrate with an intimation that he placed a wrong construction on the section and should conclude the hearing of the case.

HUMPHREYS, J.: I entirely agree.

DEVLIN, J.: I agree.

Case remitted.

Solicitors: *Solicitor, H.M. Customs and Excise* (for the appellant); *Tarlo, Lyons & Co.* (for the second respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re BAILEY (*deceased*). BARRETT v. HYDER AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), January 19, 22, 1951.]

Will—Necessary implication—Gift over on death of B in A's lifetime—B surviving A but predeceasing testatrix.

By her will, dated in April, 1929, a testatrix gave her residuary estate to trustees on trust for conversion and investment and “to pay the income arising therefrom to my [daughter E.] during her life and after her death as to capital and income in trust for my sister-in-law [M.] absolutely if she shall be living at the death of my said daughter but if she shall predecease my said daughter then upon trust for my nephew [G.] absolutely.” In July, 1935, E. died, and in March, 1944, M. died. In February, 1949, the testatrix died, without having altered her will. G. claimed to be absolutely entitled to the residuary estate.

HELD: the gift to M. lapsed for a reason independent of the condition imposed by the will, namely, her death during the lifetime of the testatrix; the gift to G. was limited to operate only if M. predeceased the daughter; in the circumstances it did not appear that the testatrix must *a fortiori* have intended the disposition over to G. to take effect in the event which had actually happened; the principle in *Jones v. Westcomb* (1711) (Prec. Ch. 316) did not apply; and, therefore, the gift to G. did not take effect.

Re Graham ([1929] 2 Ch. 127), *approved*.

Brookman v. Smith (1872) (L.R. 7 Exch. 271), *applied*.

Re Fox's Estate ([1937] 4 All E.R. 664) and *Jones v. Westcomb* (1711) (Prec. Ch. 316), *distinguished*.

[AS TO APPLICATION OF GIFT OVER TO OMITTED EVENTS, see HALSBURY, Hailsham Edn., Vol. 34, pp. 382-385, para. 428; and FOR CASES, see DIGEST, Vol. 44, pp. 1172-1182, Nos. 10148-10218.]

Cases referred to:

- (1) *Jones v. Westcomb*, (1711), Prec. Ch. 316; 24 E.R. 149; 44 Digest 1175, 10165.
- (2) *Re Graham*, [1929] 2 Ch. 127; 98 L.J.Ch. 291; 141 L.T. 197; Digest Supp. A
- (3) *Re Fox's Estate*, [1937] 4 All E.R. 664; Digest Supp.
- (4) *Re Bowen*, [1948] 2 All E.R. 979; [1949] Ch. 67; [1949] L.J.R. 413; 2nd Digest Supp.
- (5) *Brookman v. Smith*, (1872), L.R. 7 Exch. 271; 41 L.J.Ex. 114; 26 L.T. 974; 44 Digest 1176, 10177.
- (6) *Tarbuck v. Tarbuck*, (1835), 4 L.J.Ch. 129; 44 Digest 1139, 9849. B
- (7) *Davies v. Davies*, (1882), 47 L.T. 40; 44 Digest 1159, 10037.

APPEAL by the first defendant, William George Henry Hyder, from an order of ROMER, J., dated Oct. 13, 1950.

ROMER, J., held that on the true construction of the will of Charlotte Bailey, deceased, the condition on which the residuary estate of the testatrix was to be given to the first defendant had not been complied with and that a partial intestacy resulted. It was argued on behalf of the first defendant that the testatrix's intention disclosed by the will was that the beneficiary (of the three beneficiaries named) living at the date of distribution should take, and that, therefore, although the precise event (expressed in the will) on which the first defendant was to take was not, in fact, the event which defeated the prior interests, the court was bound to treat this as an "*a fortiori*" case and apply the rule in *Jones v. Westcomb* (1711) (Prec. Ch. 316) as it was applied in *Re Fox's Estate* ([1937] 4 All E.R. 664). C D

Salt, K.C., and *H. E. Francis* for the first defendant, who claimed as residuary legatee.

C. A. Settle, Mendel and Harold Lightman for those claiming as next of kin. E
P. S. A. Rossdale (M. Bowles with him) for the plaintiff, the trustee of the will.

SIR RAYMOND EVERSLED, M.R.: By her will, which was dated in April, 1929, the testatrix, Charlotte Bailey, so far as relevant, gave all her residue to trustees on trust for conversion and then to hold the resulting investments

"to pay the income arising therefrom to my said daughter Eva Ellen during her life and after her death as to capital and income in trust for my sister-in-law Mary Alice Bailey absolutely if she shall be living at the death of my said daughter but if she shall predecease my said daughter then upon trust for my nephew George Hyder absolutely." F

It is apparent from the language which I have read that on the face of it the testatrix provided, subject to a life interest in her daughter's favour, for a gift to her sister-in-law (hereinafter called Mrs. Bailey), conditionally on her surviving the testatrix's daughter, and that the testatrix then provided for the alternative event of Mrs. Bailey not surviving the testatrix's daughter, in that event the property being given to George Hyder, the first defendant and the appellant before us. G

The daughter, Eva Ellen Leeson, died in July, 1935, shortly after the making of the will. On the face of it, therefore, from that date the provision in the will to the effect that George Hyder should take absolutely in the event of Mrs. Bailey predeceasing the daughter could never take effect, but it is to be noted that the testatrix (who, one must assume, knew of the death of her own daughter though there is no evidence about it) did not then or at any time thereafter alter the will. In March, 1944, Mrs. Bailey died, and in February, 1949, the testatrix died also. It will be seen that an event, therefore, occurred for which in terms H

no provision was made by the will, *viz.*, that both the daughter and Mrs. Bailey predeceased the testatrix herself. If the result is that the gift over in favour of George Hyder cannot now take effect, it follows that the testatrix has died intestate as to her residue. No doubt, that is a circumstance proper to be taken into account in considering the question presented for our determination, for it has been said that certainly where there is ambiguity the court should tend to that view of the construction which would not produce an intestacy. On the other hand, the fact that on a certain view an intestacy would follow does not justify the court either in giving an unnatural meaning to the words or altogether re-writing the will so as to produce a result which might appear to be more satisfactory.

In the circumstances I have mentioned the present proceedings were started, the plaintiff being the trustee of the will, and the first defendant, George Hyder, claiming, notwithstanding the imperfection of the language used by the will, to be entitled to the residue. The remaining defendants are, with the first defendant, as far as we know, the testatrix's next-of-kin. The matter came before ROMER, J., and he felt constrained to decide in favour of the next of kin. He observed:

"I confess that, were I free from authority and able to treat myself as the supreme authority, I would find that the necessary degree of probability had been attained, and that, therefore, the principle [in *Jones v. Westcomb* (1)] ought to be applied."

The learned judge then considered *Re Graham* (2) and, a later decision in this court, *Re Fox's Estate* (3), and a decision of WYNN-PARRY, J., in *Re Bowen* (4). He felt himself bound by the authority of *Re Graham* (2) to hold that the will must take effect according to its language, and that, accordingly, there was no provision in the events which happened sufficient to pass the beneficial interest to George Hyder. For myself, I confess that I sympathise strongly with the opinion expressed in the language which I have read of ROMER, J., for, on reading this will, I find it impossible to persuade myself that, had the testatrix been asked the question: "Having regard to the death of your daughter and your sister-in-law, what do you intend to happen to your residue?", she would have done other than answer: "In that event it should go to George Hyder." Having considered the authorities, however, I have felt, like the learned judge, constrained to hold that, posing that question and suggesting that answer, there is nevertheless not sufficient to justify this court in doing what I think would amount to a re-writing of the will, and that, if the court did so, we should be acting in disregard of the decisions, particularly of *Brookman v. Smith* (5), a decision of the Exchequer Chamber which binds this court.

I also feel bound to say that in the course of the argument I have felt impressed by the circumstance that both my brethren have felt less difficulty than I have.

In a case of this kind it would be perhaps a convenient starting point to look at the passages cited from THEOBALD ON WILLS, 10th ed. There are two passages I would like to cite. At p. 456 I find:

"When there is a gift over upon a certain contingency, it will not take effect, unless the exact contingency happens. Thus, if there is a gift to A with a gift over if he dies in the testator's lifetime, and A dies simultaneously with the testator, the gift over does not take effect. There are here two distinct and independent events, in which the gift to A will lapse: death in the testator's lifetime and death simultaneously with the testator, one of which the testator has contemplated and the other not. No doubt it may be said that the gift over might be read as equivalent to 'if A does not survive me to B'; but this would be making a will for the testator, since the event that has happened does not include the event contemplated, and it cannot be said that, if the gift over was to have effect, if A died in the

testator's lifetime, *a fortiori* it was to have effect, if A died simultaneously with the testator."

The passage beginning "*a fortiori*" is an anticipation of the so-called rule in *Jones v. Westcomb* (1), which is later referred to on p. 456, and was mentioned by ROMER, J. To that I must in due course return, but, first, I will read the second of the passages which I have indicated. There is a series of numbered paragraphs under the general heading on p. 458 "Gifts over upon death of the legatee under a given age." Number 2 is:

"If A dies over twenty-one in the testator's lifetime, the gift over does not take effect. In this case, since A, if he had survived, would have taken an indefeasible interest, the failure of the gift to him is due to lapse only, which the testator cannot be supposed to have contemplated, and the event, on which alone there is a bequest to the claimant, has not occurred."

Again, under No. 3 (c) there is a similar rule applicable in the case of a gift to a class at twenty-one, but I think it will take up time unduly for me to read that in full. From those passages, if they are correct, it would appear to follow that the law stands thus. If there is a gift to take effect on a certain condition, plus a gift over on non-fulfilment of the condition, and the first gift lapses for reasons independent of the condition, the court, generally speaking, cannot by inserting some new passage in the will get rid of the effect of the lapse and fill the gap which it has created. If, as I think, that is the law, it must apply to this case. There was here a gift after the death of the life tenant (the daughter) to pay the capital and income to Mrs. Bailey absolutely, if she should be living at the daughter's death. She was, of course, living at the daughter's death, but the gift lapsed because she was not living at the testatrix's death. The will provided for the alternative event—alternative, that is, to the condition attached to the first gift—if Mrs. Bailey should predecease the daughter, which she did not do. Mrs. Bailey, having survived the daughter, would, if she had survived the testatrix, have taken the residue absolutely, but her not surviving the testatrix caused the gift to lapse. In other words, the gift did not fail as a result of the non-fulfilment of any condition or term imposed by the will, but because the law requires that a beneficiary under a will should survive the testatrix in order to take the benefit conferred.

That the law is as I have stated emerges, I think, from certain of the cases which have been cited and were relied on and formed the basis of EVE, J.'s decision in *Re Graham* (2). It may be convenient to go at once to *Re Graham* (2) as, I think, on its facts (though the language is not, of course, identical) it is indistinguishable from the present case. Therefore, if we were to hold that the first defendant should succeed in this case we should have to say that *Re Graham* (2), decided twenty-one years ago by EVE, J., was wrongly decided. In *Re Graham* (2) a testatrix, after giving a life interest to her parents and to the survivor of them, bequeathed her estate in trust for her husband, if living after the death of the testatrix's parents. She proceeded ([1929] 2 Ch. 129):

"Should he, however, have predeceased both my parents the trust fund shall be held in trust . . ."

for certain other persons. The fact was that the husband did survive both the testatrix's parents, so that, the condition in the will being satisfied, had he survived his wife, he would have taken the whole property, but he, like Mrs. Bailey in this case, predeceased the testatrix, and that fact caused the gift to lapse according to the general law. The learned judge, in a reserved judgment, held that the court could not re-write the will, and however strongly it might be supposed that, if asked, the testatrix would have so provided by her will, nevertheless the court must give effect to the will and its terms, and in the circumstances, therefore, the gift over could not take effect because the event on the happening of which alone it was expressed to take effect had not occurred.

The learned judge based himself in arriving at that conclusion on a series of cases, the last of which was *Brookman v. Smith* (5) in the Exchequer Chamber. It is unnecessary for me to go through them all, but I am satisfied that they cannot be distinguished from the present case in the way that counsel for the first defendant suggested, that is, on the ground that here the whole emphasis of the provision in the will was on the period of distribution as distinct, for example, from the attainment of a given age as the condition of the gift taking effect, in which latter case, if the beneficiary attained that age (assuming he survived the testator or testatrix) it would be unnecessary for him or her to survive the period of distribution.

That no such valid distinction can be drawn appears from *Tarbuck v. Tarbuck* (6) which was expressly affirmed in the Court of Exchequer Chamber. In *Tarbuck v. Tarbuck* (6) the testator devised an estate to his son, A, for life with remainder equally among his children and their heirs as tenants in common. There was a similar devise to another son, B, and his children, and there was a provision that, if one died without children, the estate of that one should go to augment the estate given to the other. Then there was this final provision:

"... but if both his sons should die without leaving lawful issue, then he gave the estates over to C in fee."

A, the first-mentioned son, had issue, but both he and his son predeceased the testator. B had no issue. Therefore, when the testator died it was impossible for the gift to A's son to take effect. But the gift over to C was expressed to be on the term that both A and B died without leaving lawful issue, an event which did not happen. In those circumstances SIR CHARLES PEPPYS, M.R., held that effect could not be given to the gift over. I think I need read only this part of the judgment (4 L.J.Ch. 132):

"It is, as I conceive, clear, that if James and Jonathan had survived the testator, the devise to the nephews and nieces could not have taken effect under the circumstances which happened; and it is, I think, established by authority, that the situation of the parties is not altered by their having died before the testator ... I am therefore of opinion, that the event, on which the nephews and nieces were to take, did not happen ..."

Consequently, there was, as here, an intestacy.

That case, of course, would not bind this court, but in *Brookman v. Smith* (5), *Tarbuck v. Tarbuck* (6) was considered by the Court of Exchequer Chamber. *Brookman v. Smith* (5) was a case of rather more elaboration, but I think the matter can be sufficiently stated in this way. Under the relevant will there was a provision by the testator that certain property should go in these terms:

"And in case every child born, or to be born, [of his daughter] shall die under the age of twenty-one years and without leaving issue, to the use of the heirs and assigns [of the testator's daughter] as if she had continued sole and unmarried."

It happened that there were three children born to his daughter. Two had died in infancy before the date of the will, but at that time one of the children was still alive, and lived to attain majority, but that child also predeceased the testator, and the daughter never had any more children. When the testator died, the question then arose whether the daughter could claim according to the terms of the ultimate limitation. The court decided negatively, for it was said that the event on which (and on which alone) the gift over took effect had not occurred, *viz.*, that of children of the daughter all dying under twenty-one. As I have indicated, one of them lived to twenty-three, but predeceased the testator. The court decided (and in the course of the judgment *Tarbuck* (6) was clearly approved) that that result must follow. I think it would be proper for me to read a short passage from the judgment of COCKBURN, C.J. (L.R. 7 Exch. 273):

"Now, does the ultimate limitation come into effect? In what case is it to come into effect? It is to come into effect in case any child born—'to be born' we may leave out, because no children were afterwards born—shall die under the age of twenty-one years, and without leaving issue. Did that state of things exist? It did not. A child had been born, which child did not die under the age of twenty-one years, but attained that age, and then died in the lifetime of the testator, without leaving issue. What we are asked to do is to take those words, 'shall die under the age of twenty-one years without leaving issue,' to mean, 'shall, having attained the age of twenty-one years, die in the lifetime of the testator,' because that is what in point of fact has taken place. It seems to me that we should be making a new will, if we were to introduce an entirely new term to meet a new contingency which is not provided for. A great deal has been said about the intention of the testator, which, however, must be more or less speculative. It is possible that he may have had some intention as to the particular event which has happened, but I see no evidence of it. I think it far more probable that the case which has since arisen, and to which we are called upon to apply the terms of this will, was not present to the minds either of those who drew the will, or of the testator who executed it. At the time the will was made there was a child living, and in all probability that child might be expected to outlive the testator, his grandfather."

I need not, I think, read any more, except to say that the Chief Justice observed that testators normally make their wills on the assumption that the persons they intend to benefit will survive them, and, accordingly, do not make provision for what is to happen if they do not.

At one time, I must confess that I thought that, looking at this will, and reading the language without any excursion into realms of speculation, it left on my mind so strong a conviction that the testatrix must have intended the first defendant to take if Mrs. Bailey herself did not survive to enjoy the residue, that the court would be justified in so construing the words or so adding to them by inserting new phrases as to give effect to that intention. I think, indeed, if it is a question of guessing, that the guess in favour of the first defendant, George Hyder, would be even easier than it might have been in *Brookman v. Smith* (5). Still it is the fact, for reasons of which we know nothing, that this will, made in 1929, was left unaltered by this testatrix for years not only after her own daughter had died, but also after her sister-in-law had died. Apart from speculation, there is the further difficulty that the language which the testatrix has used is not the language one sometimes finds in wills drawn by people themselves without expert assistance, clumsy, inapt and on the face of it ambiguous. This is a lawyer-drawn will, and the language used and the conditions expressed in that language are precise, and *Brookman v. Smith* (5) seems to me to lay it down, for this court to follow, that in a case such as this there is no right for the court to introduce words into this will which will fill the gap created, not by the happening of some event mentioned by the testatrix, but by the lapse of the gift through, and only through, the designated beneficiary having failed to survive the testatrix. As I have already said, since Mrs. Bailey did survive the testatrix's daughter, if she had survived the testatrix, she would have taken absolutely.

That, then, was the state of the law in 1929, and it only remains to consider whether any subsequent authorities have in any degree affected the position. Very naturally, counsel for the first defendant have placed great emphasis on the decision of this court in *Re Fox's Estate* (3), not so much because that case on its facts sufficiently resembles this case as to be itself an authority affecting this will, but because the principle of *Jones v. Westcomb* (1) was there elucidated by ROMER, L.J., in language which, it is said, enables, and, indeed, compels, us to apply the *Jones v. Westcomb* (1) rule in this case to the relief of the first defendant. I have come to the conclusion that that is not so, and that *Fox's*

case (3) leaves the law (so far as relevant to this case) as it was before and as it was stated in the passages in THEOBALD which I have read.

The matter has been fully argued, and I think it is only just to those arguments that I should deal at a little length with this part of the first defendant's argument. In *Re Fox's Estate* (3) the testator had no professional assistance in making his will. The will was in these terms ([1937] 4 All E.R. 665):

- A "I give to my executors all my substance upon trust as to one fourth part thereof for my daughter Fanny Sarah Fox for her separate use as to one other fourth part for my daughter Anna Charlotte Perry for her sole use for her life, and after her decease for her children if she shall leave children . . ."

After provisions relating to the other two fourth parts he went on (*ibid.*):

- B "I declare that benefit hereunder shall become vested on the coming of age of the legatee and that any legacy which by the death of any person shall lapse shall go to my said daughter Fanny Sarah."

The effect of the first part of the declaration was that in respect of the gift in remainder to the children of Anna Charlotte Perry the gift was conditional on those children attaining twenty-one. In fact, Anna Charlotte Perry survived the testator by a very great number of years (over half a century, I think), but she died without having had any issue. The question then arose, having regard to the final words, "that any legacy which by the death of any person shall lapse," whether the gift introduced by those words in favour of Fanny took effect? It

- C could not be suggested that the legacy which was given to the children of Anna at twenty-one "lapsed upon the death of any person." The death of Anna would not cause the "lapse," because Anna only had a life interest. The question, therefore, was: Since the language obviously was intended to cover the case supposing Anna had children and they died under twenty-one, would it also cover the case if she never had any children at all? This court came to the conclusion that the greater included the less, that is to say, if the condition was expressed to take effect on the death of the children under a certain age it must *a fortiori* take effect if there were no children ever born at all. The conclusion followed the rule in *Jones v. Westcomb* (1), to which I have already made more than one reference. The facts of that case are fully stated in *Fox's case* (3) by SIR WILFRID GREENE, M.R. ([1937] 4 All E.R. 666):

- E "That was a case where a testator bequeathed a term of years to his wife for life, and after her death to the child she was *enceinte* with at the date of the will, and, if such child should die before attaining the age of twenty-one, then one third part to his wife, and two third parts to other persons. The only event in which the property was to be disposed of, in that case, was on the death of that child before twenty-one. In point of fact, the wife was not *enceinte* at all. It was held, nevertheless, that the bequest took effect."

G The principle of *Jones v. Westcomb* (1), I think, is stated accurately (and the statement has been cited and relied on in this case and in other cases) by ROMER, L.J., in these terms (*ibid.*, 669):

- H "The principle [of *Jones v. Westcomb* (1)] is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect."

It is the main plank of the argument of counsel for the first defendant that this is, as was *Re Fox's Estate* (3), an *a fortiori* case, and for this reason. The whole point, say they, of making the provision which this testatrix did that

Mrs. Bailey should only take the estate if she survived the life tenant, the daughter Eva Ellen, was the testatrix's insistence that she, Mrs. Bailey, should be actually there and alive at the date of distribution to take the property for her personal enjoyment. It is obvious if that is so (it is argued) that the testatrix must be treated as having laid down two conditions which had to be satisfied, that is, that Mrs. Bailey would take only if she survived both the daughter and also the testatrix, for, unless she survived the testatrix, the law would (as the testatrix must be taken to have known) cause the gift to lapse. If that is, therefore, the real meaning of the first part of the clause, then, since the testatrix only provided for the gift to the first defendant in the event of Mrs. Bailey predeceasing Mrs. Leeson, it must follow *a fortiori* that the same result will occur if Mrs. Bailey, whether she survived the daughter or not, does not survive the testatrix. That is an attractive argument, but I have already indicated that I cannot see that its acceptance would be consistent with *Brookman v. Smith* (5), nor can I see that it follows from the statement of principle which I have read from *Jones v. Westcomb* (1). It is to be observed that in *Jones v. Westcomb* (1) there was after the life interest a gift to a person believed to be in being, or about to come into being, to take effect at twenty-one and then a gift over expressed to take effect in the event of that person not attaining twenty-one. To give effect to this gift over it was unnecessary to add to, or alter in any way, the meaning or construction of the first gift, the gift to the child believed to be in its mother's womb. All that it was necessary to do was to say that the gift over expressed to take effect on the child not attaining twenty-one should also take effect on the child not coming into existence at all. There was no inconsistency by adding that rider, so to speak, to the second part of the gift. There was, in other words, in *Jones v. Westcomb* (1) no question of a person who, had he survived the testator, would have become absolutely entitled, but the gift to whom lapsed by reason of earlier decease. The same is equally true of *Re Fox's Estate* (3). The will there was more difficult to construe in one sense, but the point again was that there was no need to alter in any way or affect the original gift in remainder to the children of Anna. The only question was whether a provision, expressed to take effect on the death of those children under twenty-one, should operate also in the event that there were no children at all who would ever attain twenty-one. The difficulty, by way of contrast, in the present case, is that, if we look at the first part of this clause, it is to the original gift in remainder that the first essential addition or emendation must be made. You are faced with the difficulty that you are going to try to read the gift over in a sense completely contradictory to the language which is there used. The language used is: "If Mrs. Bailey shall predecease my daughter, then . . ." You have to make that fit in the precisely opposite event of Mrs. Bailey having survived the daughter, but having predeceased the testatrix. That is the problem which confronted the Court of Exchequer in *Brookman v. Smith* (5), and required an addition beyond anything which the court said could legitimately be made.

To make this will meet the facts as counsel for the first defendant want them met you have got, so far as I can see, first of all to say that the gift to Mrs. Bailey expressed to be conditional on her surviving the testatrix's daughter must also be expressed to be conditional on her surviving the testatrix, for only if you have got those words in do you get the necessary condition for the application of the rule in *Jones v. Westcomb* (1), namely, that the gift over is incomplete because it in terms only provides for one of the two events which were conditional on the previous gift taking effect. I, therefore, think that there is an important distinction between *Jones v. Westcomb* (1) and *Re Fox's Estate* (3), on the one hand (and the older decisions which I have already mentioned), and *EVE, J.'s* decision in *Re Graham* (2), on the other. I think the distinction can be expressed in the language which I originally read from THEOBALD on p. 458, where he says, referring to the *Re Graham* (2) class of case:

"In this case, since A [Mrs. Bailey] if [she] had survived, would have taken an indefeasible interest, the failure of the gift to [her] is due to lapse only, which the [testatrix] cannot be supposed to have contemplated, and the event, on which alone there is a bequest to the claimant [George Hyder], has not occurred."

A I think that is the conclusion from those cases. I think it is correct. I think it does not affect the *Jones v. Westcomb* (1) type of case or *Re Fox's Estate* (3) which is, for the reasons I have tried to state, essentially different.

I have dealt at length with this part of the argument out of respect to counsel for the first defendant and also because it is necessary in conclusion to say a word about one other case, *Re Bowen* (4). In that case WYNN-PARRY, J., was able to do what ROMER, J.—and, indeed, I myself—would have liked to have
B done in this case, namely, to hold that *Jones v. Westcomb* (1) applied so that the ultimate gift over took effect. There was, however, a difference between *Re Bowen* (4), on the one hand, and *Re Graham* (2) and this case, on the other. I will read the words of part of the will in *Re Bowen* (4). The relevant gift was of

C "my real and personal estate to my trustees upon trust for my dear mother during her life and from and after her decease upon trust for my uncle Evan Bowen. In the event of my said uncle Evan Bowen dying in my mother's lifetime then I give my said real and personal estate "

to a named person. It is to be noted that the gift to Evan Bowen was not expressed to be conditional on his surviving the testator's mother. The gift was an absolute one subject to a life interest of the mother, and it did not depend
D on Evan Bowen surviving the mother. Evan Bowen did not survive the testator. The gift over did not, so to speak, match the earlier gift, because it was expressed to be in the event of Evan Bowen "dying in my mother's lifetime." If the testator's mother had survived the testator and Evan had also survived the testator, but died in the mother's lifetime, it might well have been a question whether the gift over took effect according to its strict terms or whether he
E had an absolute interest. That question did not arise, but, as there was no express condition to the gift to Evan Bowen, in the first place those who argued for the ultimate remaindermen—those corresponding with the first defendant, George Hyder, here—had not the difficulty (as in this case) of having to add to the express condition in the first part of the gift. Because the gift to Evan Bowen was not expressed to be conditional that particular problem was not presented,
F and the case was, therefore, on its terms different from the case before EVE, J.—*Re Graham* (2). So WYNN-PARRY, J., was able to say ([1948] 2 All E.R. 982):

G "In the case now before me it appears to me, on the true construction of this will, that the gift to the uncle was not conditional. I think that the case of *Re Graham* (2) is distinguishable, and I feel free to apply the test indicated by ROMER, L.J., in *Re Fox's Estate* (3)."

Because that case is different from the present case it is unnecessary for me to say anything more about it. I, therefore, express no view whether that case was rightly or wrongly decided. That is a matter beyond the interests of the decision of the present case. Suffice it to say that it did differ in a material respect, at any rate in the view of the learned judge, and clearly differed in
H language from this case. I think it does not afford any guidance to the decision of this case, and I, therefore, say no more about it. I come back to the first conclusion which I have already indicated, repeating, I confess, my strong feeling of regret, but, in the face of the law as I find it to be and notwithstanding the very strong impression that this will has made on my mind as to what the testatrix's intention would have been expressed to be had she contemplated the events which happened, I, nevertheless, am of opinion that this appeal must be dismissed.

JENKINS, L.J.: I agree that the appeal fails, and I share the regret already expressed by my Lord that, as a matter of established principle, it is impossible for this court to repair the imperfections which the events that actually happened have disclosed in the disposition of this testatrix's residuary estate. But it is not the function of a court of construction to improve on or perfect testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case. In the present case the gift, already referred to by my Lord, is a trust to pay the income arising from the testatrix's residuary estate to her daughter Eva Ellen during her life

A

"and after her death as to capital and income in trust for my sister-in-law Mary Alice Bailey absolutely if she shall be living at the death of my said daughter but if she shall predecease my said daughter then upon trust for my nephew George Hyder absolutely."

B

As my Lord has said, the daughter Eva died in 1935; the sister-in-law survived her, but died in 1944; and the testatrix herself died in 1949. It is thus apparent that the event on which the gift to the testatrix's nephew George was to take effect, according to the express terms of the will, did not happen, because the sister-in-law did not predecease the daughter. *Prima facie*, therefore, the gift to the nephew George failed in accordance with the cardinal principle read by my Lord from THEOBALD ON WILLS, 10th ed., p. 456:

C

"When there is a gift over upon a certain contingency, it will not take effect, unless the exact contingency happens."

D

It is sought by the first defendant to escape from that general rule on the principle to be deduced from *Jones v. Westcomb* (1) as explained by the Court of Appeal in *Re Fox's Estate* (3). I agree with my Lord that it is impossible to bring this case within that class of exception. On examination I think it will be found that all the cases in which the *Jones v. Westcomb* (1) principle has been applied are cases in which the contingency has either been expressed in imperfect or ambiguous terms or relates to an event of which it may be said in the language of ROMER, L.J., in *Fox's case* (3) and in the language cited by him from THEOBALD ON WILLS that the gift over "must *a fortiori* have been intended to take effect" in the event which actually happened.

E

I need not multiply examples. In *Jones v. Westcomb* (1) itself a child who it was assumed would be born was not born. The gift over was expressed to take effect in the event of the death of the child before twenty-one, and it was held that the gift over took effect in the actual event of the child never coming into existence at all. That, I think, is clearly an *a fortiori* case. The event provided for may be said to include the event which happened. Similarly, in *Re Fox's Estate* (3) the gift over was to take effect in the event of what the testator inaccurately termed lapse owing to the death of any legatee. What actually happened was that a daughter, whose children were to take in remainder after her, died never having had any children. It was held that the event of a failure in that way of the daughter's children should be included by implication as one of the events in which the gift over was to take effect. Another example is *Davies v. Davies* (7), where the testator gave his residuary estate in trust for his wife for life providing she should survive him for twelve months and remain unmarried, and he gave his wife certain powers of disposition over the estate. There was a gift over in case of his wife dying within the twelve months from his own decease. The wife died in his lifetime and it was held that the gift over took effect. That, I think, could fairly be described as an *a fortiori* case, and also, perhaps, as a case where the language of the gift over was not wholly accurate and might be capable of bearing a construction making it equivalent to: "If my wife shall not be alive at the expiration of the period of twelve months from my decease."

F

G

H

In the present case, however, the testatrix, as it seems to me, has provided in clear and unambiguous language, on the one hand, the event in which the gift to the sister-in-law is to take effect—that is, “if she shall be living at the death of my said daughter”—and, on the other hand, the event in which the gift to George Hyder is to take effect—that is, “if she, the sister-in-law, shall predecease my said daughter.” The first event happened and the second did not.

A I find it impossible to hold that, as a matter of necessary implication from the language used by the testatrix, an intention is sufficiently expressed, or must be imputed to her, of making a gift to her nephew George not only in the event expressed in the will, but in the opposite event which actually happened of the sister-in-law surviving the daughter, should the sister-in-law, having so survived, die in the lifetime of the testatrix. In my view, it is impossible to hold
B that the testatrix contemplated or provided for this combination of events at all. It may very well be that, had it been pointed out to her that the sequence of events which took place might happen and that in such case there would be an intestacy, she would have been anxious to supply the deficiency, and in all probability she would have said that in those circumstances also she wished her nephew George to take. But it is one thing to say
C that, if it had been pointed out to the testatrix that she had not provided for a certain eventuality, she would probably have provided for it in a certain way, and quite another to hold that the contingencies expressed in her will in clear terms must be added to or altered in order to give effect to what would probably have been the testatrix’s intention if she had appreciated that the contingencies as expressed did not provide for that other possible state of affairs. That course,
D I think, clearly is not open to us on the authorities, or, indeed, on any principle of construction. In my view, this case falls within the principle stated in *Tarbutt v. Tarbutt* (6) and in *Brookman v. Smith* (5) as opposed to the line of cases in which the *Jones v. Westcomb* (1) principle has been adopted. This is a case in which, as in *Re Graham* (2), the first taker of an absolute interest under the term of the will had satisfied the condition of the gift in the lifetime of the testatrix, and the testatrix cannot be supposed to have contemplated the failure
E of the gift by lapse. The condition on which the sister-in-law was to take had been fulfilled in the testatrix’s lifetime by her surviving the daughter, and the failure was due to lapse and lapse alone. For these reasons I agree with my Lord, as I have said with regret, that the appeal should be dismissed. I also agree with him that it is unnecessary to decide whether *Re Bowen* (4) is validly
F distinguishable on the ground on which the learned judge who tried the case found himself able to distinguish it.

HODSON, L.J.: I agree with the construction placed on this will by the learned judge. In the events which have happened it has been found that the gift over cannot take effect. That is quite clear on the plain words of the will itself, but it was argued before the learned judge on the principle of *Jones v. Westcomb* (1) that the court was at liberty to uphold the gift if it could find that
G if the testatrix had contemplated the events which happened there was an overwhelming probability that she intended the remaining gift to take effect. To my mind, that is putting an argument on the basis of *Jones v. Westcomb* (1) which that case will not bear. As my Lords have pointed out, it could be said in *Jones v. Westcomb* (1) that the greater included the less. That cannot be said
H here where it is necessary for the first defendant to contend that the exact opposite of what has happened produces the necessary result from his point of view. I think the learned judge was right in the view which he took that this case was on all fours with *Re Graham* (2), in a considered judgment in which EVE, J., considered the old cases including *Brookman v. Smith* (5). The language of COCKBURN, C.J., following the passage which the Master of the Rolls has already read, seems to me to be directly in point in considering this particular case. He said (L.R. 7 Exch. 274):

"Are we to force the words of the will, or rather to interpolate new words into it, in order to make it meet this altered and, as I think, in all probability, unforeseen state of things? I think we cannot do that. If there is anything ambiguous in the will, and from the context you can gather the intention of the testator, it is possible that in such a case you may make the language of the remainder of the will meet what you clearly conceive to be the meaning of the man making it. But I see nothing in that which is expressed, and nothing in the rest of the will which would lead me to suppose that it was intended to provide for this contingency, which it would have been so easy to provide for, which a few words would have made perfectly clear, and which, if it had been present to the mind of the testator, he would have provided for. I do not think that we are to make the words of the will embrace that which they do not embrace, and which I do not think, by implication, they were intended to embrace. That would have been my view of the case, independently of the authority of the case of *Tarbuck v. Tarbuck* (6), which is directly in point. That decision seems to me to be based on sound principles, nor can I find that it has been anywhere overruled, either directly or indirectly . . ."

In this case there is no ambiguity, and it seems to me impossible to say that by necessary implication the contingency which has arisen must be treated as having been provided for. I agree that the appeal fails.

Appeal dismissed. Costs of all parties as between solicitor and client to be paid out of the residue of the estate.

Solicitors: *Adam Burn & Son* (for the first defendant); *Henry Boustred & Sons*, agents for *Percy Walker & Co.*, Hastings; and *Crofts & Ingram and Wyatt & Co.*, agents for *Sprott & Sons*, Crowborough, and *Judge, Hackman & Judge* (for other defendants); *Lovell, Son & Pitfield*, agents for *Robinson & Allfree*, Ramsgate (for the plaintiff).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

McCULLOCH v. HANNAM.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Devlin, J.), January 19, 1951.]

Food and Drugs—Analyst's certificate—Added water in milk—Statement of opinion—Admission of certificate in evidence—Food and Drugs Act, 1938 (c. 56), s. 81 (1)—Public Analysts Regulations, 1939 (S.R. & O., 1939, No. 840), reg. 4.

CASE STATED by Dorchester (Dorset) justices.

On July 22, 1950, an information was preferred by the appellant, Thomas McCulloch, sampling officer of the Dorset County Council, against the respondent, Frank Leslie Ralph Hannam, milk producer and retailer, charging him with having had in his possession for sale milk to which water had been added, contrary to the Food and Drugs Act, 1938, s. 24 (1) (c). The appellant put in the following certificate in the form prescribed by reg. 4 of the Public Analysts Regulations, 1939, made under s. 66 of the Food and Drugs Act, 1938:

"I, the undersigned, public analyst for the county of Dorset, do hereby certify that I received on June 2, 1950 . . . a sample submitted as a sample of milk for analysis which was marked No. B 3447 dated June 2, 1950,

signed W. K. Nattrass, sealed . . . and weighed . . . about seven fluid ounces. I further certify that I have analysed it, and as a result of my analysis I am of opinion that: the constituents of the sample included the following substances in proportions as under:

Total milk solids 10.54 per cent.
including:—

A milk fat 3.20 per cent.
 milk solids other than milk fat 7.34 per cent.

and that it consisted of: milk not more than eighty-seven parts per cent: added water at least thirteen parts per cent. This opinion is based on the above figures and on the Sale of Milk Regulations, 1939. The presence of added water was confirmed by the freezing point. No change had taken place in the constitution of the article that would interfere with the analysis."

B The respondent did not require that the analyst should be called as a witness. Evidence was called by the respondent to show that no water could have been, or was, added to the milk. The justices dismissed the information, being of the opinion that the statement in the certificate that the milk consisted of thirteen parts of added water was a statement of opinion, and, therefore, not admissible as evidence under s. 81 of the Act unless the analyst was called as a witness.

Fay for the appellant.

The respondent did not appear.

D **LORD GODDARD, C.J.:** The justices took too narrow a view of the effect of s. 81 of the Food and Drugs Act, 1938. The question was whether a certificate of a public analyst was sufficient evidence of the fact that a certain sample of milk contained added water and the justices say that, in spite of the evidence to the contrary given by the respondent, they would have found that there was added water if they could have accepted the analyst's certificate as evidence. Section 81 (1) provides:

E "In any proceedings under this Act, the production by one of the parties of a document purporting to be a certificate of a public analyst in the prescribed form, or of a document supplied to him by the other party as being a copy of such a certificate, shall be sufficient evidence of the facts stated therein, unless, in the first-mentioned case, the other party
F requires that the analyst shall be called as a witness."

The prescribed form provides that the analyst can state: "I further certify that I have analysed it"—that is, the sample—"and as the result of my analysis I am of opinion that," and then he sets out his opinion. In this case the analyst found that the sample contained "milk not more than eighty-seven parts per cent.: added water at least thirteen parts per cent." The
G justices thought that, unless the analyst was called to give evidence, that was not enough, because the opinion that the sample consisted of added water of at least thirteen parts per cent. was a statement of opinion and not of fact, but everything which the analyst states with regard to his analysis is a matter of opinion. It cannot be more than that. It is rebuttable and the statutory form obviously contemplates that the analyst will give his certificate in this
H form. We think the case must go back to the justices with an intimation that in the opinion of this court the analyst's certificate was admissible as evidence in full and *prima facie* shows that there were at least thirteen parts of added water in this milk.

Case remitted.

Solicitors: *Booth & Blackwell*, agents for *C. P. Brutton*, Dorchester (for the appellant).

F.A.A.

BRITISH AND COLONIAL FURNITURE CO., LTD. AND
OTHERS v. WILLIAM McILROY, LTD.

[COURT OF APPEAL (Jenkins and Hodson, L.J.J.), January 25, 1951.]

Landlord and Tenant—New lease—Interim order—Application by tenant—Undertaking by landlord not to dispossess tenant during proceedings for new lease—Right of tenant to interim order—Landlord and Tenant Act, 1927 (c. 36), s. 5 (1), (13).

Tenants of business premises applied for an interim order under s. 5 (13) of the Landlord and Tenant Act, 1927, authorising them to continue in possession of the premises pending the completion of proceedings taken by them for the grant of a new lease under s. 5 (1) of the Act. At the hearing of the application the landlords gave an undertaking to the court that they would take no steps to dispossess the tenants before the termination of the proceedings and no interim order under s. 5 (13) was made.

Held: the landlords having offered an undertaking which, in the view of the court, was satisfactory, the court was entitled, in its discretion, to accept that undertaking in lieu of making an interim order under s. 5 (13).

Semble: although s. 5 (13) was framed permissively, once it was shown that proceedings under s. 5 (1) for a new lease could not be completed before the termination of the tenancy, the court should, in the absence of special circumstances, make an interim order.

[AS TO TENANT'S RIGHT TO A NEW LEASE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 297-301, paras. 340-345; and FOR CASES, see DIGEST Supp.]

APPEALS by the tenants of business premises from a decision of PARKER, J., dated Dec. 20, 1950, whereby he refused to make interim orders under s. 5 (13) of the Landlord and Tenant Act, 1927, on the ground that the landlords had given an undertaking not to take steps to dispossess the tenants of the premises during the hearing of proceedings for the grant to them of new leases.

Weitzman and Hawser for the tenants.

Winn for the landlords.

JENKINS, L.J.: These are two appeals by two tenants of the same landlords in proceedings under the Landlord and Tenant Act, 1927. The short effect of that Act is that tenants who, or whose predecessors in title, have been carrying on business in leasehold premises for a specified minimum period may claim at the termination of their tenancy on quitting their holding compensation for goodwill, subject to the statutory requirements being complied with. Section 4 of the Act deals with compensation for goodwill. In s. 5 there are provisions that where a tenant would be entitled to claim compensation for goodwill, but alleges that the compensation he would receive would not make good the loss he would suffer by disturbance, he can claim a new lease in lieu of compensation. In such a case an application is made to the prescribed tribunal for a new lease, combined, as a rule, with a claim for compensation in the alternative. In the present case both tenants are claiming a new lease, and the parties agreed, as they were entitled to under s. 21 (1) (a), that the matter should be dealt with by the High Court instead of in the county court which is the usual tribunal for this purpose.

In a case in which there is a claim for a new lease it is obviously important that the tenant should be able to remain in the premises in question without a break pending the decision of the matter. Otherwise the object of the Act, namely, the preservation of the tenant's business and goodwill in the particular premises, would be frustrated, because it would be open to the landlord, between the termination of the contractual tenancy—if I may so describe it—and the commencement of a new lease granted under the order of the tribunal, to eject the tenant on the ground that the tenancy had come to an end. To deal with that situation s. 5 (13) of the Act provides:

"Where it appears to the tribunal that proceedings under this section cannot be completed and a new lease in accordance with the order of the tribunal entered into before the termination of the tenancy of the tenant, and that the delay is not due to any default on the part of the tenant, the tribunal may make an interim order authorising the tenant to continue in possession of the premises for such time after the termination of his tenancy and on such terms as the tribunal may allow."

A

In the present two cases applications were made for directions, including the question of interim protection under s. 5 (13). Those applications came before SLADE, J., in chambers on Dec. 14, 1950. On that occasion the landlords' solicitors offered an undertaking that the landlords would take no steps to dispossess the tenants before the termination of the proceedings. On that undertaking

B

being offered, the learned judge made no order under s. 5 (13) in either case, and the undertaking was embodied in the orders made as an undertaking given to the court. It appears that the tenants, having further considered the position, were not satisfied with that undertaking, and the two applications were brought on again on Dec. 20, and were dealt with by PARKER, J. All objections to their being re-heard were waived, and PARKER, J., decided that no order varying the

C

order of SLADE, J., should be made. This is an appeal from the two orders of PARKER, J., to that effect, one in each of these two proceedings.

Counsel for the tenants contend that it follows from the obvious intention of s. 5 (13) and the type of protection it is designed to give that, although the sub-section is framed permissively in the form that the tribunal "may" make an interim order, so as to give the tribunal discretion in the matter, yet, once it

D

is shown that the proceedings cannot be completed and implemented by the grant of a new lease (if so ordered) before the termination of the tenancy, then, unless the tenant has been in default in some way or there are other special circumstances, the tribunal ought to make an interim order. That, *prima facie*, is the right view of the sub-section. A case in which an interim order was refused

E

would, I should say, be an exceptional one because it is essential to the effective operation of the Act that a tenant who may get a new lease should be left undisturbed until the matter has been determined. Counsel, however, as it seems to me, carry that argument to a wholly excessive length. They say that, even if the landlord appears before the court and gives an undertaking to the court which will fully protect the tenant in his interim possession of the premises, nevertheless, the court is obliged to say: "No, an order will be made. An under-

F

taking will not be accepted." That is a contention which I am constrained to reject. In interlocutory proceedings it is a matter of everyday occurrence, where the court is asked to make an order for which there is a *prima facie* case and the party against whom the order is sought appears and offers an undertaking which the court regards as meeting the case, for the court to say: "In view of this undertaking no order will be made." That seems to me to be a regular and

G

proper exercise of the discretion.

Counsel for the tenants say, however, that in these two cases the orders ought to have been made because certain pending legislation, namely, the Leasehold Property (Temporary Provisions) Bill, if, and when, it comes into force, and providing it comes into force in the form in which the Bill now stands, will give some advantage to a tenant in occupation under an interim order which

H

would be denied to a tenant who is in possession under an undertaking given to the court in lieu of an actual order under sub-s. (13). To demonstrate that this pending legislation would, or might have, that effect we were invited to look at and to construe the print of the Bill. We refused to do that. In my judgment, it is contrary to all principles that we should decide these two cases not simply on matters relevant to the particular landlord and tenant legislation as it stands, but by reference to possible alterations in the law which may be made under legislation yet to be passed. Indeed, I cannot see how the possible operation of

future legislation can have any bearing on the question whether the learned judge properly exercised his discretion under s. 5 (13). The only object of sub-s. (13) is to maintain the *status quo* until the claim for a new lease has been adjudicated on under the provisions of the Landlord and Tenant Act, 1927. It is not designed to give any ulterior advantage to one side or the other. It is simply to keep the matter open in order that the new lease, when granted, may achieve its purpose of protecting the tenant in the enjoyment of the premises without the disturbance which might otherwise take place at the determination of the contractual tenancy. In my judgment, the undertaking which was given to the court in each of these two cases gave the tenant all the protection he could reasonably require or could be regarded as entitled to under s. 5 (13). I, therefore, hold that there is no substance in either of these appeals, which fail and should be dismissed.

HODSON, L.J.: I agree.

Appeals dismissed with costs.

Solicitors: *Paisner & Co.* (for British & Colonial Furniture Co., Ltd.); *Sidney Torrance & Co.* (for Maurice Lennard & Warde's Hollywood Film Star Shoes, Ltd.); *Hale, Ringrose & Morrow* (for the landlords).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

READ'S TRUSTEE IN BANKRUPTCY *v.* SMITH (PORTMAN BUILDING SOCIETY, Third Party).

[CHANCERY DIVISION (Roxburgh, J.), December 19, 20, 21, 1950, January 24, 1951.]

Judgment—Tender—Claim for £149—£106 paid into court—£136 awarded to plaintiff—Amount for which judgment should be given—Costs.

The plaintiff claimed from the defendant £149 16s. 9d. in respect of work done by him on behalf of the defendant. The defendant alleged that, having regard to the cost of remedying certain defects in the work, £106 11s. 9d. was the reasonable price therefor, and offered that amount to the plaintiff. The plaintiff refused to accept the offer, and the defendant paid £106 11s. 9d. into court. The court held that the sum due to the plaintiff was £139 16s. 9d., and it was argued by the defendant that, in view of the offer of payment of £106 11s. 9d., judgment ought to be given for £33 5s. with liberty to the plaintiff to take out of court £106 11s. 9d., and, consequently, that under the County Courts Act, 1934, s. 47 (1) (a) (i), the plaintiff was not entitled to costs.

HELD: the defendant could not plead tender because he had not offered the full amount claimed and did not in his defence admit the contract on which the action was founded, and in the absence of a good plea of tender there must be judgment for the plaintiff for £139 16s. 9d. with costs.

Dixon v. Clark (1848) (5 C.B. 365), *applied*.

James v. Vane (1860) (29 L.J.Q.B. 169), *not applied*.

[AS TO COSTS AFTER PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 99, para. 187; and FOR CASES, see DIGEST, Practice, pp. 874-876, Nos. 4156-4163.]

Cases referred to:

(1) *Dixon v. Clark*, (1848), 5 C.B. 365; 16 L.J.C.P. 237; 136 E.R. 919; 12 Digest 321, 2658.

(2) *James v. Vane*, (1860), 2 E. & E. 883; 29 L.J.Q.B. 169; 2 L.T. 281; 121 E.R. 330; 12 Digest 327, 2726.

ACTION by the trustee in bankruptcy of Charles Read to recover £149 16s. 9d., being the balance of the price of work and labour done by the bankrupt for and on behalf of the defendant.

A The defendant served a third-party notice on the Portman Building Society claiming an indemnity. The defendant paid £106 11s. 9d. into court, and, ROXBURGH, J., having held that the plaintiff was entitled to recover £139 16s. 9d. against the defendant, the form of the order to be made in the circumstances was considered in connection with the question of costs.

C. A. *Settle* for the plaintiff.

M. R. *Hoare* for the defendant.

B *Hewins* for the third party.

ROXBURGH, J.: In his defence, the defendant said:

C "If and in so far as the said bankrupt, his servants or agents, did any work in and about the said premises either for and on behalf of the defendant or at all (which is not admitted) such work was undertaken in purported pursuance of two specifications prepared by [one, Stiff,] for and on behalf of the Portman Building Society, the mortgagees of the said premises. If and in so far as it is alleged that the said work was executed pursuant to any contract express or implied between the said bankrupt and the defendant (which is not admitted) such contract was an entire contract for the complete execution of the whole of the works specified as aforesaid, and no sum became, or could become, due or payable in respect of the execution of a part only of such works. Neither the said bankrupt nor any person on his behalf completed the whole of the said works. Further or alternatively, in so far as any of the items of work specified as aforesaid were executed, the same were not completed fully or efficiently or at all, but were defective. The defendant admits that the reasonable total price for the proper and efficient execution of such of the said items as were executed would be the said sum of £204 16s. 9d., but says that the reasonable costs of remedying the said defects is £43 5s., in consequence whereof the reasonable total price for the said items is £161 11s. 9d. and no more."

E £55 had been paid by the defendant, and, making allowance for that payment, F the net amount claimed by the plaintiff was approximately £149, and the net amount which the defendant was prepared to pay was approximately £106. The defence continued:

G "The defendant accordingly, by letter to the plaintiff's solicitors, dated Dec. 27 aforesaid, . . . tendered a cheque for the said sum of £106 11s. 9d. but the said solicitors, by letter dated Dec. 28 aforesaid, refused to accept the same, and upon the same being again tendered as aforesaid by letter to the said solicitors, dated Dec. 29 aforesaid, such tender was again refused. No objection was taken with regard to any of the said tenders that the same were by cheque, but only that the amount tendered as aforesaid was insufficient to satisfy the plaintiff's claim. The defendant H accordingly brings into court the said sum of £106 11s. 9d."

I have, in my judgment, awarded the plaintiff £139, which is £10 less than he claims, and £33 more than the defendant paid into court. On that judgment, what does the plaintiff recover? But for an authority which is causing me much difficulty, I should have answered without hesitation that he recovers £139, and that the judgment should direct that the plaintiff should be at liberty to take out of court the £106 paid into court in part satisfaction of the judgment. Counsel for the defendant argues, however, that that is wrong. He says that

the court ought to order that the plaintiff do recover £33, and he be at liberty to take the sum paid into court out of court in addition to the said sum of £33.

Pausing there for a moment in a somewhat obscure branch of the law, it is plain that this was not a tender in the technical sense. In *Dixon v. Clark* (1) WILDE, C.J., says (5 C.B. 376):

"The argument further involved the general question, whether a tender of part of an entire debt is good: and several ancient and modern authorities bearing on this question, were referred to, but no case directly in point was cited; nor have we been able to find any. On consideration, however, we are of opinion, upon principle, that such a tender is bad . . . In actions of debt and *assumpsit*, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt . . . (for that would be inconsistent with the *uncore prêt* and *profert in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar."

In this case there were two defects which prevent the offer of payment from being regarded as a tender in the technical sense. First, only a part of the sum due was tendered. I have held that the sum due was £139, and the sum tendered was only £106. I am not concerned with appropriation in this case. It was an entire claim, and the sum of £106 was tendered in satisfaction of the entire claim. Moreover, so far from being *toujours prêt* to perform entirely the contract on which the action is founded, the defendant, in his defence, did not admit it. Therefore, it seems to me that, regarded from the technical point of view, this is not a good plea of tender.

I pass to the difficult case, *James v. Vane* (2). In that case (29 L.J.Q.B. 169) the declaration contained counts for goods sold and delivered, work and service done and materials provided, use and occupation of rooms and apartments, and upon accounts stated. Plea, except as to £26 10s. 6d., parcel, etc., never indebted. Secondly, as to the said sum of £26 10s. 6d., that the defendant was always ready and willing to pay to the plaintiff the said sum of £26 10s. 6d., parcel of the money claimed, and that before action he tendered and offered to pay the same to the plaintiff, but he refused to accept it, and that the defendant now brought into court the said sum of £26 10s. 6d. ready to be paid to the plaintiff. Pausing there, that looks like a good plea of tender, if—and that, of course, was the footing on which it was pleaded—the sum due was £26 10s. 6d. and no more. In other words, I think that was intended to be a technical plea of tender, which would have been well founded if the court had not awarded a larger sum. The report states:

"Issues were taken and joined upon these pleas. At the trial, which took place at the last Durham Assizes, it appeared that the action was brought to recover two sums of £24 8s. 10d. and £4 10s. 6d., and the jury found as to £26 10s. 6d., that the defendant did tender and offer to pay the same to the plaintiff, but he refused to accept it, and that the said sum was not enough by £2 8s. 10d. to satisfy the claim of the plaintiff in respect of the matter to which the within plea was pleaded."

Pausing there, it would seem to follow that it was a bad plea of tender because, as I have already said, it is established by authority that a lesser sum cannot be tendered in satisfaction of a larger sum so as to make a good tender. The report continues:

A "The judge refused to certify that the cause was a proper one to be tried before him, and, upon taxation, the master decided that the plaintiff was entitled to costs upon the higher scale, and taxed them accordingly. Subsequently, Hindmarch obtained a rule, calling upon the plaintiff to show cause why the master should not review his taxation."

B If there is, in fact, a good tender in law, it seems to me clear that the judgment should be that the action be dismissed with costs, but, of course, the plaintiff, notwithstanding that the action is dismissed with costs, is allowed to take out of court the sum paid into court. Therefore, if the defence had been made good in the present case, the order would have been that the action be dismissed with costs, but the plaintiff be at liberty to take out of court the £106 paid into court. Again, supposing the claim had been for two sums of, say, £100 and £30, and supposing the defence of tender had been made good as to £100 and the £100 had been brought into court, and the £30 claim had been resisted, C but had ultimately been found to be good, I am equally clear judgment would be for £30 and not £100. But is it the same thing if no good plea of tender is established? Apart from this authority, I should have thought, plainly, not. It is said that the plaintiff might have accepted the £106. Of course he might, but he could only accept it in full satisfaction of his claim. He was not in a position to take the £106 and then go on with the action. If he had been in D that position, then it might fairly be said all he would have recovered in the action was the £33, but, if he was not prepared to accept the £106 in full satisfaction, he could not take any of it. He had no option, as far as I can see, but to pursue the claim. He chose to pursue it for £149.

E Where is the doctrine to end? Supposing, before action brought, but with proceedings threatened, a solicitor writes and says: "My client will pay half of your claim if you are prepared to accept it in full satisfaction." Is it to be said in the action, on the footing that the claim is wholly successful, that the plaintiff has not recovered the whole debt, but only half of it, because he could have had the other half without any action? It seems to me that such reasoning will not do.

F If I were quite clear what the court decided in *James v. Vane* (2), I should be bound, of course, to give effect to that decision, but I must confess to considerable bewilderment. COCKBURN, C.J., says (29 L.J.Q.B. 171):

G "Upon the substantial justice of the case I have no doubt. Where a plaintiff claims an amount which is the result of one demand, and which cannot be separated, he may say to the defendant when a smaller sum is tendered to him, 'I will not take less than the whole sum which I claim,' but where the whole demand is made up of an aggregate of items, and the defendant comes and says, 'I acknowledge that I owe you so much, and there is your money for you,' the plaintiff is wrong if he refuses to take it; and *quoad* that amount, he ought not to be allowed to keep the claim alive in its entirety, for the purpose of suing the defendant upon it in the superior court, so as to get costs upon the higher scale."

H That passage makes me certain that there were some facts in *James v. Vane* (2) which are not elucidated in the report. It does not suggest in the report that the £26 10s. 6d. tendered was appropriated to any one of the claims. It looks as though that sum was paid in in answer to the claims aggregating over £28, and, therefore, the sum paid in, on the face of it, was insufficient. The plaintiff, as far as I can see, was wholly entitled to go on with his action for the £28 19s. 4d. How it could be said he was only doing it for the purpose of

suings the defendant in a superior court so as to get his costs on the higher scale I cannot see. There must have been some facts which do not appear in the report. The Chief Justice continues (*ibid.*):

"His claim is really for the excess above that which he ought to have taken when it was offered to him,"

but it was offered to him in full satisfaction of his demand, and he could not take it except in full satisfaction of his demand, and, *ex hypothesi*, he was not bound to take it, because he was entitled to demand more. There, again, there must be something which remains obscure owing to some omission from the report. The Chief Justice goes on (*ibid.*):

"If he declines to accept that which the defendant was always ready to deliver over to him, and thus goes on with the action with a view of getting higher costs, he ought to be prevented from getting them. That is the substance of the matter . . ."

If that was the substance of the matter in *James v. Vane* (2), it is certainly not the substance of the matter in this case, for there is no doubt whatever that, while I do think that this action ought to have been brought in the county court, there is no reason whatever for suggesting that the plaintiff did not accept the £106 because he wanted to get costs on the higher scale. He obviously could not accept the £106 except on the footing that he abandoned £33 of his lawful claim. I am convinced—though I do not know what the distinction is—that there must be a very great distinction between *James v. Vane* (2) and the present case. The Chief Justice continues (*ibid.*):

". . . and then arises the question, whether the plaintiff must be allowed to get them upon any technical ground? My brother PICOTT says, that a plea of tender is not in bar of the action, and, therefore, that the plaintiff must be considered as recovering the whole, because the effect of the action is, that he gets the whole; but when the matter is looked at, it appears not to be so. The effect is this: suppose an action is brought for a given sum of money, and a tender is pleaded of that amount, and the money is brought into court; if the plaintiff does not take it, and goes on with the action, the defendant would have judgment and costs and, therefore, upon technical grounds, and upon the law of the case, the plaintiff has only recovered the excess above the sum which was tendered to him, and that excess which he has recovered is not sufficient to entitle him to have his costs taxed upon the higher scale."

I must confess I cannot follow the sequence of thought involved in the word "therefore." A good plea of tender is a defence, and, accordingly, the action fails and is dismissed with costs, but a bad plea of tender is no defence, and, therefore, the action succeeds—and succeeds, as far as I can see, to the full amount of the claim. Why, because when a good plea of tender is made out the judgment takes a special form, it should follow that whenever a bad plea of tender is pleaded the plaintiff should recover, not the amount of his debt, but only the amount of his debt less something which was proffered under the bad plea I confess I have difficulty in seeing.

CROMPTON, J., says (*ibid.*):

"If a tender had been pleaded of the whole amount claimed, he could not be said to recover that amount by getting judgment in the action. The effect of the plea of tender, and of its being proved, is, that the plaintiff is deprived of costs upon the higher scale, for he has made claim for something that he does not recover."

There, again, with all respect, I cannot follow it. The effect of a plea of tender, and of its being proved, is not that the plaintiff is deprived of costs on the

higher scale, but that his action is dismissed with costs. That is quite clear, and it is so stated by COCKBURN, C.J. CROMPTON, J., continues (*ibid.*):

"If he would recover nothing if the whole had been tendered to him, the same rule applies here, and shows that he only recovers that amount which is in excess of the sum tendered."

- A I cannot help thinking, where CROMPTON, J., uses the word "tendered," he means tendered in a technical sense, and he has somehow overlooked the fact that there was no tender in the technical sense in *James v. Vane* (2), or, possibly, the truth is that there was a technical tender for some reason which the report does not disclose, in which case, of course, the reasoning is very easy to follow. In refusing to apply *James v. Vane* (2), which is an authority that, so far as
- B I know, has not before now been discussed, I feel justified because I am certain that there must be circumstances in that case which differentiate it from the present one. I cannot believe that the law is that when anybody brings money into court, or even offers money out of court, judgment ought to be given only for the difference between the sum recovered and the sum offered merely because, if the plaintiff had been content to do so, he could have taken the sum offered
- C in full satisfaction without any proceedings. Therefore, I hold that the plaintiff has recovered, or will recover, in this action £139, and that he be at liberty to take out of court the £106 paid into court in part satisfaction of this judgment.
- D The form of order which I have made with deliberation, for the reasons which I have given, of itself shows that the plaintiff has recovered more than £100. That being so, ought I to deprive him of any costs? In my view, the County Courts Act, 1934, s. 47, is intended to supply a code in this matter, and although, no doubt, the discretion of the court over costs is very wide, in a matter which is wholly within s. 47 it seems to me that it would be unwise for me to depart from that code. I think I had better say, in case the matter should go to the Court of Appeal, that, if there had been no such code and if I had thought that my discretion was wholly at large, I should have awarded
- E the plaintiff only such costs as he would have had if he had brought this action in the county court, but, having regard to the code in s. 47, to the fact that he has recovered over £100, and to the fact that his conduct is open to no criticism except on this one point of having brought this action in the High Court, I do not think that I ought to treat my discretion as wholly at large.

Order accordingly.

- F Solicitors: *Tarry, Sherlock & King* (for the plaintiff); *Warmingtons* (for the defendant); *Hewlett & Co.* (for the third party).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

FERGUSON v. WEAVING.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Devlin, JJ.), January 17, 18, 26, 1951.]

Intoxicating Liquor—Offences—Consumption after permitted hours—Aiding and abetting—Knowledge of offence by licensee's servants—No knowledge in licensee—Liability of licensee—Licensing Act, 1921 (c. 42), s. 4 (b).

Police officers visiting licensed premises found persons consuming intoxicating liquor outside the permitted hours, contrary to s. 4 (b) of the Licensing Act, 1921. The respondent, the licensee, who was not at any material time present in that part of the premises where the offence was committed, had taken all reasonable precautions to prevent consumption after the closing time, but the waiters she employed had not carried out her instructions.

HELD: in view of the terms of s. 4 knowledge could not be imputed to the respondent to make her guilty of aiding and abetting the commission of the offences by the persons consuming.

[AS TO OFFENCES RELATING TO PERMITTED HOURS, see HALSBURY, Hailsham Edn., Vol. 19, pp. 145, 146, paras. 350-352; and FOR CASES, see DIGEST, Vol. 30, pp. 94-97, Nos. 724-741, Digest Supp., and 2nd Digest Supp.]

Cases referred to:

- (1) *Re Smith*, (1858), 3 H. & N. 227; 157 E.R. 455; *sub nom. Ex p. Smith*, 27 L.J.M.C. 186; 31 L.T.O.S. 87; 22 J.P. 450; 33 Digest 361, 707.
- (2) *Johnson v. Youden*, [1950] 1 All E.R. 300; [1950] 1 K.B. 544.
- (3) *Cundy v. Le Cocq*, (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 30 Digest 86, 667.
- (4) *Somerset v. Hart*, (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 14 Digest 43, 122.
- (5) *Somerset v. Wade*, [1894] 1 Q.B. 574; 63 L.J.M.C. 126; 70 L.T. 452; 58 J.P. 231; 14 Digest 38, 79.
- (6) *Linnett v. Metropolitan Police Comr.*, [1946] 1 All E.R. 380; [1946] K.B. 290; 115 L.J.K.B. 513; 174 L.T. 178; 110 J.P. 153; 2nd Digest Supp.

CASE STATED by the stipendiary magistrate for Leeds.

At a court of summary jurisdiction sitting at Leeds on July 27, 1950, the appellant, a chief inspector of police, preferred informations against twelve persons charging them with consuming intoxicating liquor on licensed premises at a time not within permitted hours, namely, about 10.18 p.m., contrary to s. 4 of the Licensing Act, 1921, and charging the respondent, the licensee of the premises, with aiding, abetting, counselling and procuring the commission of the said offences, contrary to s. 5 of the Summary Jurisdiction Act, 1848. The twelve persons were found Guilty and fined, but the charge against the respondent was dismissed.

It was contended on behalf of the appellant that one or more of the respondent's servants either knew of or connived at the offences, that the presence or knowledge of her servants was in law her presence or knowledge, and that the respondent was not entitled to a dismissal of the charges against her merely because she was not personally present at the time of the commission of the offences. For the respondent it was contended that she had no part in or knowledge of the commission of the offences and was not guilty of aiding, abetting, counselling or procuring them.

The magistrate was of the opinion (a) that the respondent was present, not only actually on the premises, but also constructively in that part of the premises where the offences were committed through the presence of her servants who were there; but (b) that the respondent did everything she could to see that the requirements of the law were complied with; and (c) that because one or some of

her servants failed in his or their duty, she could not be said to be actually or constructively assisting in the commission of the offences. Accordingly, he dismissed the information against her.

Stanley-Price for the appellant.

G. Pollock for the respondent.

Cur. adv. vult.

- A Jan. 26. **LORD GODDARD, C.J.**, read the following judgment of the court. This is a Special Case stated by the stipendiary magistrate for Leeds, before whom certain persons, who do not appeal, were convicted of consuming intoxicating liquor on licensed premises known as the Oakwood Hotel at a time not within permitted hours. The respondent, who was the licensee of the hotel, was charged with aiding, abetting, counselling and procuring the commission of the said offences, contrary to s. 5 of the Summary Jurisdiction Act, 1848, the offence itself being created by s. 4 of the Licensing Act, 1921. At the hearing an application was made to amend the information against the respondent by the deletion of the words "aid and abet," so that the information charged her only with counselling and procuring the commission of the offences. Before us it was contended on her behalf that, even if the facts on which the prosecution relied were accepted, they could only establish a case of aiding and abetting, and that there was no evidence that the respondent in any way counselled or procured the commission of the said offences. It is well known that the words "aid and abet" are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein. He is then described as an aider and abettor, whereas the words "counsel and procure" are appropriate to a person who, though not present at the commission of the offence, is an accessory before the fact. That all these words may be used together to charge a person who is alleged to have participated in an offence otherwise than as a principal in the first degree was established by *Re Smith* (1). Whether, where the words "counsel and procure" alone are used, there must be a proof of something more than would establish a case of being an accessory before the fact is not one which we feel necessary to decide in this case. The main point that was argued is one of general importance with regard to offences under the Licensing Acts, and, as we are satisfied that the respondent cannot be convicted as a participant, to use a compendious expression, in the offences charged against the persons who consumed the intoxicating liquor, we give no decision on it.
- The facts found by the magistrate were that on the night in question, soon after 10 p.m., police officers entered the hotel, some going into the concert room and others into the tap-room. In the concert room some sixty or seventy people were sitting at tables, including those persons who were convicted of consuming drink after hours. Three waiters employed by the respondent were on duty in the room and the respondent's instructions to them were that at ten o'clock they were to collect glasses containing any intoxicating liquor before collecting empty glasses, and were to require persons having glasses containing such liquor either to drink it or give up the glass. The respondent was in the central part of the premises, in a place called the service bar. From there she gave two signals, one at five minutes to ten, putting off one light in the room to indicate the approach of closing time, and at ten o'clock she switched off one of the electric chandeliers and the electric fan in each room and the waiters called "time."
- H She went from the service bar into the smoke-room and from there into the lounge, and was going into the concert room when she was made aware of the presence of the police. The magistrate also found that, if the waiters had properly carried out their instructions, all glasses, whether containing liquor or not, would have been collected by ten minutes past ten, and one or more of the waiters in the concert room had failed to carry out his or their duties and instructions. The magistrate found that the respondent was not only present on the premises, but also present constructively through the presence of her servants, but whether

she was present constructively is a question of law. The magistrate also found that she did everything she could to see that the requirements of the law were complied with and could not be said to be actively or constructively assisting in the commission of these offences. Accordingly, he dismissed the charge against her.

The argument for the appellant may be summarised as follows. If the respondent herself had been present or had knowledge that the customers were consuming liquor after hours and took no steps to prevent it, she would be aiding and abetting the offence. Although she herself was not present and had no knowledge, yet, as she had placed waiters in charge of the concert room and had, as it was said, delegated the management of the room to them, their knowledge was her knowledge, and she was, accordingly, guilty of aiding and abetting.

The first thing to observe is that, while s. 4 of the Licensing Act, 1921, prohibits a licensee from selling or supplying either by himself or his servants intoxicating liquor outside permitted hours, and also prohibits the consumption in licensed premises of any intoxicating liquor after those hours, it does not make it an offence in the licensee to suffer or permit the consumption of liquor after hours. While it may seem curious that Parliament did not make this an offence in a licensee, nothing would be gained by discussing whether the omission appears to be deliberate or accidental. The fact remains that consuming liquor after hours is only a substantive offence in the consumer. At the same time, there can be no doubt that, if a licensee consciously permits consumption after hours, it would amount to aiding and abetting the offence, but we have now to consider whether, as the section does not create a substantive offence in the licensee, she can be convicted of aiding and abetting by imputing to her the knowledge of her servants.

There can be no doubt that this court has more than once laid it down in clear terms that before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute the offence: see, for instance, *Johnson v. Youden* (2). The magistrate in this case has acquitted the respondent of any knowledge of the matters which constituted the principal offence, but it is said that the cases establish that the knowledge of her servants must be imputed to her, and that there are many cases in which a licensee has been convicted although he himself did not know the facts constituting the offence is, of course, beyond question. There are certain offences under the Licensing Acts which arise because the statute imposes an absolute prohibition, for instance, the offence of selling liquor to a drunken person. In *Cundy v. Le Cocq* (3) it was held that the prohibition against selling to such a person imposed by s. 13 of the Licensing Act, 1872, now replaced by s. 75 of the Licensing (Consolidation) Act, 1910, is absolute and that knowledge of the condition of the person served is not necessary to constitute the offence. On the other hand, there are many offences in which it is necessary to show either that the licensee suffered or permitted the offence to take place, or that he knowingly permitted matters which constitute an offence. There is no material difference between permitting or suffering something and knowingly allowing it to take place, for, as was said in *Somerset v. Hart* (4) (12 Q.B.D. 362):

"How can a man suffer a thing to be done when he does not know of it?"

The difference between an absolute prohibition and a prohibition against permitting or suffering was pointed out by COLLINS, J., in *Somerset v. Wade* (5), where, under other words in the same section as was under consideration in *Cundy v. Le Cocq* (3), the licensee was prosecuted not for selling to a drunken person but for permitting drunkenness on licensed premises. As it was there proved that the licensee did not know that the person in question was drunk the court held he could not be convicted of permitting drunkenness, though they approved the decision in *Cundy v. Le Cocq* (3) because the prohibition against selling to a drunken person was absolute.

We now turn to the cases in which knowledge has been imputed to a licensee because of the knowledge of his manager or servant. It is unnecessary to go through them all because the principle which applies was laid down, not for the first time, in *Linnett v. Metropolitan Police Comr.* (6). All the cases on the subject were quoted and, in giving judgment, I said ([1946] 1 All E.R. 382):

- A "The principle does not, in my opinion, depend merely upon the legal relationship between the two persons, the person who actually permitted with knowledge and the person who is convicted although he had no actual knowledge. The point does not, as I say, depend merely on the fact that the relationship of master and servant exists; it depends on the fact that the person who is responsible in law as the keeper of the house, or the licensee of the house if the offence is under the Licensing Act [1872], has chosen to delegate his duties, powers and authority to somebody else."
- B

- We will assume for the purpose of this case that the respondent had delegated to the waiters the conduct and management of the concert room, and if the Act of 1921 had made it an offence for a licensee knowingly to permit liquor to be consumed after hours then the fact that she had delegated the management and control of the concert room to the waiters would have made their knowledge her knowledge. In this case there is no substantive offence in the licensee at all. The substantive offence is committed only by the customers. She can aid and abet the customers if she knows that the customers are committing the offence, but we are not prepared to hold that knowledge can be imputed to her so as to make her, not a principal offender, but an aider and abettor. So to hold would be to establish a new principle in criminal law and one for which there is no authority. If Parliament had desired to make a licensee guilty of an offence by allowing persons to consume liquor after hours it would have been perfectly easy so to provide in the section. A doctrine of criminal law that a licensee who has knowledge of the facts is liable as a principal in the second degree is no reason for holding that, if she herself had no knowledge of the facts but someone in her employ and to whom she may have entrusted the management of the room did know them, this makes her an aider and abettor. As no duty is imposed on her by the section to prevent the consumption of liquor after hours there was no duty in this respect that she could delegate to her employees. While it may be that the waiters could have been prosecuted for aiding and abetting the consumers, as to which we need express no opinion, we are clearly of opinion that the respondent could not be. To hold the contrary would, in our opinion, be an unwarranted extension of the doctrine of vicarious responsibility in criminal law. The appeal will be dismissed with costs.
- C
- D
- E
- F

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the appellant); *Collyer-Bristow & Co.*, agents for *Alf. Masser & Co.*, Leeds (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

DOWNIE v. TURNER AND OTHI

[COURT OF APPEAL (Somervell, Jenkins and Birkett, L.J.J.), November 28, 29, 1950.]

Landlord and Tenant — Lease — Forfeiture — Waiver — Breach of covenant — Covenants against underletting without consent and against user otherwise than as private dwelling-house—Unlawful underletting—Acceptance by landlord of rent—Waiver of forfeiture for breach of covenant as to user.

By an agreement in writing, dated Nov. 9, 1940, the landlord agreed to let a dwelling-house to the tenant for one year and thereafter, subject to notice as therein provided, at a weekly rent of 35s. The agreement provided *inter alia* that the tenant "will not during such tenancy underlet the said premises or any part thereof without the previous consent in writing of the landlord: such consent shall not be unreasonably withheld to a good tenant . . . and the tenant agrees that he will not use the said premises for any other purpose than as a private dwelling-house . . ." In February, 1946, without obtaining the landlord's consent, the tenant sub-let part of the premises as living accommodation to the sub-tenant and his wife. On Oct. 21, 1949, the landlord served a notice to quit on the tenant, and on Nov. 22, 1949, the tenant served a notice to quit on the sub-tenant. On Apr. 4, 1950, the landlord served on the tenant a forfeiture notice under the Law of Property Act, 1925, s. 146 (1). After September, 1949, the landlord continued accepting rent from the tenant until Feb. 13, 1950, with knowledge of the sub-letting. It was conceded that the landlord's acceptance of rent after September, 1949, operated as a waiver in respect of the breach of the covenant against underletting, but it was argued that the tenant was in breach of his covenant to use the premises only as a private dwelling-house, and that that breach was continuous and had not, therefore, been waived.

HELD: assuming that the unlawful sub-letting was a breach of the covenant as to user, the acceptance by the landlord of the rent after he had knowledge of the sub-letting constituted a waiver not only of the breach of the covenant against underletting, but also of the breach of the covenant with regard to user.

Walrond v. Hawkins (1875) (L.R. 10 C.P. 342), as explained by BRAMWELL, L.J., in *Lawrie v. Lees* (1880) (14 Ch.D. 262), applied.

[AS TO WAIVER OF FORFEITURE, see HALSBURY, Hailsham Edn., Vol. 20, pp. 253-257, paras. 286-289; and FOR CASES, see DIGEST, Vol. 31, pp. 497-503, Nos. 6427-6504.]

Cases referred to:

- (1) *Penton v. Barnett*, [1898] 1 Q.B. 276; 67 L.J.Q.B. 11; 77 L.T. 645; 31 Digest 484, 6327.
- (2) *Atkin v. Rose*, [1923] 1 Ch. 522; 92 L.J.Ch. 209; 128 L.T. 653; 31 Digest 152, 2871.
- (3) *Walrond v. Hawkins*, (1875), L.R. 10 C.P. 342; 44 L.J.C.P. 116; 39 J.P. 248; *sub nom. Waldron v. Hawkins*, 32 L.T. 119; 31 Digest 504, 6515.
- (4) *Griffin v. Tomkins*, (1880), 42 L.T. 359; 44 J.P. 457; 31 Digest 58, 2044.
- (5) *Lawrie v. Lees*, (1880), 14 Ch.D. 249; 49 L.J.Ch. 636; 42 L.T. 485; 44 J.P. 506; *affd.*, (1881), 7 App. Cas. 19; 51 L.J.Ch. 209; 46 L.T. 210; 31 Digest 172, 3049.
- (6) *Barton v. Keeble*, [1928] Ch. 517; 97 L.J.Ch. 215; 139 L.T. 136; Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE SIR GERALD HURST, K.C., Croydon County Court, dated July 28, 1950.

The landlord claimed possession against both the tenant and the sub-tenant and the sub-tenant's wife for forfeiture, but JUDGE HURST gave judgment for

the defendants on the ground that the breaches of covenants of which the landlord complained had been waived by the landlord's subsequent acceptance of rent.

L. A. Blundell for the landlord.

Lermon for the tenant.

The sub-tenant and his wife were not represented.

A **SOMERVELL, L.J.:** This is an appeal from a decision of His Honour JUDGE SIR GERALD HURST, K.C. The landlord claimed possession of premises on the ground of forfeiture. The lease contained two covenants with which we are concerned. The first was a covenant in the ordinary form that the tenant

"... will not during such tenancy underlet the said premises or any part thereof without the previous consent in writing of the landlord: such consent shall not be unreasonably withheld to a good tenant."

B The second is a covenant by which:

"And the tenant agrees that he will not use the said premises for any other purpose than as a private dwelling-house or do anything thereon that may be or become a nuisance or annoyance to the said landlord or adjoining tenants or neighbours."

C The date of the agreement was Nov. 9, 1940. In February, 1946, the tenant sub-let to the sub-tenant without obtaining the consent required by the covenant. On Oct. 21, 1949, the landlord served a notice to quit on the tenant and on Nov. 22, 1949, the tenant served a notice to quit on the sub-tenant. On Apr. 4, 1950, the landlord served his notice in respect of forfeiture under the Law of Property Act, 1925, s. 146 (1). That notice was ignored and proceedings were taken.

D The tenant relies on waiver, and it is common ground that after September, 1949, the landlord accepted rent with knowledge that there had been a sub-letting to the sub-tenant and that he and his wife were in the house. The landlord continued to accept rent until Feb. 13, 1950. As the learned judge stated in his judgment (and it is not disputed that it is accurate):

E "Counsel for the landlord concedes that the landlord's acceptance of rent has operated as a waiver in respect of the unlawful underletting, but he contends that the breach of covenant 'not to use the said premises for any other purpose than as a private dwelling-house' is continuous, and has, therefore, not been waived. In these circumstances, the only issue between the parties is whether or no the last mentioned breach is 'continuous' in character."

F He then referred to some cases and quoted a statement from the judgment of RIGBY, L.J., in *Penton v. Barnett* (1). That was a case of non-repair, where it was held that a breach of a general covenant to keep in repair was a continuing breach. Towards the end of his judgment RIGBY, L.J., said ([1898] 1 Q.B. 281):

G "If there had not been a recurring breach, but something which had happened once for all, the state of things might have been different..."

H The case now before us proceeded in the county court on the basis that the sub-letting and the occupation by the sub-tenant was a breach of the covenant not to use the premises for a purpose other than that of a private dwelling-house, and that was the basis on which the learned judge proceeded. It is plain that, if what happened amounted to a breach of the covenant not to use the premises for a purpose other than that of a private dwelling-house, that breach arose from the sub-tenancy to the sub-tenant and his occupation under the sub-tenancy. If a breach of that covenant was to be relied on, it would not be enough simply to allege that the sub-tenant and his wife were in the house. One does not cease to use one's house as a private dwelling-house because one has a married couple in it. If there was a breach, it must be because the sub-tenant under his sub-

lease was given exclusive possession of a part of the house. If, as is conceded, the sub-letting was done once for all, *prima facie* the breach of the covenant in regard to user is also something which happened once and for all. In answer to that, counsel for the landlord submits that the continued occupation by the sub-tenant is an essential ingredient in the breach of the covenant in regard to user, whereas there would be a breach of the sub-letting covenant even if he did not occupy. I think that that is too fine a distinction on which to base a decision that the breach, if any, of the second covenant, is continuous rather than something done once and for all. Both the sub-letting and the alleged user of the house otherwise than as a private dwelling-house arose, in my opinion, from the sub-tenancy, and it is impossible, I think, in law to distinguish for this purpose and say that the one was done once for all and the other was a continuing breach.

We were referred to a number of cases, but they do not seem to me to help very much. *Atkin v. Rose* (2) and several of the other cases which were cited were cases where the covenant, a breach of which, it was said, was continuous, was, for example, not to exercise a particular trade. In *Atkins v. Rose* (2):

“The lease contained a covenant by R. that he would not use or exercise or ‘permit or suffer’ any other person to use or exercise in or upon the demised premises any trade or business other than that of a bag manufacturer.”

The business of a hairdresser was carried on, and there was some evidence that the landlord knew that it was being carried on, though there was no evidence that he knew, as the fact was, that the man carrying on the hairdresser’s business was a sub-lessee. Those cases do not assist, because the covenants deal with quite different subject-matters. Here, where there is a sub-lease for ordinary occupation as a dwelling-house, and it is sought to bring that within the general words of the wider covenant which is, obviously, primarily aimed against business use, it seems to me impossible to differentiate between the two breaches of covenant and say that one was done once and for all, but the other is continuous.

After referring to *Walrond v. Hawkins* (3), the learned county court judge said that the best way of defining, as it were, what was continuous, was to say it must be

“... something which still remains within the tenant’s power to discontinue.”

I am not sure that that is quite right. I think that that might disregard what is very important in these cases, *i.e.*, the landlord’s actual knowledge or the knowledge which he must be presumed to have at the time when he accepts the rent. That it is, however, a factor to be borne in mind in considering whether the breach is continuous or not is, in my view, established by the authorities, which show that there is no single formula which can be applied in all cases.

In *Griffin v. Tomkins* (4) premises were used in breach of contract for trading purposes, and the landlord accepted rent with some knowledge of the user. The covenant in question was a covenant against permitting or suffering. In his judgment LUSH, J., said (42 L.T. 361):

“I think this case opens a further consideration. I think it is competent to the defendant to show, as was shown here, that he had let that person in under a lease for several years, because the question is whether he permitted or suffered him to carry on business, which would seem to import voluntary acts. According to the decision of the Court of Common Pleas before mentioned [*Walrond v. Hawkins* (3)], where there is a subsisting tenancy at the time which he could not put an end to, he cannot be said to have permitted or have suffered it. I think, therefore, when he showed that

he had already granted a lease for several years, and that the waiver was committed after that lease was granted, and after some interest was known to have existed in the tenant, that assumes a tenancy at all events during the continuance of that lease, and down to such a time as the lessee is able again to enter under that lease."

A That expression of the law shows, I think, that the power to discontinue is an element in considering whether the breach is continuous.

The effect of *Walrond v. Hawkins* (3) was summarised by BRAMWELL, L.J., in *Lawrie v. Lees* (5) thus (14 Ch.D. 262):

B "The covenant in that case was that the lessee was not to assign or demise to or permit any other person to occupy the premises or any part thereof without the consent of the lessor. What the Court of Common Pleas said was this, 'What the lessee has done is a demise, and it is a breach of the covenant not to demise, but the lessor has elected not to treat it as a breach or forfeiture, and he cannot say also that the lessee has broken the other covenant that he would not permit any other person to occupy'."

C That seems to me to negative precisely what counsel for the landlord is seeking to do here. He admits that the covenant relating to sub-letting has been waived, and he is seeking to rely on the other covenant as one which says that the tenant must not allow somebody to occupy part of the house as a private dwelling-house. I think that the learned judge was right.

D I have considerable doubt whether on the construction of this lease a sub-tenancy of part of the house to be used as a dwelling-house by the sub-tenant is a breach of the covenant whereby the tenant agrees that he will not use the said premises for any other purpose than as a private dwelling-house. We were referred to cases where, subject to similar covenants, a lessee had let out a house in tenements. It seems to me plain that in so letting the lessee is not using the house as a dwelling-house, but is conducting the business of letting out flats or tenements. In *Barton v. Keeble* (6) the same principle was applied by EVE, J., to a single sub-letting of three rooms. It is to be noted that the covenant there was in a long lease, and it did not, I think, contain a covenant such as the lease in the present case contained, allowing sub-letting with consent. Of course, if a lessee sub-lets for some purpose other than use as a private dwelling-house, both covenants are broken, but where he sub-lets for the purpose of use as a private dwelling-house it seems to me difficult to say that that is a breach of the first covenant, which, however, provides for consent being given which will make it not a breach and also that it is a breach of the second covenant which has no such provision for consent. I, therefore, am inclined to think that the sub-letting of part of the house for use as a dwelling-house falls within the clause with regard to sub-letting, and is taken out, even if it might otherwise have been within it, from the general covenant with regard to the use of the premises for purposes other than a private dwelling-house. On the basis of the concession made by counsel for the landlord, if that is right, it would make it impossible for him to contend that his client could succeed. For these reasons I think this appeal must be dismissed.

H JENKINS, L.J.: I agree. Counsel for the landlord has by no means succeeded in satisfying me that the learned judge did not come to a correct conclusion. I share the doubt expressed by my Lord whether in this particular tenancy agreement, containing as it does a covenant against underletting without consent, the covenant against using the premises for any purpose other than as a private dwelling-house extends to a sub-letting of part of the house for purely residential purposes. If it does so extend, there is no doubt that curious results might ensue. In the first place, I apprehend that a sub-letting with consent could not be relied on as a breach of the covenant as to user. But that is not the only possible case. The covenant is not to underlet without the

consent in writing of the landlord and "such consent shall not be unreasonably withheld to a good tenant." The effect of that qualification would be that the tenant, being desirous of sub-letting, produces a prospective sub-lessee whom he claims to be a good tenant, and asks for consent to sub-let to that person. If the landlord withholds his consent, the tenant then (at his peril it is true) can sub-let to that person and has not committed a breach of the covenant in so doing if he can show that the sub-tenant is a good tenant and that the landlord withheld his consent unreasonably. I ask myself whether in those circumstances the sub-letting so effected, without any breach of the covenant against underletting, would in itself expose the tenant to a forfeiture because it technically involved the use of the premises for a purpose other than as a private dwelling-house, even though the purpose of the sub-letting and the use made of the part sub-let was purely residential.

Be that as it may, I am content, for the purposes of the present case, to assume that a mere sub-letting of part of the premises for residential purposes would in itself constitute a breach of the covenant as to user. Even so, it seems to me that the landlord's contention cannot succeed. It follows from the effect which he attributes to the covenant as to user, and which I for the sake of argument assume it to have, that the sub-letting of part of the premises *ex necessitate*, and of itself and without any other act on the tenant's part, was a breach of the covenant as to user, even though the sub-letting was for purely residential purposes. That being the position, what was the effect of the landlord's receipt of rent after Sept. 9, 1949, by which date he admittedly had notice of the sub-letting? The landlord knew that there was a sub-letting of part of the premises. He knew that under the terms of the tenancy agreement that sub-letting was a breach of the covenant against underletting, and also of itself necessarily constituted a breach of the covenant as to user which must automatically continue so long as the sub-tenancy lasted. That being the state of his knowledge, he received rent under the tenancy agreement, thereby confirming the tenancy notwithstanding the breach of covenant constituted by the sub-letting. In those circumstances, I think the conclusion is inevitable that the landlord must be taken to have waived, not merely the breach of the covenant against underletting itself, but also the breach of the covenant as to user so far as that breach was inseparable from, and would necessarily continue during the existence of, and merely by virtue of the existence of, the sub-letting, the breach constituted by which he had waived.

I agree with my Lord that what was said by BRAMWELL, L.J., in *Lawrie v. Lees* (5) as to the effect of *Walrond v. Hawkins* (3) is precisely in point in the present case. The landlord, having waived the breach constituted by the sub-letting, cannot rely on the continuing character of the tenant's breach of the other covenant, namely, the covenant as to user brought about by the mere fact of that same sub-letting, so as to claim a forfeiture notwithstanding his waiver of the breach constituted by the sub-letting itself. The truth is that the two breaches are no more than different aspects of one and the same act. If the act in one aspect of it is waived as an available breach of covenant, it seems to me it is necessarily waived as an available breach in its other aspect also. Accordingly, I agree that the appeal fails.

BIRKETT, L.J.: I agree. In the agreement of Nov. 9, 1940, there were two covenants with which we have been concerned. The first was not to underlet without the previous consent in writing of the landlord. After a few other matters dealing with repairs and the payment of rent and matters of that kind there comes the other:

"And the tenant agrees he will not use the said premises for any other purpose than as a private dwelling-house."

The argument of counsel for the landlord, as I understood it, was that there were two complete and separate covenants, and that there have been two quite

separate and distinct breaches of those covenants. There has been a distinct breach of the covenant not to underlet without consent, and an equally clear breach of the covenant not to use. The matter is artificial and unreal, to my way of thinking, in that the act which is complained of, from which everything else follows, was the actual underletting. The tenant sub-let so that the sub-tenant and his wife might live in the house, and those two matters, namely, the sub-letting and the user as a dwelling-house, seem to me to be one and indivisible, as I suggested in the course of the argument. I share the view which has been already expressed about whether a sub-letting for residential purposes is a breach of the contract not to use other than as a private dwelling-house, but I will deal with this case on the footing that it is. Counsel for the landlord says, with regard to the first distinct covenant and the first distinct breach, that admittedly there has been a waiver by the acceptance of rent with the knowledge that the sub-tenant was living on the premises, and, therefore, he has no effective claim with regard to that covenant, but he says with regard to the other equally distinct covenant, the user, that that is distinguished by the fact that it is a continuing breach as distinct from the breach of the covenant not to sub-let which occurred once and for all. He said that that continuing breach has not been waived by the acceptance of rent, as he concedes it was in the first instance. On that the learned county court judge said:

“ . . . the only issue between the parties is whether or no the last mentioned breach [the user] is ‘continuous’ in character. Having considered [the cases] it seems to me that the touchstone to distinguish between continuous and non-continuous breaches of covenant is to ascertain whether the breach is ‘something which had happened once for all’ (*per* RIGBY, L.J., in *Penton v. Barnet* (1) ([1898] 1 Q.B. 281)) or something which still remains within the tenant’s power to discontinue.”

With regard to the words “within the tenant’s power to discontinue” counsel for the landlord, I thought, put a very powerful argument on that matter when he said that, if that were the test, then it was within the tenant’s power to discontinue, for he could provide alternative accommodation. He could possibly persuade the sub-tenant to go, or in the last and most desperate resort he could go himself. No doubt, in a proper case, indeed in this case, this is a fact which has to be considered, but it is not of itself conclusive or decisive. My own clear view about this matter is that it is impossible in this case to make that clear line of demarcation which counsel for the landlord contended for between the two covenants, the covenant to sub-let and the covenant not to use other than as a private dwelling-house. I fully agree that it is impossible to make that differentiation or distinction in this case, and that being so, I think there was not merely a waiver of the first covenant not to sub-let, but equally by the same act there was waiver of the second covenant with regard to user, if, indeed, the sub-letting was a breach at the same time of that covenant. For these reasons I agree with the judgments which have been delivered and that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Gilbert, Clarke & Gilbert* (for the landlord); *W. H. Matthews & Co.* (for the tenant).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re GINGER (deceased). ROBERTS AND ANOTHER v. WESTMINSTER HOSPITAL GOVERNORS AND OTHERS.

[CHANCERY DIVISION (Roxburgh, J.), January 23, 1951.]

Will—Legacy—To found a cot in a hospital—“Found.”

By her will, dated May 30, 1940, a testatrix, who died on Nov. 23, 1948, requested her trustees to found a cot in the Westminster Hospital in memory of her uncle G. and to use for this purpose £1,000 free of duty. At the date of the will the Westminster Hospital had a scheme for the endowment of beds and cots, which provided for the perpetual endowment of a bed for £1,000 or of a cot for £600. Subject to the regulations of the hospital, persons so endowing beds and cots were to enjoy the privilege of naming such beds and cots and also of nominating patients to occupy them. At the date of the death of the testatrix, the hospital could allocate one of its existing beds to the bequest and affix nearby an appropriate inscription commemorating G., but it could not allow the trustees to nominate patients.

HELD: on the true construction of the will the right to nominate was not a condition of the bequest and by her use of the word “found” the testatrix did not mean that a new cot must be established; nor was the gift impracticable on the ground that it was not possible to allocate the bequest to any particular cot, for the testatrix’s intention was that the bequest should be applied to the maintenance of the hospital to the extent of the cost of the upkeep of one cot; and, on the governors’ undertaking to name a cot in perpetuity in memory of G. and to invest the legacy and apply the income thereof for purposes relating to hospital services, payment should be made to them.

A.-G. v. Belgrave Hospital ([1910] 1 Ch. 73), *applied*.

[AS TO PRINCIPLES OF CONSTRUCTION OF A WILL, see HALSBURY, Hails- ham Edn., Vol. 34, pp. 187-198, paras. 240-253; and FOR CASES, see DIGEST, Vol. 44, pp. 530-550, Nos. 3472-3685.]

Cases referred to:

- (1) *Re Morgan’s Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637.
- (2) *A.-G. v. Belgrave Hospital*, [1910] 1 Ch. 73; 79 L.J.Ch. 75; 101 L.T. 628; 8 Digest 300, 784.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Emma Ginger deceased and in the events which had happened, a gift contained in the said will expressed to be given “to found a cot in the Westminster Hospital, now at Westminster, S.W.1, in memory of my uncle Godfree William Ginger late of Great College Street, Westminster” (i) ought to be paid to the board of governors of Westminster Hospital, or (ii) was a valid charitable bequest which ought to be administered by a scheme *cy près*, or (iii) lapsed.

Dunbar for the plaintiffs, the executors of the will.

J. L. Arnold for the first defendant, the Board of Governors of Westminster Hospital.

N. S. S. Warren for the second defendant, the residuary legatee.

Denys B. Buckley for the Attorney-General.

ROXBURGH, J.: Emma Ginger, who died on Nov. 23, 1948, by her will dated May 30, 1940, requested her trustees, the plaintiffs, to found a cot in the Westminster Hospital in memory of her uncle, Godfree William Ginger, late of Great College Street, Westminster, and to use for this purpose £1,000 free of duty.

At the date of the will the Westminster Hospital had what might be called a scheme for the endowment of beds and cots which is set out in its 222nd

annual report, being its report for the year ending Dec. 31, 1939, and is as follows:

A "In response to more than one demand for information on the subject the House Committee have formulated the following scheme for the endowments of beds and cots: perpetual endowment, bed £1,000, cot £600; endowment during life of donor, bed £400, cot £250; support by annual donation, bed £50, cot £30. Subject to the general rules and regulations of the hospital, persons endowing or supporting beds and cots as above, will enjoy the privilege of naming such beds and cots, and also of nominating patients to occupy them, it being always understood that the medical officers of the hospital shall decide whether any patient so recommended is a fit and proper person to be admitted, in accordance with the laws of the hospital."

B Pausing there, the scheme is of a somewhat nebulous character. It does not suggest what is to happen if, for example, two persons each contribute £500 for the purpose of naming a bed. Were they to nominate in rotation, or had they to nominate jointly, or how was the scheme to work? Again, it does not suggest what was to happen if the endowment of the bed or cot was by will. C Had the testator's executors the right to nominate patients? The scheme is silent on this point. Nor, again, does it say what is to happen when a bed or cot is endowed by an innumerable number of small donors. I mention these matters because counsel for the residuary legatee has argued that by her will the testatrix must be deemed to have been, by implication, accepting the terms D of that scheme. I do not think so. If she was treating herself as founding a bed and was attaching any importance to rights of nominating patients, she would obviously have inquired what were the rights of nominating patients vested in the estates of deceased persons. But if, on the other hand, as counsel suggested, she is treating her trustees as founding the bed by her direction, she had no reason to assume that the scheme which was in operation in 1939 would necessarily still be in operation, without any modification whatsoever, at the date E of her death. I cannot but think that what she really had in mind was, first, to give a charitable legacy to this hospital, and, secondly, to commemorate her uncle, Godfree William Ginger.

F After her will, but before her death, the National Health Service Act, 1946, came into operation and the Westminster Hospital was designated as a teaching hospital. It now comprises a group of hospitals. So far as that point is concerned, the case is, I think, covered by *Re Morgan's Will Trusts* (1). At any rate, nobody has suggested the contrary. What I might call, for simplicity, the old Westminster Hospital is still carrying on the work of a hospital at St. John's Gardens. The continuity of the hospital work is beyond dispute, but that is not the end of the case. The present position is that the hospital G can allocate one of its existing beds to this bequest and affix nearby an appropriate inscription commemorating Godfree William Ginger, but it cannot allow the trustees to nominate patients.

H Counsel for the residuary legatee says that this bequest is, therefore, impracticable. First of all, he says that "found" means "establish as a new thing" and, indeed, but for authority, there would be a good deal to be said for that construction of the word "found." Secondly, he says that the right of nomination is an essential condition of this bequest. Thirdly, he says that it is not possible to allocate the bequest to any particular bed. In my view, these questions, except one, are answered by *A.-G. v. Belgrave Hospital* (2). The one which is not answered is the suggestion that the right to nominate is a condition of this bequest. I see nothing to lead me to hold that that is so. There is not a word about nomination of patients in the bequest. I have already said that I do not think that the testatrix can have been thinking about the

right of nomination because, if she had been doing so, she would have made some inquiries as to who could nominate, and how and in what circumstances. Accordingly, as a matter of construction, I hold that the question of nomination is not involved in this bequest.

As regards the rest, I think I had better read from the headnote in *A.-G. v. Belgrave Hospital* (2). Alfred John Randall gave

" . . . to the Belgrave Hospital for Children . . . to found a bed there to be called 'the Eleanor bed' the sum of £1,000 . . ."

The question that was there decided was that only the income of the legacy could be applied for current purposes and not the capital thereof, but in the course of that decision SWINFEN EADY, J., said a great many things which throw light on this question, if they do not decide it. First, it is stated in the summary of the facts:

"There was evidence that the annual cost of maintaining a bed or cot in a London hospital was about £75, much more than the income of £1,000 invested in trust investments."

What does that mean? I feel no doubt that it means that a rough estimate had been made of the total cost of maintaining a hospital. Then the number of beds had been taken (though I should have thought that the cost would vary according to the size of the hospital), the total cost had been divided by the number of beds, and thereby a resultant figure of £75 per bed had been obtained. It is clear that nobody calculated the actual cost of maintaining any particular bed in any particular hospital. SWINFEN EADY, J., said ([1910] 1 Ch. 75):

"Dealing with the language of the will . . . it is quite obvious that the intention of the testator was to establish something. He says 'to found a bed,' which involves the idea of establishing it; and it is established by providing a capital sum, the revenue from which may maintain it or be applied to its maintenance. The suggestion is that the language of the will would be satisfied if some bed already existing in the hospital is called the 'Eleanor bed,' and that when that is once done the fund may be applied as part of the annual income of the charity and expended in the year in which it is paid over, if necessary, and dealt with as annual income. In my opinion the idea involved in founding a bed negatives any such dealing with the fund."

He says that many different phrases are used involving the same idea, and continues (*ibid.*, 76):

"Whether the words are 'to found a bed,' or 'to establish a bed,' or 'to endow in perpetuity a bed,' or other similar or analogous expressions, the result is the same, namely, that the fund is to be used for the purpose of investment, so that by the income thereof . . . so far as it will extend, the needs of the bed or cot may be satisfied."

Pausing there, he does not really mean the needs of the particular bed or cot, because it would be impossible for any hospital to keep a separate account in respect of each bed in the hospital and to apportion the general costs of the hospital between the respective beds. What he must mean is that the fund is to be used for the purpose of investment so that the income may be applied for the maintenance of the hospital with its beds in it, and the statement that the income will maintain a bed is merely an indication of the extent to which the income in question will maintain the hospital. Say, for example, the hospital has one hundred beds and the income is said to maintain a bed, that means

that the income is approximately a one-hundredth part of the whole expenditure of the hospital.

The learned judge goes on (*ibid.*, 77):

A "I determine that, according to the true construction of the will, the £1,000 cannot be properly applied as annual income of the charity, but should be invested and the income applied, so far as it will extend, in the maintenance of a bed to be called the 'Eleanor bed.' It was suggested that that must necessarily involve establishing some new bed, but I see no reason for that. It will be sufficient for some bed already existing in the hospital to be appropriated for this purpose, and the bed named the 'Eleanor bed,' as I gather has been done. The fund must be invested, and the income will be applied towards the maintenance of the bed."

B As I have already said, I think that does not mean the maintenance of the particular bed, but it means towards the maintenance of the hospital to the extent of one bed in the hospital. I think, therefore, that that case answers both the remaining points made by counsel for the residuary legatee. The word in that case was "found", and SWINFEN EADY, J., said that that did not necessarily involve establishing a new bed. I also gather that he meant, C not that the income was to be allocated to any particular bed, but that the income was to be applied for the general purposes of the hospital and that it would approximately maintain the hospital to the extent of one bed.

D I do not think that in this case the passing of the National Health Service Act, 1946, is of much importance. Apart from the right to nominate, the position is much the same as it was before, except that the hospital is entitled to very substantial contributions from the State towards its maintenance. There is no difficulty, as far as I can see, in the hospital giving an undertaking which will bring this case precisely into line with *A.-G. v. Belgrave Hospital* (2). Counsel for the board of governors has indicated the willingness of his clients to give the undertaking, and the proposed undertaking has the approval of E the Attorney-General. I shall, accordingly, direct payment of £1,000 to the board of governors of the Westminster Hospital on their undertaking to name in perpetuity a cot in memory of Godfree William Ginger, to invest the said sum in investments for the time being authorised by law, and to apply the income thereof for purposes relating to hospital services rendered by the Westminster Hospital at St. John's Gardens, or such other place to which such F hospital may be removed.

Order accordingly. Costs of all parties to be taxed as between solicitor and client and raised and paid out of the estate in due course of administration.

Solicitors: *Oldman, Cornwall & Wood Roberts* (for the plaintiffs); *Trollope & Winckworth* (for the first defendant); *Blyth, Dutton, Wright & Bennett*, for *Menneer, Idle & Brackett*, St. Leonards (for the second defendant); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

CANDLER v. CRANE CHRISTMAS & CO.

[COURT OF APPEAL (Cohen, Asquith and Denning, L.J.J.), December 11, 12, 13, 14, 15, 1950, January 26, 1951.]

Negligence—Accountant—Preparation of company's accounts—Knowledge that accounts to be shown to prospective investor in company—Liability of accountants to investor.

The managing director of a company instructed the defendants, a firm of accountants and auditors, to prepare the company's accounts and balance sheet. A clerk in the employment of the defendants (who was held to be acting throughout within the scope of his employment) prepared the accounts knowing that they were wanted for the purpose of inducing the plaintiff to invest money in the company. The draft accounts were shown to the plaintiff in the presence of the defendants' clerk, and, relying on their accuracy, the plaintiff subscribed £2,000 for shares in the company. The defendants subsequently certified the accounts in the form in which their clerk had shown them to the plaintiff. The accounts had been prepared negligently, but without any fraud on the part of the defendants or their clerk, and did not give a true statement of the financial position of the company. The company went into liquidation, and, there being no assets, the plaintiff lost the money which he had invested. In an action against the defendants for damages for negligence, or, alternatively, for breach of their duty, in the circumstances, to give to the plaintiff accurate information.

HELD: (i) (DENNING, L.J., *dissentiente*) in the absence of a contractual or fiduciary relationship between the parties, the defendants owed no duty to the plaintiff to exercise care in preparing the accounts and giving their certificate, and the plaintiff, therefore, could not maintain against them an action for negligence.

Le Lievre v. Gould ([1893] 1 Q.B. 491), *applied*.

Principles in Donoghue v. Stevenson ([1932] A.C. 562), *discussed*.

(ii) since the plaintiff had invested the sum of £2,000 before the relationship between the defendants, as auditors, and the plaintiff, as shareholder, of the company had become operative, no damage flowed from the breach of any such duty owed by the defendants to the plaintiff in that capacity.

[AS TO DUTY TO TAKE CARE, see HALSBURY, Hailsham Edn., Vol. 23, pp. 568-584, paras. 823-835; and FOR CASES, see DIGEST, Vol. 36, pp. 12-16, 19, 20, Nos. 33-67, 87-90.]

Cases referred to:

- (1) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (2) *Slim v. Croucher*, (1860), 1 De G.F. & J. 518; 29 L.J.Ch. 273; 2 L.T. 103; 45 E.R. 462; 35 Digest 34, 262.
- (3) *Evans v. Bicknell*, (1801), 6 Ves. 174; 31 E.R. 998; 35 Digest 33, 249.
- (4) *Brownlie v. Campbell*, (1880), 5 App. Cas. 925; 35 Digest 9, 24.
- (5) *Derry v. Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 35 Digest 27, 185.
- (6) *Nocton v. Ashburton (Lord)*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 35 Digest 55, 493.
- (7) *Le Lievre v. Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 35 Digest 28, 187.
- (8) *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179; 113 J.P. 388; *sub nom. Smith & Snipes Hall Farm, Ltd. v. River Douglas Catchment Board*, [1949] 2 K.B. 500; 2nd Digest Supp.
- (9) *Winterbottom v. Wright*, (1842), 10 M. & W. 109; 11 L.J.Ex. 415; 152 E.R. 402; 36 Digest 63, 407.

- (10) *Alton v. Midland Ry. Co.*, (1865), 19 C.B.N.S. 213; 34 L.J.C.P. 292; 12 L.T. 703; 144 E.R. 768; 12 Digest 49, 269.
- (11) *Pasley v. Freeman*, (1789), 3 Term. Rep. 51; 100 E.R. 450; 35 Digest 25, 163.
- (12) *Dixon v. Bell*, (1816), 5 M. & S. 198; 105 E.R. 1023; 36 Digest 57, 354.
- (13) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 35 Digest 33, 254.
- A (14) *Cann v. Willson*, (1888), 39 Ch.D. 39; 57 L.J.Ch. 1034; 59 L.T. 723; 35 Digest 33, 242.
- (15) *Ashby v. White*, (1703), 2 Ld. Raym. 938; 92 E.R. 126; *revsd.*, (1704), 1 Bro. Parl. Cas. 62; 1 E.R. 417; 36 Digest 289, 376.
- (16) *Chapman v. Pickersgill*, (1762), 2 Wils. 145; 95 E.R. 734; 1 Digest 24, 193.
- B (17) *Haseldine v. Daw & Son, Ltd.*, [1941] 3 All E.R. 156; [1941] 2 K.B. 343; 111 L.J.K.B. 45; 165 L.T. 185; 2nd Digest Supp.
- (18) *Old Gate Estates, Ltd. v. Toplis & Harding & Russell*, [1939] 3 All E.R. 209; 161 L.T. 227; Digest Supp.
- (19) *Shiells v. Blackburne*, (1789), 1 Hy. Bl. 158; 126 E.R. 94; 1 Digest 435, 1267.
- C (20) *Heskell v. Continental Express, Ltd.*, [1950] 1 All E.R. 1033.
- (21) *Everett v. Griffiths*, [1920] 3 K.B. 163; 89 L.J.Ch. 929; 123 L.T. 280; 84 J.P. 161; *affd.*, [1921] 1 A.C. 631; 90 L.J.K.B. 737; 125 L.T. 230; 85 J.P. 149; 33 Digest 267, 1862.
- (22) *Fish v. Kelly*, (1864), 17 C.B.N.S. 194; 144 E.R. 78; 44 Digest 108, 1032.
- D (23) *Langridge v. Levy*, (1837), 2 M. & W. 519; 6 L.J.Ex. 137; 150 E.R. 863; *affd.*, (1838), 4 M. & W. 337; 150 E.R. 1458; *sub nom. Levi v. Langridge*, 1 Horn & H. 325; 7 L.J.Ex. 387; 35 Digest 51, 464.
- (24) *George v. Skivington*, (1869), L.R. 5 Exch. 1; 39 L.J.Ex. 8; 21 L.T. 495; 39 Digest 441, 705.
- (25) *Heaven v. Pender*, (1882), 9 Q.B.D. 302; 51 L.J.Q.B. 465; 47 L.T. 163; 47 J.P. 87; *revsd.*, (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 36 Digest 8, 9.
- E (26) *Blacker v. Lake & Elliot, Ltd.*, (1912), 106 L.T. 533; 39 Digest 458, 849.
- (27) *Humphery v. Bowers*, (1929), 45 T.L.R. 297; Digest Supp.
- (28) *Ultramares Corp'n. v. Touche*, (1931), 174 N.E. 441; 255 N.Y. 170.
- (29) *Denny v. Supplies & Transport Co., Ltd.*, [1950] 2 K.B. 374.
- F (30) *Laurence v. Fox*, (1859), 20 N.Y. 268.

APPEAL by the plaintiff from an order of LLOYD-JACOB, J., made on July 14, 1950, whereby he dismissed the plaintiff's claim for damages, holding that the defendants owed to the plaintiff no duty to take care.

The defendants, a firm of accountants and auditors, had prepared, by their clerk, a company's accounts and balance sheet which, to the knowledge of the clerk, were intended to be put before the plaintiff to induce him to invest money in the company. The accounts had been prepared negligently and did not give a true view of the state of the company's affairs. Relying on the accuracy of the accounts, the plaintiff subscribed the sum of £2,000 for shares in the company. He lost this money and claimed that the defendants were liable for the loss which he had sustained. It was admitted that the defendants had failed to use proper care and skill in the preparation and presentation of the accounts, but there was no fraud on their part. The learned judge dismissed the plaintiff's claim on the ground that the defendants owed no duty to the plaintiff to exercise care in preparing and presenting the accounts. On appeal by the plaintiff it was contended for the defendants that (i) in the absence of fraud, a duty to take care in making statements could arise only out of a contractual duty owed by the defendants to the plaintiff or a fiduciary relationship between the parties, and no such duty or relationship existed, and (ii) a

duty to take care arose only where the result of a failure to take care would cause physical damage to persons or property. The facts are fully set out in the judgment of DENNING, L.J.

N. Lawson for the plaintiff.

Foster, K.C., and *Quass* for the defendants.

Cur. adv. vult.

Jan. 26. The following judgments were read.

DENNING, L.J.: In September, 1946, the plaintiff invested £2,000 in a company called Trevanance Hydraulic Tin Mines, Ltd. (which I will call "the company"), and he has lost it all because the company turned out to be a failure. He now brings this action against the defendants, who are the company's accountants and auditors, claiming that he was induced to invest the money because of erroneous accounts put before him by them and on the faith of which he invested his money. The judge has found that the accounts were "defective and deficient" and presented a position of the company which was "wholly contrary to the actual position," that the accountants were "in fact extremely careless in the preparation of the accounts," and that the damage suffered by the plaintiff was "plain," but, nevertheless, the judge dismissed his claim because, in his opinion, there was no duty of care owed by the accountants to the plaintiff.

The case raises a point of law of much importance because counsel for the plaintiff submitted that, although there was no contract between the plaintiff and the defendants, nevertheless, the relationship between them was so close and direct that the defendants did owe a duty of care to him within the principles stated in *Donoghue v. Stevenson* (1), whereas counsel on behalf of the defendants submitted that the duty owed by the defendants was purely a contractual duty owed by them to the company, and, therefore, they were not liable for negligence to a person to whom they were under no contractual duty. Before discussing this point of law, I must set out the facts in some detail so as to see what exactly the relationship was between the plaintiff and the defendants.

In November, 1944, a Mr. Donald Ogilvie formed the company to work some surface tin in Cornwall, with himself as chairman and managing director for life. In March, 1946, he told the defendants that he wanted them to prepare the accounts of the company and to write up the books. The defendants entrusted the work to one of their clerks named Henry Fraser, but he had not done much towards it when, in June, 1946, Mr. Ogilvie told the defendants that he had decided "to go out for substantially more capital" and asked them to insert an advertisement in "The Times" as quickly as possible. They arranged it for him, and it appeared on July 8, 1946, in these words:

"£10,000 established tin mine (low capitalisation) in Cornwall seeks further capital instal additional milling plant, directorship and active participation open to suitable applicant—Apply," etc.

The plaintiff answered that advertisement in these words:

"I should be interested to take an active part in a Cornish tin mine and have about £2,000 to invest. Will you let me have particulars?"

The defendants sent that letter unopened to Mr. Ogilvie who got into touch with the plaintiff. As a result, in the first half of September, 1946, Mr. Ogilvie showed the plaintiff the Cornish workings and told him that if he invested £2,000 he would get a directorship in the company and a service agreement for two years at £10 a week. The plaintiff said, however, that he wanted to see the balance sheet of the company first. As a result of the plaintiff's request, Mr. Ogilvie started pressing the defendants to get out the accounts. He told their clerk, Mr. Fraser, that he wanted the accounts as quickly as possible,

and that they were required to be shown to a potential investor in the company, whose name was Candler. Mr. Fraser was asked in the witness box:

"Q.—Did you assume at that time that the accounts that Mr. Ogilvie was pressing for had some relation to his negotiations with Mr. Candler?

A.—I thought there would be a connection, of course. Yes, I suppose so."

A Mr. Fraser, accordingly, in the middle of September, 1946, worked on the accounts very intensively, going to Mr. Ogilvie's flat two or three times a day for his explanation of various items. He was, as the judge found, under the mistaken impression that it was, in substance, Mr. Ogilvie's business and he accepted Mr. Ogilvie's statements without verification.

B On Monday, Sept. 16, 1946, Mr. Ogilvie asked Mr. Fraser to meet the plaintiff the next day so as to give him information relating to the accounts of the company, and, accordingly, on Tuesday, Sept. 17, Mr. Fraser went with Mr. Ogilvie to meet the plaintiff and took with him the draft accounts which he had by that time prepared. At the meeting Mr. Ogilvie introduced Mr. Fraser to the plaintiff as the representative of Crane Christmas & Co., the accountants and auditors of the company who were preparing the accounts, and he introduced the plaintiff to Mr. Fraser as a gentleman who was contemplating an investment in the company, Mr. Fraser knew, of course, of the advertisement which his firm had inserted for new capital, and he knew, when the meeting commenced, that the negotiations depended on the plaintiff being satisfied with the balance sheet of the company. At this meeting on Sept. 17, Mr. Fraser produced the draft accounts. They had already, at that time, on them a certificate ready for signature by the defendants, saying in the usual formula:

D "We have audited the balance sheet as above set forth. We have obtained all the information and explanations we have required and we report that such balance sheet is in our opinion properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of our information and the explanations given to us and as shown by the books of the company."

E That certificate was not signed at the time, but Mr. Fraser told the plaintiff that it would be signed with a clear docket, subject to one or two small alterations which he wished to consider for another two or three days. At the meeting the plaintiff took down in his own handwriting a copy of the accounts, because he wanted to put them before his own accountant for advice. There was a conflict of recollection as to how he came to take them down, but the judge said that it did not matter because Mr. Fraser clearly assented to the plaintiff taking a copy. The judge said:

G "Having regard to the fact that Mr. Fraser was plainly aware of the purpose for which the draft accounts were required, I entertain no doubt at all that he was aware of and acquiesced in the showing of these accounts to Mr. Candler: indeed, the meeting would have been wholly pointless but for that purpose."

H Mr. Fraser drew the plaintiff's attention to the fact that some of the items in the draft balance sheet might need revision and the parties arranged to meet again on Sept. 20, 1946. The judge expressly finds that, when the meeting of Sept. 17 broke up, Mr. Fraser must have been satisfied, not only that the plaintiff was considering an investment in the company, but was taking with him and relying on the draft accounts which Mr. Fraser had prepared. The parties did, in fact, meet again on Sept. 20. By that time Mr. Fraser had concluded his examination of the books and drew the plaintiff's attention to some modifications which are for present purposes immaterial. The plaintiff had meanwhile himself got advice from his own accountant and at the end of the meeting the plaintiff told Mr. Ogilvie and Mr. Fraser that he was satisfied and would invest

£2,000 in the company. He sent off a cheque for £500 that day to Mr. Ogilvie and the balance of £1,500 on Sept. 25, 1946.

The judge has found that, to Mr. Fraser's knowledge, the plaintiff was induced to believe that the accounts, as modified on Sept. 20, 1946, would be the certified accounts as they emerged from the defendants, and that is what did, in fact, happen. On Sept. 27, 1946, the accounts were certified by the defendants in precisely the same form as Mr. Fraser had shown them to the plaintiff at the meeting of Sept. 20, without any alteration. It has subsequently turned out that the accounts gave an altogether false picture of the position of the company. Instances were given to us which show that there was no verification whatever by the defendants of the information which they were given by Mr. Ogilvie. Thus, among the assets were inserted: "Freehold cottages (at cost) £650." In fact, the company had no title deeds for the cottages. The cottages stood in Mr. Ogilvie's name and he had mortgaged them to the bank for his own overdraft. Again: "Leasehold buildings (at cost) £650." The company had no leases; the leases stood in Mr. Ogilvie's name and were ultimately forfeited for non-payment of rent. It was admitted that the defendants had entirely failed to use proper care and skill in the preparation and presentation of the accounts.

The result was disastrous for the plaintiff. In September, 1946, he entered the service of the company and moved down to Cornwall and worked at the mine. Indeed, he invested in November, 1946, another £200. A little later his suspicions became aroused because he discovered that his £2,000 had not been applied for the purposes of the company's business, but that most of it had been withdrawn by Mr. Ogilvie for his own private purposes. Ultimately he discovered that the company was in a very bad way. It was not even able to pay his salary. He himself issued writs against the company on May 1 and June 30, 1947, for salary and money lent. On Aug. 11, 1947, he presented a petition for winding-up and on Dec. 15, 1947, a winding-up order was made. There are no assets. The bank took the freehold cottages for Ogilvie's debt. The lessors forfeited the leasehold property. Ogilvie has gone bankrupt. The plaintiff has lost his £2,000 altogether, and he says it is due to the carelessness of the defendants because, if they had put before him accounts which had been properly prepared, the true position of affairs would have been disclosed and he would never have invested his money in the company. The only defences raised by the defendants at the hearing of the appeal were: (i) that Mr. Fraser was not acting in the course of his employment; (ii) that, even if he was, they owed no duty of care to the plaintiff.

The judge seems to have treated it as beyond question that Mr. Fraser was acting in the course of his employment, and I agree with him. There is no doubt that Mr. Fraser was acting within his actual authority in writing up the books and preparing the accounts, and, indeed, his action in so doing was ratified and confirmed by the senior partner who signed the certificate, but it is said that Mr. Fraser had no authority to show the draft accounts to the plaintiff or to answer his queries, at any rate not without asking his principals for permission to do so. The senior partner admitted that it was a very common thing for accountants at the request of the chairman or person in control of a company to give details of the company's accounts to a prospective investor so as to induce him to invest money, but he said that it was for the principal of the firm to do it and not for a clerk. That may well be so. It may not have been within Mr. Fraser's actual authority, but that is not the point. A master is often made responsible for the unauthorised or forbidden acts of his servant when he has for his own purposes put the servant in a position where he can do the acts. Practical good sense demands that, even though the master is not at fault himself, he should be responsible if the servant conducts himself in a way which is injurious to others. He takes the benefits of the servant's

rightful acts and should bear the burden of his wrongful ones, and he is, as a rule, the only one who has the means to pay. So, here, I have no doubt that the defendants are responsible for the way in which Mr. Fraser conducted himself in preparing the accounts and showing them to the plaintiff, who, after all, was perfectly innocent in the matter and had not the slightest idea that Mr. Fraser had no authority to do what he did.

- A I come now to the great question in the case: Did the defendants owe a duty of care to the plaintiff? If the matter were free from authority, I should have said that they clearly did owe a duty of care to him. They were professional accountants who prepared and put before him these accounts, knowing that he was going to be guided by them in making an investment in the company. On the faith of those accounts he did make the investment, whereas, if the accounts had been carefully prepared, he would not have made the investment at all. The result is that he has lost his money. In the circumstances, had he not every right to rely on the accounts being prepared with proper care, and is he not entitled to redress from the defendants on whom he relied? I say he is, and I would apply to the present case the words of KNIGHT BRUCE, L.J., in *Stim v. Croucher* (2), an analogous case ninety years ago, where he said (1 De G.F. & J. 527):

"A country whose administration of justice did not afford redress in a case of the present description would not be in a state of civilisation."

- Turning now to authority, I can point to many general statements of principle which cover the case made by some of the great names in the law: LORD ELDON, L.C., in *Evans v. Bicknell* (3) (6 Ves. 183), LORD CAMPBELL, L.C., in *Slim v. Croucher* (2) (1 De G.F. & J. 523), LORD SELBORNE, L.C., in *Brownlie v. Campbell* (4) (5 App. Cas. 935), LORD HERSCHELL in *Derry v. Peek* (5) (14 App. Cas. 360), LORD SHAW OF DUNFERMLINE in *Nocton v. Ashburton* (Lord) (6) ([1914] A.C. 972), and LORD ATKIN in *Donoghue v. Stevenson* (1) ([1932] A.C. 581). It is said, however, that these statements of principle cannot be given effect to because there is an actual decision of this court in 1893 which is to the contrary, namely, *Le Lievre v. Gould* (7).

- E Before I consider the decision in *Le Lievre v. Gould* (7) I wish to say that, in my opinion, at the time it was decided current legal thought was infected by two cardinal errors. The first error was one which appears time and time again in nineteenth-century thought, namely, that no one who is not a party to a contract can sue on it or on anything arising out of it. This error has had unfortunate consequences both in the law of contract and in the law of tort. So far as contract is concerned, I have said something about it in *Smith v. River Douglas Catchment Board* (8) ([1949] 2 All E.R. 187). So far as tort is concerned, it led the lawyers of that day to suppose that, if one of the parties to a contract was negligent in carrying it out, no third person who was injured by that negligence could sue for damages on account of it: see *Winterbottom v. Wright* (9) (10 M. & W. 109), *Alton v. Midland Ry. Co.* (10) 19 C.B. N.S. 213, and the notes in *Pasley v. Freeman* (11) (2 Smith L.C., 13th ed., pp. 103, 110); except in the case of things dangerous in themselves, like guns: see *Dixon v. Bell* (12). This error lies at the root of the reasoning of BOWEN, L.J., in *Le Lievre v. Gould* (7) ([1893] 1 Q.B. 502), when he said that the law of England

- H "... does not consider that what a man writes on paper is like a gun or other dangerous instrument . . ."

meaning thereby that, unless it was a thing which was dangerous in itself, no action lay. This error was exploded by the great case of *Donoghue v. Stevenson* (1) ([1932] A.C. 562), which decided that the presence of a contract did not defeat an action for negligence by a third person, provided that the circumstances disclosed a duty by the contracting party to him. The second

error was an error as to the effect of *Derry v. Peek* (5), an error which persisted for thirty-five years at least after the decision, namely, that no action ever lies for a negligent statement even though it is intended to be acted on by the plaintiff and is, in fact, acted on by him to his loss. This error led the Court of Appeal in *Low v. Bouverie* (13) to deny the correctness of *Slim v. Croucher* (2), and in *Le Lievre v. Gould* (7) to deny the correctness of *Cann v. Willson* (14). The cases thus denied were so plainly just that the very denial of them was itself an error. The error was, however, exposed by *Nocton v. Ashburton* (6), which decided that an action did lie for a negligent statement where the circumstances disclosed a duty to be careful, and that all that is to be deduced from (though not decided by) *Derry v. Peek* (5) is that in the particular circumstances of that case there was no duty to be careful. VISCOUNT HALDANE, L.C., observed significantly ([1914] A.C. 947) that the authorities subsequent to *Derry v. Peek* (5) had shown

" . . . a tendency to assume that it was intended to mean more than it did."

In my opinion, these decisions of the House of Lords in *Donoghue v. Stevenson* (1) and *Nocton v. Ashburton* (6) are sufficient to entitle this court to examine afresh the law as to negligent statements.

The first submission put forward by counsel for the defendants was that a duty to be careful in making statements arose only out of a contractual duty to the plaintiff or a fiduciary relationship to him. Apart from such cases no action, he said, had ever been allowed for negligent statements, and he urged that this want of authority was a reason against it being allowed now. This argument about the novelty of the action does not appeal to me. It has been put forward in all the great cases which have been milestones of progress in our law, and it has nearly always been rejected. If one reads *Ashby v. White* (15), *Pasley v. Freeman* (11) and *Donoghue v. Stevenson* (1) one finds that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed. Whenever this argument of novelty is put forward I call to mind the emphatic answer given by PRATT, C.J., nearly two hundred years ago in *Chapman v. Pickersgill* (16) when he said (2 Wils. 146):

"I wish never to hear this objection again. This action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief . . ."

The same answer was given by LORD MACMILLAN in *Donoghue v. Stevenson* (1) ([1932] A.C. 619) when he said:

"The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed."

It needs only a little imagination to see how much the common law would have suffered if those decisions had gone the other way.

The second submission of counsel for the defendants was that a duty to take care only arose where the result of a failure to take care will cause physical damage to persons or property. It was for this reason that he did not dispute two illustrations of negligent statements which I put in the course of the argument—the case of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is, in fact, poisonous, or the case of an inspector of lifts who negligently reports that a particular lift is safe, whereas it is, in fact, dangerous. The analyst and the lift inspector would, I should have thought, be liable to any person who was injured by consuming the food or using the lift, at any rate if there was no likelihood of

intermediate inspection: *Donoghue v. Stevenson* (1); *Haseldine v. Daw & Son, Ltd.* (17). Counsel said that that might well be so because the negligence there caused physical damage, but that the same would not apply to negligence which caused financial loss. He referred to some observations of WROTTESELEY, J. ([1939] 3 All E.R. 209), which were in his favour on this point: *Old Gate Estates, Ltd. v. Toplis & Harding & Russell* (18). I cannot accept this as a valid distinction.

A I can understand that in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care, but if once the duty exists I cannot think that liability depends on the nature of the damage.

The third submission of counsel was that the duty owed by the defendants was purely a contractual duty, and, therefore, they were not liable for negligence to a person to whom they were under no contractual obligation. This seems to me to be simply a repetition of the nineteenth-century fallacy which was

B stated in *Alton v. Midland Ry. Co.* (10) and exploded by *Donoghue v. Stevenson* (1).

Let me now be constructive and suggest the circumstances in which I say that a duty to use care in making a statement does exist apart from a contract in that behalf. First, what persons are under such duty? My answer is those

C persons, such as accountants, surveyors, valuers and analysts, whose profession and occupation it is to examine books, accounts, and other things, and to make reports on which other people—other than their clients—rely in the ordinary course of business. Their duty is not merely a duty to use care in their reports. They have also a duty to use care in their work which results in their reports. Herein lies the difference between these professional men and other persons

D who have been held to be under no duty to use care in their statements, such as promoters who issue a prospectus: *Derry v. Peek* (5) (now altered by statute [Companies Act, 1948, s. 43]), and trustees who answer inquiries about the trust funds: *Low v. Bouverie* (13). Those persons do not bring, and are not expected to bring, any professional knowledge or skill into the preparation of their statements. They can only be made responsible by the law affecting persons

E generally, such as contract, estoppel, innocent misrepresentation or fraud. It is, however, very different with persons who engage in a calling which requires special knowledge and skill. From very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work apart altogether from any contract or undertaking in that behalf. Thus, FITZ-HERBERT in his *NEW NATURA BREVIVM* (1534) 94D, says that

F “ . . . if a smith prick my horse with a nail . . . I shall have my action upon the case against him, without any warranty by the smith to do it well . . . for it is the duty of every artificer to exercise his art rightly and truly as he ought.”

This reasoning has been treated as applicable not only to shoeing smiths, surgeons and barbers, who work with hammers, knives and scissors, but also to

G shipbrokers and clerks in the Custom House who work with figures and make entries in books

“ . . . because their situation and employment necessarily imply a competent degree of knowledge in making such entries . . .”:

see *Shiells v. Blackburne* (19) (1 Hy. Bl. 162, *per* LORD LOUGHBOROUGH) which was not referred to by DEVLIN, J., in *Heskell v. Continental Express, Ltd.* (20) ([1950] 1 All E.R. 1042). The same reasoning has been applied to medical men who make reports on the sanity of others: see *Everett v. Griffiths* (21) ([1920] 3 K.B. 182, 217). It is, I think, also applicable to professional accountants. They are not liable, of course, for casual remarks made in the course of conversation, nor for other statements made outside their work, or not made in their capacity as accountants: compare *Fish v. Kelly* (22); but they are, in my opinion, in proper cases, apart from any contract in the matter, under a duty

to use reasonable care in the preparation of their accounts and in the making of their reports.

Secondly, to whom do these professional people owe this duty? I will take accountants, but the same reasoning applies to the others. They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them. I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts. Once the accountants have handed their accounts to their employer, they are not, as a rule, responsible for what he does with them without their knowledge or consent. A good illustration is afforded by the decision in *Le Lievre v. Gould* (7) itself, which I certainly would not wish to call in question. The facts are somewhat differently stated in the various reports, but collecting them together they come to this: A surveyor there surveyed work for a building owner and handed certificates to him so that the owner could know the amounts which he had to pay the builder. The building owner then chose to show the certificates to his own mortgagees who advanced money on them instead of on the certificates of their own surveyor. The mortgagees then said that the owner's surveyor owed a duty of care to them. That was obviously untenable, because they should have had the work surveyed by their own surveyor. Indeed, they had actually stipulated for it. The relationship was, therefore, one in which the inspection of an intermediate person might reasonably be interposed, and was, consequently, too remote to raise a duty of care: see LORD ATKIN in *Donoghue v. Stevenson* (1) ([1932] A.C. 582). Excluding such cases as those, however, there are some cases—of which the present is one—where the accountants know all the time, even before they present their accounts, that their employer requires the accounts to show to a third person so as to induce him to act on them, and then they themselves, or their employers, present the accounts to him for the purpose. In such cases I am of opinion that the accountants owe a duty of care to the third person.

The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him? That appears from *Langridge v. Levy* (23), as extended by CLEASBY, B., in *George v. Skivington* (24) (L.R. 5 Exch. 5), and from the decision of CHITTY, J., in *Cann v. Willson* (14) which is directly in point. In that case a valuer made a valuation of property for the very purpose of enabling his client to raise a mortgage on it. In order to further the transaction, the valuer himself actually put the valuation before the mortgagee's solicitor, saying that it was a very moderate valuation and not made in favour of the borrower. The mortgagee advanced money on the faith of the valuation, but it turned out that the valuer had been grossly careless, and the mortgagee lost his money. CHITTY, J., held that the valuer was liable in negligence, apart from any contract at all. He said (39 Ch.D. 42) that the valuation was sent by the valuer direct to the mortgagee's solicitor

“for the purpose of inducing the plaintiff and his co-trustee to lay out the trust money on mortgage. It seems to me that the defendants knowingly placed themselves in that position, and in point of law incurred a duty towards him to use reasonable care in the preparation of the document called a valuation. I think it is like the case of the supply of an article—the supply of the hairwash in the case of *George v. Skivington* (24).”

That reasoning seems to me to be good sense and good law. I know that in *Le Lievre v. Gould* (7) the Court of Appeal said that *Cann v. Willson* (14) was wrongly decided, but it must be remembered that at that time the general opinion of the profession was that *George v. Skivington* (24), on which CHITTY, J.,

relied, was itself wrongly decided, or, at any rate, that the principle stated in it by CLEASBY, B., was wrong: see *per* FIELD and CAVE, JJ., and BOWEN and COTTON, L.JJ., in *Heaven v. Pender* (25) (9 Q.B.D. 306, 307; 11 Q.B.D. 516, 517), and *per* HAMILTON, J., in *Blacker v. Lake & Elliot, Ltd.* (26) (106 L.T. 533). If *George v. Skivington* (24) was wrong, then, of course, *Cann v. Willson* (14) was wrong, for it was based on it. In *Donoghue v. Stevenson* (1), however, the House of Lords fully restored *George v. Skivington* (24), and LORD ATKIN approved ([1932] A.C. 584) the reasoning of CLEASBY, B. It seems to me that by so doing the House of Lords have implicitly restored *Cann v. Willson* (14), because they have restored the case on which it was based, and, if *Cann v. Willson* (14) is good law, it follows that in the present case the accountants owed a duty of care to the plaintiff, for the circumstances are indistinguishable.

Thirdly, to what transactions does the duty of care extend? It extends, I think, only to those transactions for which the accountants knew their accounts were required. For instance, in the present case it extends to the original investment of £2,000 which the plaintiff made in reliance on the accounts, because the defendants knew that the accounts were required for his guidance in making that investment, but it does not extend to the subsequent £200 which he invested after he had been two months with the company. This distinction, that the duty only extends to the very transaction in mind at the time, is implicit in the decided cases. Thus, a doctor, who negligently certifies a man to be a lunatic when he is not, is liable to him, although there is no contract in the matter, because the doctor knows that his certificate is required for the very purpose of deciding whether the man should be detained or not, but an insurance company's doctor owes no duty to the insured person, because he makes his examination only for the purposes of the insurance company: see *Everett v. Griffiths* (21) ([1920] 3 K.B. 211, 217), where ATKIN, L.J., proceeds on the self-same principles as he expounded fully later in *Donoghue v. Stevenson* (1). So, also, a Lloyd's surveyor who, in surveying for classification purposes, negligently passes a mast as sound when it is not, is not liable to the owner for damage caused by it breaking, because the surveyor makes his survey only for the purpose of classifying the ship for the Yacht Register and not otherwise: *Humphery v. Bowers* (27). Again, a scientist or expert (including a marine hydrographer) is not liable to his readers for careless statements in his published works. He publishes his work simply to give information, and not with any particular transaction in mind. When, however, a scientist or an expert makes an investigation and report for the very purpose of a particular transaction, then, in my opinion, he is under a duty of care in respect of that transaction.

It will be noticed that I have confined the duty to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question. That is sufficient for the decision of this case. I can well understand that it would be going too far to make an accountant liable to any person in the land who chooses to rely on the accounts in matters of business, for that would expose him, in the words of CARDOZO, C.J., in *Ultramares Corp'n. v. Touche* (28) (174 N.E. 444), to

" . . . liability in an indeterminate amount for an indeterminate time to an indeterminate class."

Whether he would be liable if he prepared his accounts for the guidance of a specific class of persons in a specific class of transactions, I do not say. I should have thought he might be, just as the analyst and lift inspector would be liable in the instances I have given earlier. It is, perhaps, worth mentioning that Parliament has intervened to make the professional man liable for negligent reports given for the purposes of a prospectus: see s. 40 and s. 43 of the Companies Act, 1948. That is an instance of liability for reports made for the guidance of a specific class of persons—investors in a specific class of transactions—

applying for shares. That enactment does not help one way or the other to show what result the common law would have reached in the absence of such provisions, but it does show what result it ought to reach.

My conclusion is that a duty to use care in statement is recognised by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to which it applies.

One final word. I think the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. Its influence would be most marked in cases where the client is a company or firm controlled by one man. It would encourage accountants to accept the information which the one man gives them without verifying it, and to prepare and present the accounts rather as a lawyer prepares and presents a case, putting the best appearance on the accounts they can without expressing their personal opinion of them. This is, to my way of thinking, an entirely wrong approach. There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case, whereas the accountant, who certifies the accounts of his client, is always called on to express his personal opinion whether the accounts exhibit a true and correct view of his client's affairs, and he is required to do this, not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities, and others who may have to rely on the accounts in serious matters of business. If we should decide this case in favour of the defendants, there will be no reason why accountants should ever verify the word of the one man in a one-man company, because there will be no one to complain about it. The one man who gives them wrong information will not complain if they do not verify it. He wants their backing for the misleading information he gives them, and he can only get it if they accept his word without verification. It is just what he wants so as to gain his own ends. And the persons who are misled cannot complain because the accountants owe no duty to them. If such be the law, I think it is to be regretted, for it means that the accountants' certificate, which should be a safeguard, becomes a snare for those who rely on it. I do not myself think that it is the law. In my opinion, accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared. I would, therefore, be in favour of allowing the appeal and entering judgment for the plaintiff for damages in the sum of £2,000.

ASQUITH, L.J.: On two points I entirely agree with the judgment delivered by DENNING, L.J. I agree that the cause of action based on an alleged breach of duty occurring after the plaintiff became a shareholder cannot be made out if only because the damage relied on preceded the breach. I also agree, for the reasons he has given, that Mr. Fraser was clearly acting within the scope of his employment by the defendant firm in showing the draft accounts and giving certain other information to the plaintiff. I have, however, the misfortune to differ from DENNING, L.J., on the more important point raised in this case. The point may be put in this way. Assume that Mr. Fraser's negligent misrepresentations had been made by his employers, the partners in the defendant firm. Assume further, as the fact is, that there was no fraud and no contract or fiduciary relationship between them and the plaintiff. Would they, in those events, have been liable to the plaintiff in respect of damage incurred by him through acting on those negligent misrepresentations? The defendants say "No." They do not question that in the absence of fraud, contract and fiduciary relationship, there are cases in which A. may be under a legal obligation to B. to use reasonable care for some purposes. Their proposition is that under the conditions assumed in the present case the defendants were under no duty,

sounding in tort, to the plaintiff to take care that their representations of fact should be true. They rely in support of this contention on *Le Lievre v. Gould* (7), a decision binding on this court. I agree with the learned judge in considering that authority to be conclusive in their favour unless it can be shown to have been overruled or to be distinguishable.

The plaintiff's case is that, whatever may have been the position before
 A *Donoghue v. Stevenson* (1), the rule applied by the majority of the House of
 Lords in that case necessarily involves the consequence that (even where fraud,
 contract and fiduciary relationship are absent) A. will be liable to B. for any
 negligent misrepresentations on which B. acts to his detriment, provided always
 that there exists between A. and B. the necessary degree of so-called
 "proximity." They argue that there was sufficient proximity on the facts
 B of the present case.

It may make for clearness first to consider some of the authorities preceding
Donoghue's case (1) (as, for short, I will call it), and, secondly, to inquire what
 difference, if any, that case has made. I do not think it useful to go back
 further than *Derry v. Peek* (5), decided in 1889. In that case the plaintiff sub-
 C scribed for shares in a limited company in reliance on a prospectus issued by
 the directors who included the defendants. The prospectus contained a negligent
 mis-statement made in good faith. The claim on the writ as amended was for
 damages for deceit, for that and nothing else. There was no independent alter-
 native claim in respect of negligent or innocent misrepresentation. The Court
 of Appeal held that fraud would be sufficiently established by proof that the
 directors had no reasonable grounds for believing the statement they made.
 D The House of Lords, reversing the Court of Appeal, held that this was not
 enough to constitute fraud. If the defendants believed what they said, it mattered
 not how credulous they were or how groundless their belief. Fraud necessarily
 connotes dishonesty and no degree of mere stupidity can serve in its place.
 The case is, therefore, primarily, and according to one view solely, a decision
 on the meaning of the word "fraud," and is, therefore, not directly relevant
 E to the main issue in the present case from which fraud, though originally alleged,
 has been eliminated. Nevertheless, it is indirectly relevant and illuminating.
 For, although it does not decide in terms, it clearly assumes or implies that
 a merely negligent misrepresentation made by director to potential subscribers
 for shares, on which some of them act to their detriment, affords the latter no
 remedy. The notion that *Donoghue's* case (1) was intended parenthetically or
 F *sub silentio* to sweep away this substratum of *Derry v. Peek* (5) seems to me
 quite unconvincing.

After the Court of Appeal had given its decision in *Derry v. Peek* (5), but
 before it had been reversed by the House of Lords, a case came up for deter-
 mination at first instance on facts not materially distinguishable from those
 of the present case. In *Cann v. Willson* (14), CHITTY, J., relying on the decision
 G (then unreversed) of the Court of Appeal in *Derry v. Peek* (5), held that the
 plaintiff could recover damages in respect of a negligent, but (according to
 what we now know the word "fraud" means) non-fraudulent, misrepresentation.
 This was the view implicitly condemned by the House of Lords when *Derry*
v. Peek (5) reached them, and *Cann v. Willson* (14) was, consequently, on this
 assumption expressly overruled by the Court of Appeal in *Le Lievre v. Gould* (7).
 H As I have indicated, this last decision is binding on this court and disposes
 of the appeal, in my view, unless it can be shown to have been (a) overruled or
 (b) distinguishable.

I will deal with these points in turn, premising that the principle on which
Gould's case (7) was decided was, in the words of LORD ESHER, M.R. ([1893]
 1 Q.B. 498), this:

"All that he [the defendant] had done was to give untrue certificates

negligently. Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity."

Both he and BOWEN, L.J., treated *Derry v. Peek* (5) as deciding not merely that fraud was not established in that case, but that nothing short of fraud could in the circumstances of that case have given a cause of action, for example, that negligent misrepresentation could not do so. This being so, the first question is whether the principle laid down in *Gould's* case (7) has been modified or overruled, either expressly or by necessary implication, by the decision in any other case of superior authority. It has been qualified by *Nocton v. Ashburton* (6) to this extent, that in the passage cited above, after the words "in the absence of contract with the plaintiffs" the further words "or in some circumstances where a fiduciary relationship exists between the defendant and the plaintiff" ought to be written in. Subject to this gloss has it been overruled? It has certainly not there been overruled expressly. Has it then been overruled by necessary implication? LORD ATKIN in *Donoghue's* case (1) refers pointedly to *Gould's* case (7) in his speech, without a hint or a suggestion that it was wrongly decided, or that the memorable formula which he himself was propounding was inconsistent with it. As regards the two minority judgments, one of them, that of LORD BUCKMASTER, also mentions the case, and without disapproval. On the other hand, it is arguable (though the argument does not carry conviction to my mind) that, whether or not LORD ATKIN realised the fact or directed his mind to the question, the formula which he laid down does, in fact, logically invalidate the principle laid down and acted on in *Gould's* case (7). This contention must be squarely faced. LORD ATKIN pointed out that the law governing the duty owed by A. to B. in the absence of fraud, contract or fiduciary relationship has been built up piecemeal—built up, if one may pursue the metaphor, in disconnected slabs exhibiting no organic unity of structure. Certain classes owed duties of care to certain other classes—road users to other road users, bailees to persons entrusting property to them, doctors and surgeons (and originally barbers) to persons entrusting their bodies to them, occupiers of premises to persons whom they invite or permit to come on the premises, and so on. These categories attracting the duty had from time to time been added to and subtracted from. No attempt, however, had been made in the past to rationalise them, to find a common denominator between road users, bailees, surgeons, occupiers, and so on, which would explain why they should be bound to a duty of care and some other classes who might be expected equally to be so bound should be exempt—no attempt, that is, save that of SIR WILLIAM BRETT, M.R. (from which his colleagues dissociated themselves) in *Heaven v. Pender* (25). Yet, says LORD ATKIN, there must be such a common denominator, or, at any rate, some general conception of relations present in the cases in which a duty arises, and absent in cases in which it does not.

Very tentatively (and prefacing his observation with a warning that it might go beyond the province of a judge to make such an attempt) he suggested the formula which has now become classic, but which, nevertheless, it is desirable here to quote afresh ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven v. Pender* (25) as laid down by LORD ESHER (then BRETT, M.R.) when it is limited by the notion of proximity introduced by LORD ESHER himself and A. L. SMITH, L.J., in *Le Lievre v. Gould* (7)."

This passage, if read literally and without regard to the qualifying effect of its context or of the *subjecta materies*, might be taken to comprehend not only conduct causing physical injury to person or property through setting a certain kind of chattels in motion or in circulation (the case immediately under review), but also conduct of any kind, through any means (including negligent mis-statement) causing *damnum* of any kind recognised by the law, whether physical or not, to anyone who could bring himself within LORD ATKIN's definition of a "neighbour." I cannot believe so broad an application was intended by LORD ATKIN himself. The case may not decide quite so little as is contained in its somewhat conservative headnote, which purports to confine it to the act of a manufacturer launching into circulation a negligently manufactured chattel which is calculated to injure and, in fact, injures the ultimate consumer or user in circumstances in which neither he nor any intermediate party has a reasonable opportunity of examining it. In fact, it has since been applied somewhat outside this limited ambit: for instance, to physical injury caused by negligent failure to repair a lift: *Haseldine v. Daw* (17), and a motor car: *Denny v. Supplies & Transport Co., Ltd.* (29), or by the negligent adoption of a system of working. It has, however, I think, never been applied where the damage complained of was not physical. WROTESLEY, J., in *Old Gate Estates v. Toplis & Harding & Russell* (18), held its application was limited to cases where the injury was to life or limb. I think this is too narrow a view and that physical injury to property may suffice, but it has never been applied to injury other than physical. Apart, however, from any limitation which should be read into LORD ATKIN's language by reference to the facts of the case before him—the *subjecta materies*—it seems to me incredible that if he thought his formula was inconsistent with *Gould's* case (7), he would not have said so. This case, now nearly sixty years old, had at that time stood for nearly forty years. He must have considered it closely. Yet his only reference to it is as annexing a valid and essential qualification to SIR W. BRETT, M.R.'s formula in *Heaven v. Pender* (25). Not a word of disapproval of the decision on its merits. The inference seems to me to be that LORD ATKIN continued to accept the distinction between liability in tort for careless (but non-fraudulent) mis-statements and liability in tort for some other forms of carelessness, and that his formula defining "who is my neighbour" must be read subject to his acceptance of this overriding distinction.

Counsel for the plaintiff was unable to point to any clean decided case, standing unreversed, either before or after *Donoghue's* case (1), in which (always apart from fraud, contract and fiduciary relationship) A. had ever been held liable to B. in damages for a careless misrepresentation. He anchored, however, certain hopes on *George v. Skivington* (24) and on certain observations of LORD HERSCHELL in *Derry v. Peek* (5). I will say a word now on each of these cases.

George v. Skivington (24), a decision "battered but unbowed," was in the end vindicated by the House of Lords in *Donoghue's* case (1). The case was tried on demurrer. The declaration averred, *inter alia*,

" . . . that the defendant carried on the business of a chemist, and in the course of such business professed to sell a chemical compound made of ingredients known only to the defendant, and which he represented and professed to be fit and proper to be used for washing the hair, which could and might be so used without personal injury to the person using the same, and to have been carefully and skilfully and properly compounded by him, the defendant; and thereupon the plaintiff, Joseph George, bought of the defendant, and the defendant sold to him at a certain price, a bottle of the said compound, to be used by the plaintiff Emma for washing her hair, as the defendant then knew, and on the terms that the same then was fit and proper to be used, and could be safely used, by her for the

purpose aforesaid, without personal injury to her, and had been skilfully, carefully, and properly compounded by the defendant . . .”

and that the wife suffered consequent injury. Thus, it was averred that the defendant put into circulation, knowing it was intended to be used by the purchaser's wife, a negligently compounded and deleterious hairwash. She used it, sustained physical injury, and an action was brought by her, or on her behalf, in which she succeeded on the issue raised by the demurrer. So far the case is on all fours with *Donoghue's* case (1) according to its narrowest interpretation, and it is not surprising that *Donoghue's* case (1) affirmed it. The declaration, however, also averred that the defendant had said the hairwash was safe. The present plaintiff, basing himself on this last averment, contended that it—an averment of negligent mis-statement—standing alone, would have evoked the same decision, namely, that the facts averred amounted, if proved, to a good cause of action. This I venture to doubt. It seems to me that the essence of the decision resided in the averment of negligent compounding and setting in motion by the defendant of a physical thing with knowledge that the plaintiff would, or might, use the physical thing so compounded and with resulting injury to the plaintiff, and that the parallel between *Donoghue's* case (1) and *George v. Skivington* (24) lay exclusively in these features.

Turning to the decision in *Derry v. Peek* (5), it is said that among decided cases *Derry v. Peek* (5) also lends indirect support to the plaintiff's case. This contention is based on a *dictum* of LORD HERSCHELL who, in deciding that the defendants were not liable for a non-fraudulent misrepresentation in their prospectus, said (14 App. Cas. 360) that he excluded from his purview cases

“where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course . . .”

Here, again, is a statement which, if construed in its literal breadth, might seem to fit the present case. LORD HERSCHELL's *dictum* was, however, later interpreted both by the Court of Appeal in *Low v. Bouverie* (13) and later by the House of Lords in *Nocton v. Ashburton* (6) ([1914] A.C. 950). It seems clear from the latter case (in which the former was also considered and affirmed) that LORD HERSCHELL's proposition has been held only to hold good where (to use its terms) the “ . . . person within whose special province it lay to know a particular fact . . .” occupies a contractual or fiduciary position *vis-a-vis* the “ . . . person desirous of ascertaining the fact . . .” The cases which had decided otherwise are one by one dismissed by VISCOUNT HALDANE, L.C., as defensible if at all only on some other ground—warranty, estoppel, or what-not. He affirms that liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act. The cases which are cited in support of LORD HERSCHELL's *dictum* are all based, according to LORD DUNEDIN ([1914] A.C. 964),

“ . . . upon the existence of a fiduciary relationship, and subsequently the breach of duty arising.”

In what has gone before it has been assumed that the two law lords who agreed with LORD ATKIN's opinion or result, accepted the broad formula about “my duty to my neighbour” which he laid down, as well as in the narrow proposition limited to the liability of the negligent manufacturer of a chattel which reaches the consumer without an opportunity of intermediate examination and injures him. This assumption seems to me more than questionable. LORD THANKERTON, though he says ([1932] A.C. 604) that he entirely agreed with LORD ATKIN's discussion of the authorities, is clearly considering the authorities in their application to the narrow ambit of a manufacturer's liability, chattels

and physical injury. His judgment does not travel outside these limits. Nor do I read LORD MACMILLAN's judgment as endorsing the wider proposition. There is a passage (*ibid.*, 619) in which he lays down certain general propositions. It would have been easy for him to have adopted LORD ATKIN's formula in terms if he had thought so broad a proposition justified. When he says, however, in an oft-quoted phrase (*ibid.*): "The categories of negligence are never closed" he is not, in my view, accepting an acid test of liability valid in all circumstances. He does not mention the word "neighbour". He is merely saying that in accordance with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge—in this case by the addition of a careless manufacturer or circulator of a chattel, as parties bound, *vis-a-vis* consumers or users, as parties entitled. In other words, what LORD MACMILLAN envisaged was the addition of another slab to the existing edifice, not a systematic reconstruction of the edifice on a single logical plan. For these reasons I am of opinion that *Donoghue's* case (1) neither reverses nor qualifies the principle laid down in *Gould's* case (7).

If I am wrong in thinking LORD ATKIN's formula was not accepted by the majority of the House, there remains the question whether, assuming that *Gould's* case (7) was well decided on its own facts, the facts of the present case are not so far different as to justify and require a different conclusion. The suggestion here is that the conclusion in *Gould's* case (7) could be defended consistently with the principle of *Donoghue's* case (1) being applicable to negligent misrepresentation, if in *Gould's* case (7) there was insufficient "proximity" between the parties to attract the *Donoghue* (1) principle, and that a conclusion favourable to the plaintiff in the present case could properly be reached on the ground that in the present case there was sufficient "proximity." The contention under this head is, in other words, first, that *Donoghue's* case (1) overrules *Gould's* (7) so far as the latter places careless mis-statements on a different and privileged level as compared with some other forms of careless behaviour, but, secondly, that the actual result of *Gould's* case (7) was right because the *Donoghue* (1) principle required "proximity" as a condition of liability and there was in *Gould's* case (7) no sufficient "proximity", and, thirdly, that this accounts *inter alia* for LORD ATKIN's omission to say that *Gould's* case (7) was wrongly decided. This argument also seems to me invalid. The only difference, *quoad* "proximity," between the present case and *Gould's* (7) is that in the present case Mr. Fraser knew when he made his representation the identity of the man who was likely to rely on his representations, whereas *Gould* did not know this. He did not know that the parties who were to make the advances were the mortgagees, the plaintiffs, or, at least, he did not know the contents of the mortgage deed. Consider, however, what he did know. He knew before any mortgage was effected that his certificates were required because advances were going to be made by someone to the builder on the security of the work performed up to date as vouched by his certificates. That someone could only be the building owner or some other lender relying on the same security. I take the following passage from the statement of facts ([1893] 1 Q.B. 492), premising that Hunt was the owner of the land on which two houses were to be built, Lovering was the builder, Dennes was the mortgagee who ultimately made advances, and Le Lievre, the plaintiff, was Dennes' assign.

"Hunt arranged with the plaintiff Dennes that he should advance the £850 to Lovering upon the security of a mortgage from him. Hunt also agreed with the defendant Gould, who was an architect and surveyor at Ilfracombe, that he should give certificates from time to time that the work had reached the respective stages at which the respective instalments were to be advanced as provided by the schedule of advances, a copy of

which was given to the defendant. This agreement with the defendant was made before the execution of the mortgage . . .”

On those facts, to say there was insufficient proximity in the *Gould* case (7) seems to me wrong. LORD ATKIN, in affirming the *Donoghue* (1) type of liability, and annexing to it the condition of proximity, did not say: “There is no proximity unless the defendant can identify the ultimate victim of his carelessness in advance.” The manufacturers of the peccant bottle of ginger beer had no idea who would in the end consume it. All they knew was that someone would. You may adapt the formula “*Certus est qui certus reddi potest.*” The unidentifiability in advance of the ultimate consumer and victim did not, by displacing the notion of proximity or in any other way, protect them from liability. I am, therefore, of opinion, that this argument fails.

Singular consequences would follow if the principle laid down in *Donoghue's* case (1) were applied to negligent misrepresentation in every case in which the representee were proximate to the representor. The case has been instanced by PROFESSOR WINFIELD in his TEXTBOOK OF THE LAW OF TORT, 4th edn., p. 387, and referred to by DENNING, L.J., of a marine hydrographer who carelessly omits to indicate on his map the existence of a reef. The captain of the “Queen Mary,” in reliance on the map and having no opportunity of checking it by reference to any other map, steers her on the unsuspected rocks, and she becomes a total loss. Is the unfortunate cartographer to be liable to her owners in negligence for some millions of pounds damages? Yet what line can be drawn between him and the defendants in the present case? If it be said that there is no proximity between the cartographer and those for whose use his map is designed, the reply surely is that there is just as much as there was between the manufacturer of the peccant ginger beer and its ultimate consumer.

In the present state of our law different rules still seem to apply to the negligent mis-statement, on the one hand, and to the negligent circulation or repair of chattels, on the other, and *Donoghue's* case (1) does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law or contending that it is strictly logical. It clearly is not—but I am merely recording what I think it is. If this relegates me to the company of “timorous souls,” I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.

COHEN, L.J.: The learned judge dismissed the plaintiff's claim. He found “no fraud” and from this part of his judgment the plaintiff does not appeal. He also found that the only duty which the defendants owed to the plaintiff was to produce accounts which they honestly believed to be the draft accounts of the company. In other words, he found that they owed no duty of care to the plaintiff. From that part of his judgment the plaintiff appeals on two grounds. He says, first, that, since to the knowledge of the defendants' employee, Mr. Fraser, the plaintiff was a prospective investor in the company and was asking for information about the accounts of the company to assist him in reaching a decision whether to make the investment, the defendants, in accordance with the principles laid down by LORD ATKIN in *Donoghue v. Stevenson* (1) ([1932] A.C. 580), owed a duty to the plaintiff, when giving him that information, to exercise care to see that it was accurate. Secondly, he says that since the information given to the plaintiff was inaccurate in material particulars owing to the negligence of the defendants' employee, Mr. Fraser, the defendants are liable in damages. Alternatively, the plaintiff alleges that, as he became a shareholder in the company and the defendants were the auditors of the company, they owed a duty to him as shareholder to give him the accurate information which they should have given him when he was a prospective investor. This duty, he says, was broken, and, accordingly, he is entitled to damages. So far as the second ground is concerned, I entirely agree with the learned judge that no damage flowed from the breach of such duty as is owed

by the defendants as auditors to the plaintiff as a shareholder. The £2,000 had been irretrievably invested before the relationship had become operative. I would add that I doubt whether the defendants' alleged duty as auditors extends to cover information given to the plaintiff before he became a shareholder.

A The first ground presents more difficulty, but despite counsel's able and lucid argument, I have come to the conclusion that we are bound by authority to hold that the learned judge came to the right conclusion. Counsel for the defendants submitted, first, that Mr. Fraser was not acting within the scope of his employment in giving to the plaintiff information as to the accounts, and, therefore, the defendants could not be liable for his negligence in the preparation thereof. So far as this point is concerned, I have nothing to add to the reasons given by my brethren for thinking that it cannot be sustained.

B Secondly, he said that the principle of *Donoghue v. Stevenson* (1) had never been applied to a case of negligent mis-statement. A defendant could only be liable for negligent mis-statement where there was a contractual nexus or a fiduciary relationship between him and the plaintiff. In the absence of such a relationship the decision in *Derry v. Peek* (5), as interpreted in *Nocton v. Ashburton* (6), is, says counsel, authority that no liability in negligence exists.

C This argument, is, I think, well-founded.

In *Donoghue v. Stevenson* (1), and in all the other cases to which our attention was called, the breach of duty alleged has been one which has resulted in damages to the person of the plaintiff: see *Haseldine v. Daw & Son, Ltd.* (17); *Denny v. Supplies & Transport Co., Ltd.* (29). In *Old Gate Estates v. Toplis & Harding & Russell* (18), WROTTESELEY, J., refused to apply the principle of *Donoghue v. Stevenson* (1) to a case where a company had paid too much for a property owing to an over-valuation by the defendants who had been instructed by the promoters to value it for the purpose of the promotion. The company, which was the plaintiff, was not formed at the time of the valuation. WROTTESELEY, J., rejecting an argument based on *Donoghue v. Stevenson* (1), said ([1939] 3 All E.R. 216):

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"The thing which runs through these cases alike, however, both in those applications of the principle and in the original case of *Donoghue v. Stevenson* (1) itself, is that that which was negligently created or put into circulation was something which was dangerous either to life or limb—those are, I think, the very words of LORD ATKIN himself and the other learned lords who delivered opinions, or the opinions of the majority, in *Donoghue v. Stevenson* (1)—or else was a thing which, carelessly handled, carelessly made, or carelessly mended, would become dangerous to life or limb or health. I think that today it is as true as it was in 1893, when *Le Lievre v. Gould* (7) was decided, that, to use the words of BOWEN, L.J. ([1893] 1 Q.B. 502): 'It is idle to refer to cases which were decided under totally different aspects, and upon totally different considerations of the law. Take, for example, the case of an owner of a chattel, such as a horse, a gun, or a carriage, or any other instrument, which is in itself of such a character that, if it be used carelessly, it may injure some third person who is near to it; then it is as plain as daylight that the owner of that chattel, who is responsible for its management, is bound to be careful how he uses it. Exactly in the same way with regard to the owner of premises. If the owner of premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and invitation, of course he must take reasonable care that those premises do not injure those who are coming there.' A little later BOWEN, L.J., says (*ibid.*): 'How has it [the case of a certificate given by an architect] any application to the present case? Only, I suppose, on the suggestion that a man is responsible for what he states in a certificate

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to any person to whom he may have reason to suppose that the certificate may be shown. But the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.' I think that that is as true today as it was when it was said by BOWEN, L.J., and that there is nothing in *Donoghue v. Stevenson* (1) which makes that bad law. The exceptions laid down by *Donoghue v. Stevenson* (1)—the exceptions to the rule that a man is obliged to be careful only to those to whom he owes a duty by contract—are, as I understand the decision in that case, confined to negligence which results in danger to life, danger to limb, or danger to health, and, this being no one of those, I think that the plaintiffs have no cause of action on the analogy of *Donoghue v. Stevenson* (1)."

Counsel for the defendants submitted that these observations constituted a correct statement of the law, at any rate if the words "or property" were added after the words "or danger to health."

The question of liability for negligent mis-statement was also considered by DEVLIN, J., in *Heskell v. Continental Express, Ltd.* (20), a case where through carelessness a bill of lading had been issued for goods which had not been shipped. DEVLIN, J., said ([1950] 1 All E.R. 1041):

"In my judgment, therefore, the plaintiff has not established any contractual relationship with Strick giving rise to any particular duty owing to him. In putting forward the wider proposition that Strick owed a duty to the public not carelessly to circulate a document of title knowing it would be used as such, counsel for the plaintiff acknowledged the difficulty he encountered because of *Le Lievre v. Gould* (7), and other similar decisions which make it plain that negligent mis-statement can never give rise to a cause of action."

Read literally, this statement is too wide, since negligent mis-statement can give rise to a cause of action not only where there is a contractual relationship, but also where there is a fiduciary relationship: see *Nocton v. Ashburton* (6); but with this limitation the statement is, in my opinion, correct.

So far as I am aware, there is only one reported case involving negligent mis-statement which supports the plaintiff's claim. That is the decision of CHITTY, J., in *Cann v. Willson* (14). In that case an intending mortgagor, at the request of the solicitors of an intending mortgagee, applied to a firm of valuers for a valuation of the property proposed to be mortgaged. A valuation at the sum of £3,000 was sent in by the valuers direct to the mortgagee's solicitors, and the mortgage was subsequently carried out. Default having been made in payment by the mortgagor, and a loss having resulted to the mortgagee, he commenced an action against the valuers for damages for the loss sustained through their negligence, misrepresentation, and breach of duty. The court being satisfied on the evidence that the defendants knew at the time the valuation was made that it was for the purpose of an advance, and that the valuation as made was in fact no valuation at all, it was held that, under the circumstances, the defendants were liable on two grounds: (i) that they (independently of contract) owed a duty to the plaintiff which they had failed to discharge; (ii) that they had made reckless statements on which the plaintiff had acted. If the first ground of decision was good law, it would support the argument of counsel for the plaintiff, but the case was considered by this court in *Le Lievre v. Gould* (7), and LORD ESHER, M.R., BOWEN and A. L. SMITH, L.JJ., all agreed that *Cann v. Willson* (14) must be treated as overruled by *Derry v. Peek* (5).

The facts in *Le Lievre v. Gould* (7) differed somewhat from those in the present case, but I do not think the court thought the differences material, for LORD

ESHER, M.R., stated the problem with which the court was then faced in the following terms ([1893] 1 Q.B. 496):

"Then it is said that, even if there was no contract between the plaintiff Dennes and the defendant, nevertheless the defendant is liable to the plaintiffs for having given certificates which contained untrue statements; for, it is said, the defendant owed a duty to the plaintiffs to exercise care in giving the certificates, because he knew that the plaintiffs would or might act upon them by advancing money to Lovering."

LORD ESHER, M.R., then proceeded to consider the problem. He treated *Heaven v. Pender* (25), which was the foundation of *Donoghue v. Stevenson* (1), as good law, saying (*ibid.*, 497):

"If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. For instance, if a man is driving along a road, it is his duty not to do that which may injure another person whom he meets on the road, or to his horse or his carriage."

He then considered *Cann v. Willson* (14), and said it was not good law, and finally came to the conclusion that the action failed, saying, in the last two or three lines of his judgment (*ibid.*, 498):

"Such negligence, in the absence of contract with the plaintiffs, can give no right of action at law or in equity. All the grounds urged on behalf of the plaintiffs fail, and the appeal must be dismissed."

BOWEN and A. L. SMITH, L.JJ., gave judgment to the same effect. I need not, I think, refer to any passages in their judgments because I have referred to the material passage in the judgment of BOWEN, L.J., where it was cited by WROTESLEY, J., in *Old Gate Estates v. Toplis & Harding & Russell* (18).

The principle of the decision in *Le Lievre v. Gould* (7) seems to me directly in point in the present case. It is binding on us unless it can be said to be inconsistent with some other decision of this court or of the House of Lords. I am unable to find any such decision. Counsel asked us to say that it is inconsistent with the principle laid down by LORD ATKIN in *Donoghue v. Stevenson* (1). It is to be observed that in *Donoghue v. Stevenson* (1) LORD ATKIN himself cited with approval some passages from the judgments of LORD ESHER, M.R., and A. L. SMITH, L.J., in *Le Lievre v. Gould* (7), and I am unable to believe that if he had thought the *ratio decidendi* in that case was wrong he would have cited those passages without making it clear that he was not approving the decision. I think, therefore, that, although the passages in LORD ATKIN's speech ([1932] A.C. 580, 581) are couched in such general terms that they might possibly cover the case of negligent mis-statement, that question was not present to LORD ATKIN's mind or intended to be covered by his statement.

Counsel for the plaintiff further submitted that *Derry v. Peek* (5) was purely a case of fraud and did not touch the question of negligent mis-statement. It is true that the cause of action in *Derry v. Peek* (5) was one of fraud, but it is, I think, implicit in the speeches that their Lordships would have reached the same conclusion had there been an alternative plea of negligence. I am fortified in this conclusion by the observations of two of their Lordships in *Nocton v. Ashburton* (6). VISCOUNT HALDANE, L.C., examining the decision in *Derry v. Peek* (5), says ([1914] A.C. 947):

"My Lords, the discussion of the case by the noble and learned Lords who took part in the decision appears to me to exclude the hypothesis that they considered any other question to be before them than what was the necessary foundation of an ordinary action for deceit. They must indeed be taken to have thought that the facts proved as to the relation-

ship of the parties in *Derry v. Peek* (5) were not enough to establish any special duty arising out of that relationship other than the general duty of honesty."

Again, LORD SHAW cites with approval (*ibid.*, 971) a passage from the judgment of BOWEN, L.J., in *Low v. Bouverie* (13), where BOWEN, L.J., says ([1891] 3 Ch. 105):

"... *Derry v. Peek* (5) decides ... that in cases such as those of which that case was an instance, there is no duty enforceable at law to be careful in the representation which is made. Negligent misrepresentation does not certainly amount to deceit, and negligent misrepresentation can only amount to a cause of action if there exist a duty to be careful—not to give information except after careful inquiry. In *Derry v. Peek* (5) the House of Lords considered that the circumstances raised no such duty. It is hardly necessary to point out that, if the duty is assumed to exist, there must be a remedy for its non-performance, and that therefore the doctrine that negligent misrepresentation affords no cause of action is confined to cases in which there is no duty, such as the law recognises, to be careful."

Derry v. Peek (5) was a case where the action was founded on a false statement in a prospectus, and I find it difficult to imagine a case where the proximity test laid down by LORD ATKIN in *Donoghue v. Stevenson* (1) would more clearly be satisfied if the principle of that case is applicable to negligent mis-statement. Counsel for the plaintiff submitted that there was a distinction between *Derry v. Peek* (5) and the present case in that a prospectus is issued to the world at large, whereas Mr. Fraser's statements were addressed to the plaintiff in particular. This seems to me to be a distinction without a difference in principle. For these reasons I think the decision in *Le Lievre v. Gould* (7) is still good law and is conclusive of the present case.

I might, perhaps, add that the conclusion I have reached appears to accord with the views of the text-book writers. The learned editor of SALMOND ON THE LAW OF TORTS, 10th ed., p. 580, expresses the view that with certain exceptions not material to the present case:

"A false statement is not actionable as a tort unless it is wilfully false. Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort."

He regards the rule as anomalous. In WINFIELD'S TEXTBOOK OF THE LAW OF TORT, 4th ed., pp. 386, 387, is expressed the author's dislike of it in more forcible language, but he recognises that decisions of this court are definitely against the existence of any action in tort for negligent statement. He thinks that it is open to the House of Lords to take the contrary view. On this point I need express no opinion. Before parting with the text-book writers, I ought, perhaps, to mention that Dr. CHARLESWORTH in his book on the LAW OF NEGLIGENCE, 2nd ed., p. 16, suggests an explanation of the alleged anomaly in the rule. He says:

"The duty to take care is ultimately based on the possible consequences which will occur if care is not taken. What the consequences may be of any particular act or omission is often a very difficult problem involving inquiry into questions of causation. This inquiry is difficult enough in cases where physical damage is concerned in which the cause, whether it be defective vehicles or machinery or lack of care and skill in management, can usually be accurately traced. To regard the issue of a certificate, an opinion, or a report as carrying the same duty of care as the delivery of a defective chattel would be to introduce a most disturbing factor into the mutual intercourse of society."

I do not find this explanation entirely satisfactory, but I am unable to suggest a better one. Be that as it may, I am satisfied that on the authorities as they stand we have no alternative but to dismiss this appeal.

A Since writing this judgment my attention has been directed by PROFESSOR GOODHART to an American case where a similar point was considered. The case is *Ultramares Corpn. v. Touche* (28). It has the merit that the decision of the court was given by CARDOZO, C.J. In that case the accountants had certified the annual report of a company which, in order to finance its operations, required extensive credit and borrowed large sums from banks and other lenders. The facts are stated by the learned judge as follows (174 N.E. 442):

B "In January, 1924, the defendants, a firm of public accountants, were employed by Fred Stern & Co., Inc., to prepare and certify a balance sheet exhibiting the condition of its business as of Dec. 31, 1923. They had been employed at the end of each of the three years preceding to render a like service. Fred Stern & Co., Inc., which was in substance Stern himself, was engaged in the importation and sale of rubber. To finance its operations, it required extensive credit and borrowed large sums of money from banks and other lenders. All this was known to the defendants. C The defendants knew also that in the usual course of business the balance sheet when certified would be exhibited by the Stern company to banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion, as the basis of financial dealings. Accordingly, when the balance sheet was made up, the defendants supplied the Stern company with thirty-two copies certified with serial numbers as counterpart originals. D Nothing was said as to the persons to whom these counterparts would be shown or the extent or number of the transactions in which they would be used. In particular there was no mention of the plaintiff, a corporation doing business chiefly as a factor, which till then had never made advances to the Stern company, though it had sold merchandise in small amounts. E The range of transactions in which a certificate of audit might be expected to play a part was as indefinite and wide as the possibilities of the business that was mirrored in the summary."

F The court held that mere negligence did not make the defendants liable to the plaintiffs, who had made advances on the strength of the certified accounts, though they, in fact, found that there was evidence of negligence by the defendants in making their report. CARDOZO, C.J., said (*ibid.*, 444):

G "We are brought to the question of duty, its origin and measure. The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling. Fraud includes the pre- H tence of knowledge when knowledge there is none. To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself . . . A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. We put aside for the moment any statement in the certificate which involves the representation of a fact as true to the knowledge of the auditors. If such a statement was made, whether believed to be true or not, the defendants

are liable for deceit in the event that it was false. The plaintiff does not need the invention of novel doctrine to help it out in such conditions. The case was submitted to the jury, and the verdict was returned upon the theory that, even in the absence of a mis-statement of a fact, there is a liability also for erroneous opinion. The expression of an opinion is to be subject to a warranty implied by law. What, then, is the warranty, as yet unformulated, to be? Is it merely that the opinion is honestly conceived and that the preliminary inquiry has been honestly pursued, that a halt has not been made without a genuine belief that the search has been reasonably adequate to bring disclosure of the truth? Or does it go farther and involve the assumption of a liability for any blunder or inattention that could fairly be spoken of as negligence if the controversy were one between accountant and employer for breach of a contract to render services for pay? The assault upon the citadel of privacy is proceeding in these days apace. How far the inroads shall extend is now a favourite subject of juridical discussion . . . In the field of the law of contract there has been a gradual widening of the doctrine of *Laurence v. Fox* (30) . . . Until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy . . . Even in that field, however, the remedy is narrower where the beneficiaries of the promise are indeterminate or general. Something more must then appear than an intention that the promise shall redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to 'bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost' . . . In the field of the law of torts a manufacturer who is negligent in the manufacture of a chattel in circumstances pointing to an unreasonable risk of serious bodily harm to those using it thereafter may be liable for negligence though privacy is lacking between manufacturer and user . . . A force or instrument of harm having been launched with potentialities of danger manifest to the eye of prudence, the one who launches it is under a duty to keep it within bounds . . . Even so, the question is still open whether the potentialities of danger that will charge with liability are confined to harm to the person, or include injury to property . . . In either view, however, what is released or set in motion is a physical force. We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words."

The learned judge then considers three cases which were said to support the plaintiff's action, and continues (*ibid.*, 447):

"From the foregoing analysis the conclusion is, we think, inevitable that nothing in our previous decisions commits us to a holding of liability for negligence in the circumstances of the case at hand, and that such liability, if recognised, will be an extension of the principle of those decisions to different conditions, even if more or less analogous. The question then is whether such an extension shall be made. The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, co-terminous with that of liability for fraud. Again and again, in decisions of this court, the bounds of this latter liability have been set up, with futility the fate of every endeavour to dislodge them. *Scienter* has been declared to be an indispensable element, except where the representation has been put forward as true of one's own knowledge . . . or in circumstances where the expression of opinion was a dishonourable pretence . . . Even an opinion, especially an opinion by an expert, may be found to be fraudulent if the grounds supporting it are so flimsy as to lead to the conclusion that there was no genuine belief back of it. Further than that this court has never gone. Directors of corporations have been

A acquitted of liability for deceit, though they have been lax in investigation and negligent in speech . . . This has not meant, to be sure, that negligence may not be evidence from which a trier of the facts may draw an inference of fraud . . . but merely that, if that inference is rejected, or, in the light of all the circumstances, is found to be unreasonable, negligence alone is not a substitute for fraud. Many also are the cases that have distinguished between the wilful or reckless representation essential to the maintenance at law of an action for deceit, and the misrepresentation, negligent or innocent, that will lay a sufficient basis for rescission in equity . . . If this action is well conceived, all these principles and distinctions, so nicely wrought and formulated, have been a waste of time and effort. They have even been a snare, entrapping litigants and lawyers into an abandonment of the true remedy lying ready to the call. The suitors B thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the self-same facts, but had given the wrong another label, and all this in a State where forms of action have been abolished. So to hold is near to saying that we have been paltering with justice. A word of caution or suggestion would have set the erring suitor right. Many pages of opinion C were written by judges the most eminent, yet the word was never spoken. We may not speak it now."

The final passage which I wish to read is this (*ibid.*, 448):

D "Liability for negligence if adjudged in this case will extend to many callings other than auditors. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated to the bidders, will become E liable to purchasers who may wish the benefit of a policy without payment of a premium. These illustrations may seem to be extreme, but they go little, if any, farther than we are invited to go now. Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be F reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors. 'Everyone making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite G number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together' . . . 'The law does not spread its protection so far' . . . Our holding does not emancipate accountants from the consequences of fraud. It does not relieve them if their audit has been so negligent as to justify a finding that they had no H genuine belief in its adequacy, for this again is fraud. It does no more than say that, if less than this is proved, if there has been neither reckless mis-statement nor insincere profession of an opinion, but only honest blunder, the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made. We doubt whether the average business man receiving a certificate without paying for it, and receiving it merely as one among a multitude of possible investors, would look for anything more."

I am glad, therefore, to find that the conclusion which I have reached on the basis of the English authorities seems to accord with the opinion of so eminent a student of the common law as CARDOZO, C.J. I would only add that, despite the observations of DENNING, L.J., I do not think the conclusion I have reached will encourage accountants to fall short of the high standard of conduct which the institutes to which they belong have laid down for their members. In the result, this appeal will be dismissed.

Appeal dismissed with costs.

Solicitors: *Edwin Coe & Calder Woods* (for the plaintiff); *Ashurst, Morris Crisp & Co.* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* RENSOP DRAPERS, LTD.

[COURT OF APPEAL (Asquith, Birkett, L.J.J., Danckwerts, J.), February 5, 1951.]

Purchase Tax—Double tax—Relief—Tax chargeable on appropriation of goods by wholesaler—Tax paid on previous occasion on purchase by vendor to wholesaler—Finance Act, 1944 (c. 23), s. 15 (1).

R.D., Ltd., wholesale merchants, bought a quantity of cloth from G., another wholesaler. G. had bought the cloth from T.P., Ltd. and had paid purchase tax on it. R.D., Ltd., having appropriated the goods to the purposes of their business, claimed to be entitled to relief against payment of tax under s. 15 (1) of the Finance Act, 1944.

HELD: s. 15 (1) only applied where the person claiming relief was a party to the previous purchase of the goods in respect of which tax had been paid; in the present case R.D., Ltd. were not parties to the previous purchase; and, therefore, they were not entitled to relief.

[FOR THE FINANCE ACT, 1944, s. 15 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 21, p. 1294.]

Case referred to:

- (1) *Devonshire (Duke) v. O'Connor*, (1890), 24 Q.B.D. 468; 59 L.J.Q.B. 206; 62 L.T. 917; 54 J.P. 740; 42 Digest 607, 80.

APPEAL by the defendants from an order of SOMERVELL, L.J., sitting as an additional judge of the King's Bench Division, dated July 5, 1950, whereby he held that the defendants, who were registered wholesale merchants, were not entitled to relief under s. 15 (1) of the Finance Act, 1944, against a double charge of purchase tax in respect of goods on which tax had become chargeable on a previous occasion by virtue of a purchase made by someone other than the defendants.

Hallis for the defendants.

J. P. Ashworth for the commissioners.

DANCKWERTS, J.: This is an appeal from a judgment of SOMERVELL, L.J., sitting as an additional judge of the King's Bench Division, in an action by the Commissioners of Customs and Excise to recover £778 3s. 11d. which they claimed to be chargeable and payable for purchase tax by the defendants, Messrs. Rensop Drapers, Ltd. The matter depends primarily on the Finance

(No. 2) Act, 1940, s. 18 (as substituted by s. 10 (1) of the Finance Act, 1944), which provides:

“(1) A tax, to be called purchase tax, shall be charged, subject to and in accordance with the provisions of this Part of this Act, on the wholesale value of all chargeable goods bought under chargeable purchases. (2) A chargeable purchase is any purchase made from a wholesale merchant or manufacturer (other than one who is not required by this Part of this Act to be registered) selling by wholesale, so far as regards—(a) in the case of a purchase of ascertained goods, goods bought under the purchase which are in the United Kingdom at the time of the purchase, (b) in the case of a purchase of unascertained goods, goods appropriated to the purchase which are in the United Kingdom at the time of the appropriation, with the exception of a purchase made by a registered wholesale merchant or a registered manufacturer of goods as stock for his business in the case of a wholesale merchant or as materials in the case of a manufacturer.”

By s. 23 (1) of the Act of 1940 it is provided:

“Every wholesale merchant whose business includes the selling of any chargeable goods, and every manufacturer whose business includes the selling of any chargeable goods, shall be registered under this Part of this Act . . .”

Section 24 (1) provides:

“A purchase shall be deemed to be a purchase of goods by a registered wholesale merchant as stock for his business, or by a registered manufacturer as materials, if a representation is made to the seller in the prescribed manner and at the prescribed time by the buyer that he is the holder of a certificate of registration issued under this Part of this Act and that he intends to sell the goods or to use them as materials, and not otherwise . . .”

Section 25 (1), as amended by the Finance Act, 1944, s. 10 (4), which deals with appropriations, provides:

“Where a wholesale merchant or manufacturer who is required by this Act to be registered appropriates or applies any chargeable goods in his ownership, the property in which he acquired under a purchase of goods as stock for his business or as materials . . . or, in the case of a manufacturer, any chargeable goods which have been made by him or which are the result of a process applied by him, either—(a) to the purposes of any business carried on by him of selling chargeable goods by retail (otherwise than to registered manufacturers as materials), or (b) to the purposes of any business carried on by him of letting out chargeable goods on hire, or (c) to any other purpose not being a sale of the goods under a purchase which is a chargeable purchase or a sale of the goods to a registered wholesale merchant as stock for his business or to a registered manufacturer as materials, the appropriation or application shall be treated for the purposes of this Part of this Act as if it were a chargeable purchase, he shall be accountable for the tax chargeable in respect of the goods, and the tax shall become due at the time of the appropriation or application.”

We observe from that section that “appropriation or application” are dealt with together, and that the section is concerned with those two cases.

It is claimed by the defendants that they are entitled to relief under the provisions of s. 15 (1) of the Finance Act, 1944, which is in these terms:

“If a wholesale merchant or a manufacturer proves to the satisfaction of the commissioners, in the case of any goods in respect of which tax has become chargeable by virtue of a purchase made from him or by virtue

of such an appropriation or application as is mentioned in s. 25 of the Finance (No. 2) Act, 1940, made by him, that tax also became chargeable in respect thereof on a previous occasion by virtue of a purchase thereof, or of such an appropriation or application thereof, made by him, or of an importation thereof effected by him at a time when he was not the holder of a certificate of registration, the commissioners may remit payment of the first mentioned tax, or if it has been paid may repay it, up to an amount not exceeding the amount of the last mentioned tax."

The circumstances which the defendants claimed entitled them to relief under that section were as follows. The defendants bought a quantity of cloth from one Green, who was not a registered wholesaler. Green had bought the same cloth from a company called Tenor Products, Ltd., who were registered wholesalers, and he paid, by inclusion of an appropriate amount in the price, the equivalent of the purchase tax which was payable by Tenor Products, Ltd. It is not stated whether tax has, in fact, been paid by Tenor Products, Ltd., but there is no doubt, I think, that they are accountable to the Commissioners of Customs and Excise for the amount of the purchase tax on that transaction. It is claimed by the defendants that, tax having once been paid in respect of this cloth, they are entitled to the relief given by s. 15 (1) of the Finance Act, 1944. It is urged that the tax is charged in respect of particular goods and not in respect of persons, and that, once the tax has been paid under the provisions of these Acts in respect of particular goods, that is the end of the intention of the charging provisions, and, therefore, it is inappropriate, and, indeed, unjust, that tax should become payable a second time in respect of the same goods.

Whether that is so or not, it seems to me that the rejection of the defence by SOMERVELL, L.J., was plainly right. One may approach the question in the same way as the learned lord justice did, that is to say, with a leaning in favour of finding relief, if possible, but it seems to me that in the present circumstances it is impossible to obtain any relief from s. 15 (1). An argument was based on the word "thereof" being used in reference to "by virtue of a purchase," and then being used again, not in each case of the words "appropriation or application," but once only in respect of those words, and then again being used in respect of an "importation." It seems to me that that argument carries the matter no further. The object of the use of the word "thereof" is to pick up the words "any goods in respect of which tax has become chargeable by virtue of a purchase made from him or by virtue of such an appropriation or application," and so on, and it seems to me that the explanation of the word being used three times and not four times is simply that "appropriation or application" is, as is pointed out, found in s. 25 (1) of the Finance (No. 2) Act, 1940. It seems to me that there is nothing in that argument which assists the defendants. Again, it is said that while, if one has regard to punctuation in s. 15 (1), it may appear that the words in the middle of the section, "made by him," refer to "by virtue of a purchase" as well as "appropriation or application," we are not entitled to have regard to punctuation. A reference was made to the rule stated by LORD ESHER, M.R., in *Devonshire (Duke) v. O'Connor* (1) (24 Q.B.D. 478), but, whether that is so or not, it seems to me plain that on the terms of s. 15 (1) "made by him" must refer to both "purchase" and "appropriation or application," as, indeed, also "effected" does to "importation." In each case the legislature has treated the person concerned as being the person who is claiming relief, and, if they had intended to refer to a previous purchase by somebody else, as is said by the learned lord justice in his judgment, it would have been unnecessary to add any words after "a previous occasion." The words which now follow would have been omitted, or one would have found the words "or in whosoever hands the goods are to be found." It is only a purchase or appropriation, application or

importation by the person who is claiming relief which creates a case for relief, and the fact that tax has been paid by somebody else on a previous occasion on another purchase does not bring the case within the section. I, therefore, consider that the appeal should be dismissed.

BIRKETT, L.J.: I agree.

ASQUITH, L.J.: I also agree. The question is whether the words
A "purchase thereof" in the middle of s. 15 (1) are qualified by the words "made by him" in the next line of the sub-section, that is to say, by the merchant seeking relief, or whether the words "made by him" qualify only the intermediate words "or of such an appropriation or application thereof" which the phrase "made by him" immediately follows—in other words, whether a purchase of the goods on a previous occasion attracting tax by anyone whatsoever will suffice to found a claim for relief. If B. is claiming relief in respect of
B "a purchase made by him," must he show that A., who is the immediate seller, became liable to pay and paid the tax, or will it suffice to show that Z., from whom A. bought, or Y. from whom Z. bought became liable to pay, and paid it? In my opinion, clearly the former is the true position. If I were permitted to take punctuation into account in construing an Act of Parliament, I should
C think the comma which comes after the words "appropriation or application thereof" before the words "made by him" would, in itself, be fatal to the defendants' argument, but, in deference to certain authorities binding on this court (none of them very modern) I disregard punctuation. On its natural construction, however, the section seems to contemplate throughout transactions to which the person claiming relief is a party. Thus, it contemplates
D (i) a purchase made by him; (ii) an appropriation of the goods made by him; (iii) an application of the goods made by him; and (iv) an importation of the goods effected by him. Between (i) and (ii) come the words "by virtue of a purchase thereof." It seems to me unnatural after those words to read in words such as "by whomsoever made" in a context which, otherwise, refers exclusively to things done by the claimant himself. For those and the other
E reasons given by SOMERVELL, L.J., and by DANCKWERTS, J., I agree that the appeal fails, for the previous purchase of the goods in respect of which tax became chargeable, which was relied on, was not one to which the defendants were a party. It was a purchase by Green from Tenor Products, Ltd. It is said that this is a charging statute, that the words are ambiguous, and that the ambiguity ought to be resolved in favour of the taxpayer. It is true that
F this is a charging statute, but it is equally true that this section is a relieving section—at any rate, it gives potential or discretionary relief in cases in which its conditions are satisfied. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Tarlo, Lyons & Co.* (for the defendants); *Sir Henry Nazeby Harrington* (for the commissioners).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re WOKINGHAM FIRE BRIGADE TRUSTS. MARTIN AND OTHERS *v.* HAWKINS AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), February 1, 1951.]

Charity—Benefit to the community—Provision of fire brigade.

In 1876 the W. fire brigade was established as a result of decisions taken at a public meeting held at W. for the purpose of fighting fires in W. and the surrounding district. Until 1939 it was maintained by private donations or subscriptions, fees for attending fires, and the proceeds of an annual ball. In 1940 the local authority for the district of W. undertook to pay £250 per annum to the fire brigade in return for the brigade's services in certain parishes. In 1942, on the formation of the National Fire Service, the equipment of the brigade was purchased for the use of the National Fire Service, and the question arose how the existing funds of the brigade and the proceeds of sale of its assets ought to be disposed of.

HELD: the brigade was formed for a public purpose and for the benefit of the community, and, therefore, the assets of the brigade were the subject of charitable trusts and ought to be applied under a *cy près* scheme.

[AS TO TRUSTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168; and FOR CASES, see DIGEST, Vol. 8, pp. 255-257, Nos. 161-185.]

ADJOURNED SUMMONS to determine how in the events which had happened the assets of the Wokingham Fire Brigade ought to be dealt with. The brigade was maintained by donations and subscriptions, fees for attending fires and the proceeds of an annual ball. When the National Fire Service purchased the assets of the brigade and took over its functions the question arose whether its funds belonged to the members of the brigade, or ought to be returned to subscribers, or were the subject of charitable trusts, or were *bona vacantia*.

Monckton for the plaintiffs, trustees of the Wokingham Fire Brigade.

Elverston for members or personal representatives of deceased members of the Wokingham Fire Brigade.

J. L. Arnold for subscribers to the Wokingham Fire Brigade.

Denys B. Buckley for the Attorney-General.

Newsom for the Solicitor-General.

DANCKWERTS, J.: This case concerns the disposal of certain funds representing the proceeds of sale of equipment formerly used by a body called the Wokingham Fire Brigade for the purpose of fighting fires in the Wokingham and surrounding parishes. The funds now consist of £187 19s. 1d. at Barclays Bank, one thousand 3 per cent. Savings Bonds and one thousand 3 per cent. Defence Bonds, and the bulk appears to represent the proceeds of the sale of two fire engines, one a Dennis motor fire engine, bought in 1926 mainly as a result of public subscription, and a Leyland fire engine bought in 1937. The value of the Leyland engine is said to have been about £750 and the other £325. So those two between them account for £1,075 out of the funds in question, and, no doubt, the rest represents the proceeds of the sale of various articles of fire-fighting equipment.

On Nov. 9, 1876, a public meeting was held at the Rose Hotel, Wokingham, at which the proposal for a fire brigade was discussed. The brigade in question was formed, and, until September, 1939, when the war broke out, it was maintained by means of funds from private donations or subscriptions, fees of various amounts for attending fires (principally paid by the insurance companies concerned with the sites of the fires), and the proceeds of the fire brigade's annual ball. In 1940 the Wokingham Rural District Council wished to enter

into an agreement with the brigade to provide fire brigade services in certain parishes. The council felt a difficulty about the persons with whom they should negotiate, and the existing fourteen members of the fire brigade took it on themselves to appoint trustees by resolution. On Jan. 27, 1940, those trustees executed a declaration of trust in which they purported to declare a trust on which the property and funds of which they had taken charge were supposed to be held. If a certain conclusion is reached in regard to this case, that method of appointing trustees had no validity whatever and the trustees had no authority to declare any trusts in respect of these funds. I cannot treat that document as having much weight or importance. On Dec. 3, 1940, an agreement was entered into between those trustees, so called, and the Wokingham Rural District Council under which the council undertook to pay £250 a year to the brigade and the brigade undertook to provide services in the parishes mentioned in the document. Those sums were duly paid over. In 1942, the National Fire Service having been established, the whole of the equipment of the brigade was purchased for the sum of £1,645 and the brigade became defunct. The question is: How shall the assets of the brigade, including the proceeds of sale, be dealt with?

I have before me a number of claimants. The plaintiffs are the survivors of the trustees appointed by the document of 1940. The first twelve defendants are either members of the fire brigade when it existed or personal representatives of deceased members, and they all claim through their counsel that the assets were the private property of the members of the brigade in much the same way as the property of a member's club is owned by the members for the time being, and, therefore, can be sold and the proceeds divided among the existing members at that time by an agreement among themselves. That negatives the existence of any trust over the assets at all. It is simply a question of property. On the other hand, the thirteenth and fourteenth defendants are representatives of subscribers, and it is alleged on behalf of that class that the property was given on a rather peculiar set of trusts, a trust to use the subscriptions of money given for the purposes of a fire brigade, or, possibly, if the money was not wanted for that purpose, for the individual subscriber's benefit, and, failing the devotion of the money in that way, on a resulting trust for the subscribers on the footing that they did not intend to part out and out with all the interest in the funds which they had subscribed. The Attorney-General claims that the fund is subject to charitable trusts of a public nature and that there should be a *cy près* application, and, finally, the Solicitor-General claims as *bona vacantia* any assets to which title cannot be made by any other claimant.

To discover whether there are trusts and what those trusts are, I think one is entitled to look at the history of the matter, and, though it is rather meagre, one document which is in evidence gives some indication of what the nature of the body was and its purposes were. It is an appeal for funds, and reads:

"Wokingham Fire Brigade, Established 1876. President: Marquis of Downshire. Chief Officer, W. B. Martin. Second Officer, E. Hawkins. Hon. Surgeon, Dr. H. F. Curl. Hon. Sec., C. W. Rawlings. Our first motor engine which was purchased mainly by public subscription in 1914 to replace the old horse-drawn steam engine has given many years of good service, but its frequent need of repairs during the last two years is reliable evidence of it having seen its best days. The enormous increase in the number of houses in the large area under our care and the consequent greater risk of fires makes it essential for us to keep our machines and equipment in first-class condition, and for this purpose we are endeavouring to raise the sum of £1,000 to purchase a new motor engine with its necessary fittings. We are a voluntary brigade and all monies received for use of our engines at fires is kept quite apart from the account of annual subscriptions and

general expenses, and from this about £200 can be taken for the new engine. We feel sure that property owners and householders appreciate the difference in cost to them of a voluntary brigade and one provided by a public body, and will respond to our appeal generously."

Counsel for the subscribers relies on the appeal to self-interest which appears in the last paragraph of that appeal. That does not seem to me in the least conclusive, because many people subscribe to charitable purposes partly because they are induced by some motive in their own interest and the fact that there is an appeal to their interest does not rule out the possibility that it may be a charitable trust.

That document indicates the basis on which the brigade was carried on, and the fact that it was formed at a public meeting in 1876 points in the same way. In my view, this was a body of a non-profit-making character. It was formed to supply a public need, namely, to provide a means of fighting fires in the Wokingham district. That seems to me to be a public purpose. It was not formed for the benefit of the members, but for the benefit of the public, and its purpose was to prevent damage and loss of life in that community. The provision of a public fire brigade of this kind is as much a public charitable purpose as the provision of a life-boat, and the provision of a life-boat has been held in one way and another in a number of cases to be a public charitable purpose.

It seems, therefore, that the funds were subject to public charitable trusts which have been in operation for a number of years. That rules out any other application of the fund.

I think that the subscribers intended to part with all interest in the subscriptions when they made them for the benefit of this public purpose, and I do not feel impressed by statements which seem to me to be in the nature of after-thoughts. I do not believe that when the subscriptions were made there was any thought of the future disposition of the money in such circumstances as have arisen. The only thing which I think was taken into account was the provision of the brigade or its equipment, and, that being so, the funds were devoted out and out for a charitable purpose. That purpose being no longer practicable by reason of the sale of the assets to a different body charged with the duties previously performed by the brigade, the charitable trusts do not fail. It is not necessary to consider whether there was any general charitable intention and the trusts must be modified by means of a *cy près* application. For that purpose the matter will go to chambers for the settlement of a scheme.

Order accordingly. Costs of all parties to be taxed as between solicitor and client and raised and paid out of the fund. Proceedings stayed against all the defendants other than the Attorney-General.

Solicitors: *Soames, Edwards & Jones*, agents for *Cooke, Cooper & Barry*, Wokingham (for the plaintiffs and all defendants except the Attorney-General and the Solicitor-General); *Treasurer Solicitor*.

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

DEMETRIADES v. GLASGOW CORPORATION.

[HOUSE OF LORDS (Lord Normand, Lord Morton of Henryton, Lord MacDermott and Lord Reid), December 7, 8, 1950, February 7, 1951.]

Requisition—Land—Use by competent authority—Cutting of trees—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 51 (2).

By reg. 51 (2) of the Defence (General) Regulations, 1939, it is provided:

“While any land is in the possession of a competent authority by virtue of this regulation . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient . . . and the competent authority, so far as appears to it to be necessary or expedient in connection with the taking of possession of . . . or with the use of any land . . . (a) may do, or authorise persons using the land as aforesaid to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest . . .” In 1943 the appellant’s house and garden were requisitioned for billeting troops, and in 1946 the requisition was transferred to the Secretary of State for Scotland who took possession to use the property for accommodating persons who were inadequately housed. The Secretary of State delegated his powers to the respondent corporation, who, in the course of alterations to the property, cut and mutilated a number of trees in the garden. In proceedings by the appellant in which he asked the court (i) to interdict the respondents from cutting, mutilating, or removing trees, (ii) to grant a declaration that trees had been unlawfully cut, mutilated, and removed, and (iii) to award damages,

HELD: (i) under the regulation the competent authority had an unrestricted discretion with regard to the use of requisitioned property, either by itself or under its authority, provided that it *bona fide* considered that the use to which the property was being put or the manner in which it was being used was necessary and expedient to effect the purpose of the requisition.

(ii) in the absence of averments of bad faith, ulterior motive, or, possibly, perverseness, on the part of the authority, the jurisdiction of the courts was excluded, and the competent authority was the judge of the use which it should make of the land and of what it should do in connection with such use for the purposes of the requisition.

(iii) accordingly, the proceedings were incompetent, and the appellant’s only remedy was to seek compensation under the Compensation (Defence) Act, 1939.

[AS TO COMPENSATION IN RESPECT OF TAKING POSSESSION OF LAND UNDER THE COMPENSATION (DEFENCE) ACT, 1939, s. 2, see HALSBURY’S STATUTES, Second Edn., Vol. 3, p. 989.]

APPEAL from a judgment of the First Division of the Court of Session.

In 1943 the appellant’s property in Dumbreck Road, Glasgow, consisting of a house and large garden, was requisitioned by the Secretary of State for War for billeting troops. In 1946 the requisition was transferred to the Secretary of State for Scotland who took possession to use the property for accommodating persons inadequately housed. The Secretary of State delegated his powers to the Glasgow Corporation, the respondents, who carried out alterations and licensed certain persons to occupy the premises. The appellant complained that in October, 1948, he found that the respondents or their servants or others claiming right through them were mutilating valuable growing trees and causing irreparable damage to them. The respondents contended that they had altered the property in order to make it suitable for habitation for separate occupiers and had trimmed some trees because of complaints by an adjoining

occupier of overhanging branches. Such work had been carried out in a workmanlike manner. In an action in the Sheriff Court of Lanarkshire the appellant asked the court (i) to interdict the respondents from cutting, mutilating or removing trees, (ii) for a declaration that trees had been cut, mutilated and removed, and (iii) to award damages. On the first question the sheriff substitute found against the appellant and also rejected the further submission that the requisition was not valid, but on the second question he held that the respondents were bound to administer the property in a proper manner. The respondents appealed to the Court of Session and by their judgment the First Division dismissed the appellant's action as incompetent.

Sir David Maxwell Fyfe, K.C., G. G. Stott, K.C., and Jas. A. Forsyth (both of the Scottish Bar) for the appellant.

T. P. McDonald, K.C., and Niel MacVicar (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Feb. 7, 1951. The following opinions were read.

LORD NORMAND: My Lords, the appellant raised an action in the Sheriff Court of Lanarkshire craving the court (i) to interdict the respondents from cutting, mutilating or removing trees from a certain area of ground belonging to him; (ii) to declare that the respondents had unlawfully cut, mutilated and removed trees from the said area; and (iii) to award damages. In his condescendence he averred, *inter alia*, that the respondents had taken possession of the heritable subjects, consisting of a villa, offices and large garden under a pretended requisition made by the Secretary of State for Scotland, and that they or persons deriving right through them had caused irreparable damage to his property by cutting and mutilating trees thereon. The damage was specified in averments which relevantly instruct serious injury to the appellant's property. In their answers the respondents averred that the property had been requisitioned by the Secretary of State for War in 1943 for the billeting of troops and that in 1946, this purpose being spent, the Secretary of State for Scotland arranged that the requisition should be transferred to him for the purpose of accommodating persons inadequately housed, and that the respondents had, as his agents, carried out certain alterations on the property, thereby rendering it suitable for habitation by a number of separate occupiers, who subsequently took up their abode in the villa and were still resident there. They further averred that their whole actings relative to the property were carried out as agents for the Secretary of State. They explained that they had trimmed certain trees because the occupier of neighbouring property complained of overhanging branches and they averred that the trimming was carried out in a workmanlike manner. To this the appellant replied with a denial that the requisition was valid, without specification of the grounds of the averment or reference to the relevant statute or regulations. There was no averment of *mala fides* on the part of the respondents. The fourth plea in law for the appellant is in these terms:

"The Secretary of State for Scotland not having made any valid requisition of said subjects, any agency appointment by him in virtue of any pretended requisition is null and void and the defenders have no legal right to interfere in any way with the said subjects or the said trees, and the pursuer is entitled to declarator as craved."

The sixth plea (which was unsupported by averment) was based on the *mala fide* exercise of the respondents' powers.

After sundry procedure, which it is now unnecessary to consider, the case came before the sheriff substitute who, on May 27, 1949, *inter alia*, repelled the fourth and sixth plea in law, but allowed a proof of the parties' averments as regards the cutting down and mutilation of trees to the prejudice of the appel-

lant. It appears from the note annexed to the interlocutor that the sheriff substitute thought it was desirable to establish the facts for the purpose of reckoning the compensation which would fall to be made at the end of the requisition. Against the interlocutor the respondents appealed to the First Division of the Court of Session. The appellant would have been entitled to take advantage of the respondents' appeal to appeal against any part of the interlocutor prejudicial to him. In fact, he failed to do so and he did not move the court to recall the interlocutor of the sheriff substitute so far as it repelled the fourth or sixth plea in law. The Lord President says in his opinion:

"It is true that on record there is a *pro forma* challenge of the validity, and, indeed, of the fact of requisition; but I did not understand that challenge was seriously intended or was now insisted upon, and I proceed upon the footing that this house . . . originally requisitioned by the Secretary of State for War has been for some time, and was at the material date, requisitioned by the Secretary of State for Scotland for the purpose of accommodating persons inadequately housed and, as is customary in connection with such requisitions, was being administered on behalf of the Secretary of State by the Corporation of Glasgow."

Nevertheless, counsel for the appellant, in opening the case, began by a challenge of the validity of the requisition. When his attention was called to the procedure below and to the passage cited from the opinion of the Lord President, he said he had understood that the question of the validity of the requisition had been kept open in the Inner House but had not been argued because a decision in a previous case, binding on the court, was conclusive in favour of the validity, and he intimated his intention to challenge that previous decision in the present appeal. My Lords, whatever may have been intended, it is clear from the Lord President's opinion that the question of the validity of the requisition was not reserved in the Inner House. It would be irregular for this House to allow a challenge of a part of the sheriff substitute's interlocutor which had been acquiesced in in the Inner House, and the appeal must be restricted to the question whether the cutting down and mutilation of the trees was an improper exercise of the respondents' powers as agents of the Secretary of State under a valid requisition of the property for the purpose of accommodating persons inadequately housed. The question, moreover, has to be decided on the footing that the respondents throughout acted in good faith.

The question thus narrowed and defined depends on the terms of reg. 51 (2) of the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927). The relevant portion of the regulation is as follows:

"While any land is in the possession of a competent authority by virtue of this regulation, . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community; and the competent authority, so far as appears to it to be necessary or expedient in connection with the taking of possession of any land in pursuance of this regulation, or with the use of any land in possession of the competent authority by virtue of this regulation . . . (a) may do, or authorise persons using the land as aforesaid to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest . . ."

The First Division unanimously held that the respondents' actings were within the discretionary powers conferred by the regulation and dismissed the action.

The regulation falls into two parts, and it is not obvious at first sight, nor does it greatly matter, which of the two is the part more relevant to the present

case. The two parts are complementary and they extend to the use of the land in any manner for the purpose for which it was requisitioned and to any work or act done in connection with such use. The cutting down or trimming of trees seems on the whole to fall more naturally within the second part, and so far I am with the appellant. Neither part of the regulation confers on the competent authority unlimited powers of dealing with the subjects requisitioned. For example, the competent authority cannot alienate by grant or disposition any part of the subjects because it has itself no proprietary right and a purported grant or disposition of property would be without title. So, also, a grant of a lease is beyond power. That said, however, it is difficult to find in the regulation any limits to the powers of use or of action in connection with use of the subjects, provided that the competent authority, having applied its mind to the question, in good faith thinks the use expedient for the purpose of the requisition or the action necessary or expedient in connection with the use. Counsel for the appellant submitted that in the second part of the regulation a limitation was implied, if not expressed by the words "do . . . anything which any person having an interest in the land would be entitled to do by virtue of that interest." He maintained that "interest" fell short of ownership and that it meant a right adequate to enable the occupier to do anything necessary or expedient for the purposes of the occupation. I should myself read the words not as limiting the power of the competent authority, but as indicating its width. For example, if the land were requisitioned for the purpose of defence, the competent authority would have the power to demolish the house and offices and to alter the site and its contours in order to build gun emplacements or to clear the arc of fire of the guns, and to do other things which a proprietor might not be able to do without the superior's consent or acquiescence. In my view, "interest" means any interest or interests which any person or persons may have in the lands. But if counsel's gloss on the words is accepted, the result is precisely the same, for the demolition of buildings would then be warranted as the exercise of a right adequate to enable the occupier to do anything necessary or expedient for the purposes of defence.

Counsel for the appellant strove to find in the regulation a jurisdiction reserved to the courts to interfere with the use of the land or with the actions of the competent authority in relation to the land. He submitted that, though the competent authority was empowered to do anything ancillary to the purpose of the requisition, yet there was reserved to the courts the decision whether a particular act was ancillary or not. The words of the regulation appear to me to be well chosen to exclude such a reservation. Again, the terms of the regulation leave no jurisdiction to the courts to entertain the question whether the competent authority has acted with reasonable care and skill, and it is not intelligible to say that a negligent or unskilful act is not a thing which any person having an interest in the land would be entitled to do by virtue of that interest. In the absence of averments of bad faith or ulterior motive the jurisdiction of the courts is excluded and the competent authority is the judge of the use which it should make of the land and of what it should do in connection with such use for the purposes of the requisition.

I agree, therefore, with the learned judges of the First Division that the question in the appeal is not one for the courts. It follows that the craves for interdict and for declarator are incompetent, and, since it is agreed that on that view the appellant's only remedy is under the Compensation (Defence) Act, 1939, the interlocutor dismissing the action is unexceptionable and the appeal should be dismissed with costs.

LORD MORTON OF HENRYTON: My Lords, your Lordships have held, for reasons which have already been explained, that it is not open to the appellant to challenge the validity of the requisition in this case. Accordingly I proceed, as did the Lord President in the First Division, on the footing that

at the material date No. 7 Dumbreck Road was in the possession of a competent authority—namely, the Secretary of State for Scotland—who had legally taken possession thereof for the purpose of accommodating persons inadequately housed, and that the acts complained of were done by the respondents as agents of that competent authority. Regulation 51 (2) of the Defence (General) Regulations, 1939, provides that:

- A “While any land is in the possession of a competent authority by virtue of this regulation . . . the land may . . . be used by, or under the authority of, the competent authority for such purpose, and in such manner, as that authority thinks expedient . . .”
- B for any of the purposes specified in a statute which is admittedly applicable. It is not disputed that the purpose of accommodating persons inadequately housed comes within the specified purposes. For my part, I do not find it necessary to read the rest of the regulation. In the present case the land has been used, “under the authority of the competent authority,” in a manner which the appellant finds extremely objectionable. In his condescendence 4, the appellant alleges that on or about Oct. 27, 1948, the respondents, through
- C their servants, undertook certain operations on trees, approximately sixteen in number, on the premises No. 7 Dumbreck Road belonging to him and that such operations had the result that “the said trees were mutilated beyond repair and reduced from trees to dying stumps.” For the purposes of this appeal your Lordships must assume that these allegations are correct. The appellant, no doubt, takes the view that to treat his trees in this way is not
- D to “use” the property in a manner which is “expedient” for the purpose for which the competent authority took possession of the property, but the decision whether it is expedient or inexpedient is not left by the regulation to the decision of a court of law. The trees in question are part of the land in the possession of the competent authority, that which has been done to the trees is a user of the land, and by the words of the regulation the competent
- E authority is made the judge of what manner of user is “expedient” for the purpose for which he acquired the land. The position would be different if there were any allegation of fact that the competent authority, through his agents the respondents, had acted in bad faith and with some ulterior motive in carrying out this work on the trees. The truth or falsity of such an allegation could be investigated by a court of law. I can find no such allegation in the
- F condescendence for the appellant, and under reg. 51 (2), as I read it, the competent authority is entitled to say, through his agents: “I thought that this work was expedient for the purpose for which I went into possession of this property. I may have been correct or incorrect in so thinking, but that is a matter into which no court can inquire; it is enough that I so thought.” The action is thus incompetent, in so far as it seeks an interdict and declaration.
- G Turning to the appellant's claim to damages, I agree with the view of the First Division that the only competent remedy available to the appellant is by claim before the appropriate tribunal under the Compensation (Defence) Act, 1939, and subsequent statutes. Counsel for the appellant very properly stated that he felt unable to argue to the contrary, if the main question arising on this appeal were decided against his client. I would dismiss the appeal.
- H

LORD MACDERMOTT: My Lords, I have had the advantage of reading in print the opinion just delivered by my noble and learned friend on the Woolsack. I agree with him in thinking that this appeal fails and also in the reasoning which has led him to that conclusion. In particular, I share the view that the acts complained of come within para. (a) of the second part of reg. 51 (2), and that the words “anything which any person having an interest in the land would be entitled to do by virtue of that interest” authorise the

doing on or to the land itself of anything which could be done by virtue of any interest or conjunction of interests therein.

LORD REID: My Lords, the appellant is the owner of a house and large garden in Dumbreck Road, Glasgow. In 1943 his property was requisitioned for billeting troops, and in 1946 the requisition was transferred to the Secretary of State for Scotland who took possession to use the property for accommodating persons inadequately housed. The Secretary of State delegated his powers to the respondents who carried out alterations in the house to make it suitable for housing separate occupiers and then licensed certain persons to occupy parts of the house.

The appellant avers that in October, 1948, he found that the respondents, or their servants or others claiming right through them, were mutilating valuable trees growing on his property and doing irreparable damage to them. In November, 1948, he raised the present action against the respondents for interdict to prevent further damage and for damages. His pleadings disclose two main grounds of action—first, that the requisition was invalid, and, secondly, that, even if it was valid, the respondents' actings were unwarranted and illegal. The sheriff substitute decided against the appellant on the first question and repelled those of his pleas in law which raised the question of the validity of the requisition, but on the second question he allowed a proof on the view that the respondents were bound to administer the property in a proper manner. The respondents appealed to the Court of Session. By interlocutor of Oct. 14, 1949, against which the present appeal is taken, the First Division dismissed the action as incompetent and irrelevant. It appears that at the hearing of the appeal before the First Division the present appellant did not raise the question of the validity of the requisition. If he had wished to take advantage of that appeal in order to appeal against that part of the sheriff substitute's interlocutor which repelled certain of his pleas in law, he ought to have made an appropriate motion in the course of the hearing. It is true that he could not usefully have argued the question because the Division were bound by a previous decision on a similar question. But if he wished to keep the matter open for an appeal to this House it was necessary for him at least formally to raise the question. In my opinion, it is now too late for him to attack the interlocutor of the sheriff substitute.

This appeal must be decided on the basis that the requisition was valid. As the case has been decided on relevancy we must proceed on the footing that the appellant's averments are well founded in fact. I think that his averments, so far as material to the question at issue in this appeal, can be summarised in this way. The respondents have cut and mutilated trees and they have done that in an unskilful manner so that irreparable damage has been done and the trees have been reduced to dying stumps, and it is further averred that this was in no way connected with housing persons inadequately housed. The damage done is estimated at £225. The respondents' powers were derived from the Defence (General) Regulations, 1939, reg. 51, which at the material time was continued in force by the Supplies and Services (Transitional Powers) Act, 1945. That regulation conferred certain powers on competent authorities including power to delegate their functions. It is not disputed that the Secretary of State was a competent authority nor is it disputed that there was a proper delegation to the respondents. The regulation provides that while land is in possession of a competent authority it may be used by or under the authority of the competent authority "for such purpose, and in such manner, as that authority thinks expedient" for any of the purposes specified in s. 1 (1) of the Act of 1945, and the regulation further provides that the competent authority "so far as appears to it to be necessary or expedient" in connection with the taking of possession may do or authorise persons using the land to do in relation to the land "anything which any person having an interest in the land would

be entitled to do by virtue of that interest." It is not now open to the appellant to contend that housing persons inadequately housed is not within the purposes specified in the Act of 1945.

A The argument for the appellant was that the authority to do work or make alterations on requisitioned land is a limited authority. It was said that the reference to "any person having an interest in the land" pointed to an interest less than ownership and that one must imagine a person with an interest sufficient, but only sufficient, to enable him to do what is necessary to enable the land to be used for the purpose for which it has been requisitioned. It is not easy to see why this part of the regulation has been drafted as it has been, but it certainly cannot mean that in no case is the competent authority to have as wide powers to make alterations as an owner would have. This regulation gives the necessary authority for defence works on requisitioned land and in many cases work clearly necessary for defence purposes could not have been carried out by anyone with less than the full powers of an owner. Indeed, in some cases it may have been necessary to do things which even an owner could not do without the permission of others, for example, where the rights of other riparian owners were involved, but it is not necessary to consider cases of that character. It is enough that in many cases no powers short of those of an owner would suffice. So, in my opinion, there is no substance in the argument that the respondents could not have power under the regulation to destroy trees if that were a proper thing to do in order to get full use of the land for the purpose for which it was requisitioned.

D The next argument was that the appellant is entitled to prove that the cutting of these trees could not properly be regarded as expedient in connection with the use of the property for housing. It was said that, although the regulation gives to the competent authority full discretion in matters clearly connected with the purpose of the requisition, it does not leave it to the authority to determine the issue whether doing a particular thing is sufficiently closely connected with the purpose of the requisition to be within the authority's power. This argument assumes that, because the Secretary of State took possession of the property to use it for housing, he would not be entitled to use it for any other purpose falling within s. 1 (1) of the Supplies and Services (Transitional Powers) Act, 1945. I must not be taken as assenting to that. It is unnecessary to consider that question in this case because, even if that assumption is right, I am unable to accept the appellant's argument. The discretion conferred on the competent authority by the regulation is very wide. The authority can use the land which it has taken "for such purpose, and in such manner, as that authority thinks expedient" for the purpose of the requisition. That must, in my opinion, mean that the authority is made the judge of how best to use the requisitioned property for that purpose. I am far from saying that in no case can the actions of the authority be challenged by legal action. Admittedly, the authority must act in good faith, but bad faith is not alleged here. And it may be that there would be grounds for action if it appeared that the authority's decision was so unreasonable as to be perverse, but the averments here fall far short of making a case of that kind. All that is said is that the cutting of the trees was in no way connected with housing persons inadequately housed. Cutting some trees may be very necessary to admit light and air to a house, and in other cases there may be room for great differences of opinion. There is nothing in these averments to show that this is not a case where there was room for differences of opinion. I need not, therefore, consider what would be the result in a case where stronger averments could be made. Further, it may be that there would be grounds for action if it could be shown that neither the authority nor anyone authorised by it ever made any decision about the expediency of doing what was in fact done. But all that is said in this case is that the cutting was not done in a workmanlike manner. If a case were

made that what was done in fact was essentially different from that which the authority had decided was expedient, there might be room for action. But, again, that need not be decided here, because these averments are not sufficient to make a case of that character.

In coming to a decision on this appeal I do not proceed at all on the comparatively small amount of damage alleged. If the appellant had suffered a legal wrong he would be entitled to a remedy though his loss might be small and though the consequences might be far reaching. In my judgment, even if all that is averred was proved, the appellant could not succeed, and I, therefore, agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Stephenson, Harwood & Tatham*, agents for *Syminton & Blair*, Glasgow, and *A. Watson*, Edinburgh (for the appellant); *Martin & Co.*, agents for *Simpson & Marwick*, Edinburgh (for the respondents).

[Reported by J. D. PENNINGTON, ESQ., *Barrister-at-Law*.]

WILCOX v. JEFFERY.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 26, 1951.]

Alien—Breach of condition of leave to land—Aiding and abetting—Presence of music critic at concert—Leave to musician subject to condition not to take employment—Performance at concert—Aliens Order, 1920 (S.R. & O., 1920, No. 448), art. 18 (2).

On Dec. 11, 1949, one H., a musician and a citizen of the United States, was granted permission to land in the United Kingdom under art. 1 (4) of the Aliens Order, 1920, on condition that during his stay he would not take any employment, paid or unpaid. The appellant was present at the airport when H. landed and knew what condition had been imposed. That night H. attended a concert in a London theatre, and, on the invitation of the organisers of the concert, he gave a performance on the saxophone with other musicians. The appellant was present in the theatre throughout the concert, having paid for admission thereto, and later he wrote a laudatory commentary on H.'s performance in a magazine of which he was owner and managing editor and also published in the magazine a number of photographs.

HELD: the appellant's presence at the concert was not accidental, and in the circumstances it was open to the magistrate to find that his presence was an encouragement to H. to commit an offence against art. 1 (4) of the Order, and, therefore, under art. 18 (2), to convict him of aiding and abetting.

R. v. Coney (1882) (8 Q.B.D. 534), *applied*.

[AS TO CRIMINAL RESPONSIBILITY FOR AIDING AND ABETTING OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 30-32, paras. 30, 31; and FOR CASES, see DIGEST, Vol. 14, pp. 91-94, Nos. 605-638, and Digest Supp., and 2nd Digest Supp.]

AS TO THE CONDITIONAL LANDING OF ALIENS, see HALSBURY, Hailsham Edn., Vol. 1, p. 476, para. 805.]

Case referred to:

(1) *R. v. Coney*, (1882), 8 Q.B.D. 534; 51 L.J.M.C. 66; 46 L.T. 307; 46 J.P. 404; 15 Digest 645, 6870.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Bow Street Magistrate's Court the appellant, Herbert William Wilcox, owner and managing editor of a monthly magazine entitled "Jazz Illustrated," was charged with aiding and abetting one Coleman Hawkins, a citizen of the United States, in contravening art. 1 (4) of the Aliens Order, 1920, by failing to comply with a condition attached to a grant of leave to land in the United Kingdom, namely, that Hawkins should take no employment paid or unpaid during his stay, contrary to art. 18 (4) of the Order. It was proved or admitted that on Dec. 11, 1949, Hawkins arrived at a London airport and was met by, among others, the appellant. The appellant was present when an immigration officer interviewed two other persons who had previously applied for permission for Hawkins to perform at a concert in London, but had been told by the Ministry of Labour that their application had been refused. At that interview it was stated that Hawkins would attend the concert and would be "spotlighted" and introduced to the audience, but would not perform. The appellant said he was not connected with the persons responsible for organising the concert and that he had only gone to the airport to report Hawkins' arrival for his magazine. The immigration officer gave permission to Hawkins to remain for three days in this country, making it a condition that he should not take any paid or unpaid employment. The appellant was aware that such a condition had been imposed. Later the same day the appellant attended the concert, paying for admission. Hawkins was seated in a box, but after being "spotlighted" he went on the stage and played the saxophone. A description of the performance by Hawkins with several pages of photographs was later published in the appellant's magazine. The magistrate was of the opinion that the appellant aided and abetted the contravention of the Order by Hawkins and imposed a fine of £25 and £21 costs.

Rountree for the appellant.

J. M. G. Griffith-Jones for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the metropolitan magistrate at Bow Street Magistrate's Court before whom the appellant, Herbert William Wilcox, the proprietor of a periodical called "Jazz Illustrated," was charged on an information that "on Dec. 11, 1949, he did unlawfully aid and abet one Coleman Hawkins in contravening art. 1 (4) of the Aliens Order, 1920, by failing to comply with a condition attached to a grant of leave to land, to wit, that the said Coleman Hawkins should take no employment paid or unpaid while in the United Kingdom, contrary to art. 18 (2) of the Aliens Order, 1920." Under the Aliens Order, art. 1 (1), it is provided that

" . . . an alien coming . . . by sea to a place in the United Kingdom—
(a) shall not land in the United Kingdom without the leave of an immigration officer . . . "

It is provided by art 1 (4) that:

" An immigration officer, in accordance with general or special directions of the Secretary of State, may, by general order or notice or otherwise, attach such conditions as he may think fit to the grant of leave to land, and the Secretary of State may at any time vary such conditions in such manner as he thinks fit, and the alien shall comply with the conditions so attached or varied . . . "

If the alien fails to comply, he is to be in the same position as if he has landed without permission, *i.e.*, he commits an offence.

The case is concerned with the visit of a celebrated professor of the saxophone, a gentleman by the name of Hawkins who was a citizen of the United States. He came here at the invitation of two gentlemen of the name of Curtis and Hughes, connected with a jazz club which enlivens the neighbourhood of Willesden. They, apparently, had applied for permission for Mr. Hawkins to land and it was refused, but, nevertheless, this professor of the saxophone arrived

with four French musicians. When they came to the airport, among the people who were there to greet them was the appellant. He had not arranged their visit, but he knew they were coming and he was there to report the arrival of these important musicians for his magazine. So, evidently, he was regarding the visit of Mr. Hawkins as a matter which would be of interest to himself and the magazine which he was editing and selling for profit. Messrs. Curtis and Hughes arranged a concert at the Princes Theatre, London. The appellant attended that concert as a spectator. He paid for his ticket. Mr. Hawkins went on the stage and delighted the audience by playing the saxophone. The appellant did not get up and protest in the name of the musicians of England that Mr. Hawkins ought not to be here competing with them and taking the bread out of their mouths or the wind out of their instruments. It is not found that he actually applauded, but he was there having paid to go in, and, no doubt, enjoying the performance, and then, lo and behold, out comes his magazine with a most laudatory description, fully illustrated, of this concert. On those facts the magistrate has found that he aided and abetted.

Reliance is placed by the prosecution on *R. v. Coney* (1) which dealt with a prize fight. This case relates to a jazz band concert, but the particular nature of the entertainment provided, whether by fighting with bare fists or playing on saxophones, does not seem to me to make any difference to the question which we have to decide. The fact is that a man is charged with aiding and abetting an illegal act, and I can find no authority for saying that it matters what that illegal act is, provided that the aider and abettor knows the facts sufficiently well to know that they would constitute an offence in the principal. In *R. v. Coney* (1) the prize fight took place in the neighbourhood of Ascot, and four or five men were convicted of aiding and abetting the fight. The conviction was quashed on the ground that the chairman had not given a correct direction to the jury when he told them that, as the prisoners were physically present at the fight, they must be held to have aided and abetted. That direction, the court held, was wrong, it being too wide. The matter was very concisely put by CAVE, J., whose judgment was fully concurred in by that great master of the criminal law, STEPHEN, J. CAVE, J., said (8 Q.B.D. 540):

"Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental it is evidence, but no more than evidence, for the jury."

There was not accidental presence in this case. The appellant paid to go to the concert and he went there because he wanted to report it. He must, therefore, be held to have been present, taking part, concurring, or encouraging, whichever word you like to use for expressing this conception. It was an illegal act on the part of Hawkins to play the saxophone or any other instrument at this concert. The appellant clearly knew that it was an unlawful act for him to play. He had gone there to hear him, and his presence and his payment to go there was an encouragement. He went there to make use of the performance, because he went there, as the magistrate finds and was justified in finding, to get "copy" for his newspaper. It might have been entirely different, as I say, if he had gone there and protested, saying: "The musicians' union do not like you foreigners coming here and playing and you ought to get off the stage." If he had booed, it might have been some evidence that he was not aiding and abetting. If he had gone as a member of a *claque* to try to drown the noise of the saxophone, he might very likely be found not guilty of aiding and abetting. In this case it seems clear that he was there, not only to approve and encourage what was done, but to take advantage of it by getting "copy" for his paper. In those circumstances there was evidence on which the magistrate could find that the appellant aided and abetted, and for these reasons I am of opinion that the appeal fails.

HUMPHREYS, J.: I agree that there was evidence sufficient to justify the finding of the magistrate.

DEVLIN, J.: I agree, and I wish to add only a word on the application of *R. v. Coney* (1). Counsel for the appellant sought to distinguish that case on the facts inasmuch as in *R. v. Coney* (1) the performance, which was a prize fight, was illegal from beginning to end, whereas in the case we are considering the bulk of the concert was quite legal, the only part of the performance which was illegal being that which involved Mr. Hawkins. That, however, is not, in my judgment, a distinction which affects the application to this case of the principle in *R. v. Coney* (1). It may well be that if a spectator goes to a concert he may explain his presence during an illegal item by saying that he hardly felt it necessary to get up and go out and then return when the performance resumed its legality, if I may so call it. It is conceivable that in such circumstances (and I should wish to consider it further if it ever arose) the presence of a person during one item might fall within the accidental or casual class which was envisaged by CAVE, J. Here there was abundant evidence, apart from the mere fact of the appellant's presence, that he was making use of this item in the performance and that his attendance at that item was, therefore, deliberate. In those circumstances I think the principle in *R. v. Coney* (1) applies, and that the magistrate was justified in drawing the inference which he did draw.

Appeal dismissed with costs.

Solicitors: *Elliot & Macvie* (for the appellant); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re NOAD (*deceased*). NOAD *v.* NOAD AND OTHERS.

[CHANCERY DIVISION (Roxbury, J.), February 2, 5, 1951.]

Will—Gift “to the issue of our marriage”—*Exclusion of grandchildren.*

By his will, dated Mar. 1, 1914, a testator, who died in May, 1950, gave, devised and bequeathed all his real and personal estate of every description “unto my wife E.L.N. for her life and upon her death to be equally divided between the issue of our marriage.” One son, born in 1906, was the only child of the marriage. The son survived the testator, and was himself the father of three children at the date of the testator's death. On the construction of the gift over on the widow's death,

HELD: the phrase “issue of our marriage” ought to be construed as meaning only the child or children of the testator and his wife to the exclusion of the grandchildren.

Reed v. Braithwaite (1871) (L.R. 11 Eq. 514), *followed*.

Walsh v. Johnston ([1899] 1 I.R. 501), *not followed*.

[AS TO MEANING OF “ISSUE,” see HALSBURY, Hailsham Edn., Vol. 34, pp. 313-317, paras. 362-364; and FOR CASES, see DIGEST, Vol. 44, pp. 851-861, Nos. 7051-7163.]

Cases referred to:

- (1) *Reed v. Braithwaite*, (1871), L.R. 11 Eq. 514; 40 L.J.Ch. 355; 24 L.T. 351; 44 Digest 1153, 9977.
- (2) *Walsh v. Johnston*, [1899] 1 I.R. 501; 44 Digest 852, 7059 *iv*.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Arnold John Noad, a gift expressed to be given to the "issue of our marriage" passed to the testator's only child absolutely or whether it was to be divided equally between the testator's child and grandchildren *per capita*.

Martin Roth for the plaintiff, the executor.

Hesketh for the first defendant, the only child of the testator.

T. A. C. Burgess for remaining defendants, the grandchildren of the testator. A

ROXBURGH, J.: The testator, Arnold John Noad, died in May, 1950, having by his will dated Mar. 1, 1914, given, devised and bequeathed all his real and personal estate of every description

"unto my wife Elsie Louise Noad for her life and upon her death to be equally divided between the issue of our marriage." B

At the date of his will the testator had but one son, but there is no evidence before me to suggest that he might not have had other children. In fact, he had no other children. The son, Edward John, who was born in 1906, survived the testator, and has children. The question is whether, on the death of the testator's widow, the son takes the whole of the testator's residuary estate or whether it is to be equally divided between the son and the son's children *per capita*. C

Before I look at authority, I must emphasise the extreme improbability that the testator intended his son and his son's children to take *per capita*. It would not have been at all surprising if he had intended a distribution among his issue to all degrees *per stirpes*, but a distribution among issue of all degrees *per capita* in which parent and children compete with one another is, in my judgment, a most improbable testamentary disposition. D

Counsel for the testator's grandchildren said in his opening observations in a manner which I found very convincing: "'Issue' means issue to all degrees, unless there is a context restraining the meaning of the word. There is no context here, and, accordingly, it must mean issue to all degrees, whether the testator is likely to have intended such a result or not." Counsel for the son parried this argument with *Reed v. Braithwaite* (1). The headnote in that case is: E

"A testator gave his residuary estate to his wife for life, and afterwards to his cousin H. for her sole use; and should she have any legal issue by marriage, to be divided amongst them equally at twenty-one. 'Should the said H. not survive my wife, and die without the said legal issue by marriage,' he gave his residuary estate to M." F

So far as the report shows, no argument was addressed to the court on the meaning of the phrase "issue by marriage," but SIR RICHARD MALINS, V.-C., began his judgment, the substance of which deals with different matters, by observing that he was of opinion that the words "legal issue by marriage" clearly meant "children," and he continued (L.R. 11 Eq. 517): G

"The meaning of the clause creating the gift over is 'Should Maria Ann Halse die in the lifetime of my wife, and without such issue'; that is 'children who should attain twenty-one'." H

That decision, for it was, I think, necessary for the court there to construe the will though the judgment turns on other matters, has stood without question in England ever since. On the other hand, counsel for the grandchildren has discovered the Irish case, *Walsh v. Johnston* (2), and one of the gifts there considered was "To my wife and the issue of our marriage." Though *Reed v. Braithwaite* (1) was cited, CHATTERTON, V.-C., did not refer to the case in his judgment, but said ([1899] 1 I.R. 503):

"In dispositions by will the rule of construction is, that issue must be held to include all lineal descendants, and therefore it gives an estate in tail, or quasi-tail to the first taker, unless there are words in the context to cut down such a gift to children. The words 'of our marriage' are relied on as having that effect here. But a gift to the issue of an existing marriage does not, in my opinion, take the gift out of the general rule. 'Issue' necessarily implies lineal descent, and the addition of the words 'and the issue of a particular marriage' merely confines the descendants to those of a specified husband and wife."

There is, I think, a plain conflict between the English decision and the Irish.

It seems to me that it is not right to start, as the Irish court started, by first considering the meaning of the word "issue" *simpliciter* and then seeing whether it is affected by the context. It is true that "issue" means "issue to all degrees" unless that meaning is restrained by the context, but, in my judgment, "issue of our marriage" is a different, composite phrase, and ought to be construed, not as "issue" with a context, but as a different phrase altogether. After all, the words "of our marriage" qualify the word "issue." It is not a question of context at all. The phrase is a compound phrase which must be construed as such.

I agree that, if the court starts from the supposition that "issue" means "issue to all degrees," it is possible to construe the words "of our marriage" in such a way as not to restrain that meaning, and this is what the Irish court did, but, in my judgment, what really has to be determined is what is the proper construction to put on the compound phrase in a will, "issue of our marriage." The phrase "issue of our marriage" could only, I think, be found in a will. I cannot think of "issue of our marriage" appearing in a document like a settlement—"issue of the marriage," perhaps, but not "issue of our marriage"—and I do not think the phrase "issue of our marriage" has any technical legal meaning, whereas the word "issue" certainly has.

In my judgment, the phrase "issue of our marriage" ought to mean to the court, as it undoubtedly would mean to any layman, the children of the husband and his wife. Though the grandchildren are, in one sense, issue of the marriage between the husband and his wife, since there could have been no grandchildren if there had been no children, the grandchildren are not really issue of the marriage of the husband and his wife, but are issue of the son or daughter and his wife or her husband, who have been able to have issue by reason of the circumstance, among other things, that the grandfather had issue. My interpretation of that compound phrase accords with the decision of SIR RICHARD MALINS, V.-C., long ago.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the estate in due course of administration.

Solicitors: Ernest Bevir & Son, agents for Pinniger, Finch & Co., Westbury (for the plaintiff and the first defendant); Woodcock, Ryland & Co., agents for Vicary & Knight, Warminster (for the remaining defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

PATEL v. WILLIS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 22, 26, 1951.]

Control of Goods—Supply for export only—“Supply”—Delivery to agent—Declaration signed by agent in name of principal and undated—Validity—Proof of delivery in contravention of declaration—Knitted Goods (Manufacture and Supply) Order, 1948 (S.I., 1948, No. 316), art. 3 (2) (as substituted by art. 1 (a) of the Knitted Goods (Manufacture and Supply) (Amendment) (No. 2) Order, 1948) (S.I., 1948, No. 994); art. 3A (1) (as added by art. 1 (b) of the amending Order)—Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (S.R. & O., 1947, No. 2642), art. 16 (1) (b), art. 18 (4).

By the Knitted Goods (Manufacture and Supply) Order, 1948, art. 3 (2) (as substituted by art. 1 (a) of the Knitted Goods (Manufacture and Supply) (Amendment) (No. 2) Order, 1948), a manufacturer shall not supply any goods of a certain class otherwise than by exportation or to a person who surrenders a declaration in writing, signed and dated by him, that he will not supply the goods except on the same terms, and by art. 3A (1) (as added by art. 1 (b) of the amending Order) a person to whom goods have been supplied against the surrender by him of such declaration shall not supply such goods except in accordance with the declaration. The appellant, stating that he represented a certain firm, bought on behalf of the firm from hosiery manufacturers a quantity of nylon stockings, which were goods within the provisions of the Orders. He said that the goods were required by the firm for export to Pakistan, and when, later, he collected the goods he signed the declaration required by art. 3 (2) of the Order of 1948. He signed it, not in his own name, but in a name purporting to be that of his principal and accepted by the sellers as such. He also omitted to write in the date and it was inserted later by the sellers. The goods having been delivered to him he placed them in a taxicab in which was waiting another man who consigned the goods by train to Leeds and York where they were collected.

HELD: (i) if goods were delivered to an agent who had authority to deal with them on behalf of his principal, they were supplied as much to the agent as to the principal; the appellant took from the manufacturers delivery of the goods as one clothed with authority to deal with them on behalf of his principal; and, therefore, the goods were supplied to him within the meaning of art. 3 (2).

(ii) to prove that goods had been supplied to the appellant in contravention of art. 3A (1) the prosecution must prove a delivery in circumstances in which, unless otherwise explained, the natural inference was that the delivery was either in pursuance of a contract or as a gift within art. 18 (4) of the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947 (applied to the Knitted Goods (Manufacture and Supply) Order, 1948, by art. 13 (3) thereof), and, therefore, a “supply” within art. 18 (4) and art. 3A (1); it was then for the appellant to prove that the goods were not delivered to a third party otherwise than for exportation; he had failed to discharge that onus; and, consequently, he was guilty of an offence under art. 3A (1).

(iii) the fact that the appellant had not signed the declaration in his own name and had not dated it did not prevent the declaration being a good declaration for the purposes of art. 3A.

CASE STATED by London Quarter Sessions.

At a court of summary jurisdiction, sitting at Bow Street Magistrate's Court, the appellant was convicted on an information charging that between June 17 and June 22, 1949, he, being a person to whom knitted goods, to wit, two hundred dozen nylon stockings, had been supplied against the surrender by

him of a declaration referred to in art. 5 of the Knitted Goods (Manufacture and Supply) Order, 1948, unlawfully did supply the said goods otherwise than in accordance with that declaration, contrary to art. 3A of the said Order (as added by art. 1 (b) of the Knitted Goods (Manufacture and Supply) (Amendment) (No. 2) Order, 1948). "He was sentenced to nine months' imprisonment and ordered to pay a fine of £500 and £250 costs. An appeal against the conviction and sentence was dismissed with costs by the appeal committee of London Sessions, on May 24, 1950.

On behalf of the appellant it was contended (i) that he had neither been supplied with, nor had he supplied, goods within the ordinary meaning of the word "supply" or within the meaning of the word as defined in the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, art. 18 (4), (applied to the Knitted Goods (Manufacture and Supply) Order, 1948, by art. 13 (3) of the latter Order); (ii) that the appellant had not surrendered the declaration within the meaning of art. 3 (2) or art. 5 of the Knitted Goods (Manufacture and Supply) Order, 1948, in that the declaration was given only on behalf of a person on whose behalf the appellant was acting, and was not signed or dated by the appellant. On behalf of the respondent it was contended that the acts complained of amounted to the offence charged either as a principal or as an aider or abettor.

Platts-Mills for the appellant.

G. Pollock for the respondent.

Cur. adv. vult.

Jan. 26. **DEVLIN, J.**, read the following judgment of the court. This is a case stated by the deputy chairman of the appeal committee of the London Sessions. The appellant was charged with an offence against an Order made under the Defence (General) Regulations, 1939, which has as its object, among other things, to prevent the sale in the home market of goods—in this particular case, nylon stockings—manufactured for export. The Knitted Goods (Manufacture and Supply) Order, 1948, as amended by later Orders, provides by art. 3 (2) that a manufacturer shall not supply any goods of a certain class otherwise than by exportation or to a person who surrenders a declaration in writing signed and dated by him that he will not supply the goods except on the same terms. Article 3A (1) provides that a person to whom goods have been supplied against the surrender by him of any such declaration shall not supply any such goods except in accordance with the declaration. It is with a breach of this latter article that the appellant is charged.

The essential facts are short. In 1948 one V. S. Sastry registered himself as a firm under the title of the Central Oriental Agency. On May 18, 1949, the appellant called on Taylor Woods, Ltd., who are hosiery manufacturers, and stated that he represented the Central Oriental Agency. He arranged with Mr. Hughes, the general manager, that they should sell to the agency for export by them to Pakistan certain quantities of nylon stockings. This was followed by a written order signed by Mr. Sastry. On June 17, 1949, the appellant called to take delivery of some of the nylons. He was asked by Mr. Hughes for a declaration in the terms required by the Board of Trade, and replied that such a declaration was in the post. Mr. Hughes said that he could not hand over the goods unless they were signed for by the firm. Thereupon the appellant agreed to sign the declaration, which corresponds in its terms to that required by the Order I have read, and he wrote on the form offered to him the words "V. Shastri." The declaration was not then dated, but Mr. Hughes subsequently endorsed upon it a memorandum of the date. After the appellant had written on the declaration he was handed the nylons, and he took them and placed them in a waiting taxicab where there was another Indian gentleman. The taxicab drove to King's Cross Station—the appellant did not go all the way there—where the Indian gentleman sent part of the

goods by train to Leeds and part by train to York. At both places they were collected by a third Indian, and nothing more is stated with regard to them.

Before the appellant can be convicted of the offence with which he is charged it is necessary for the prosecution to prove two acts of supplying, first by Taylor Woods, Ltd. to the appellant, and, secondly, by the appellant to some third party. It is contended on the appellant's behalf that there was no supplying to him, but only supplying to Sastry, and, further, that there is no evidence on which it can be said that he supplied to a third party. The case has thus given rise to a discussion on the meaning of the word "supply," which is of some importance inasmuch as it is the word commonly used in regulations of this type and there appears to be no authority on it. It is defined in art. 18 (4) of the Utility Mark and Apparel and Textiles (General Provisions) Order, 1947, and this definition is, by art. 13 (3) of the Order with which this case is concerned, applied to that latter Order. The definition provides that

" 'supply' means supply in pursuance of a contract of sale, work, and labour with or without the provision of materials, sale or return, hire, hire-purchase, barter or a contract of any other description, and supply as a gift."

There is no doubt that there was a contract of sale between Taylor Woods, Ltd., and Sastry. There is likewise no doubt that, if the goods had been delivered to Sastry, they would have been supplied to him. In this case they were delivered to Sastry's agent. The definition of "supply" is very wide, but it is not every sort of delivery that amounts to a supply under "a contract . . . of any other description."

It may well be that, if goods are delivered to an agent of the seller, whose duty is merely to collect them—in short, to a mere messenger—the goods would not be supplied to the messenger. It is unnecessary to express any concluded view about that, for it is plain that the appellant was much more than that. In our judgment, if goods are delivered to an agent who has authority to deal with them on behalf of his principal, they are supplied as much to the agent as to the principal. There was ample material on which the appeal committee could come to the conclusion that the appellant was an agent in this class. He described himself, at his first interview on May 18, as representing the Central Oriental Agency, and it was he who arranged the terms of the contract. When he called to collect the goods on June 17, it is plain that he did so not merely as a messenger. He was able to inform Mr. Hughes that a declaration was in the post, and, when Mr. Hughes said that this was not sufficient and that he must have a signature "by the firm," he regarded himself as being in a position to sign the appropriate declaration. If he were a mere messenger there would have been no need for his presence at all, for it was another man who put the goods on the train. We think it plain that the appellant took delivery of the goods as one clothed with authority to deal with them on behalf of the firm.

Has the prosecution discharged whatever burden lies on it in relation to the second part of the case, and is there material sufficient to justify the conclusion that the appellant supplied the stockings to a third party otherwise than for exportation or against another declaration? The facts on this point are scanty, but we think they are enough. In our judgment, the prosecution, in order to prove a supply, must prove a delivery in circumstances in which, unless otherwise explained, the natural inference is that the delivery was either pursuant to a contract or as a gift. Once the prosecution have proved this, it is, we think, for the defence to show on what terms the goods were supplied. This is because the terms of the contract between the supplier and the third party is a matter peculiarly within the knowledge of the supplier. The burden is not, therefore, cast on the prosecution in the first instance of adducing material to show that the goods were delivered to the third party otherwise than for exportation.

Similarly, on well-established principles, if the defence have obtained from the third party a declaration in the terms of the Order, it is for them to produce it. It is not for this court to inquire whether the appellant gave evidence at his trial or to speculate on what his evidence was. We have to deal with the facts as stated. We must take it that the appellant was either unable or unwilling to give any explanation to the appeal committee for handing the goods to the Indian which the committee thought sufficiently credible to form the basis of any finding of fact. In these circumstances, we think that, once it is proved that an agent in the appellant's position handed to a third party goods which were despatched to their destinations by train, the proper inference, in the absence of any other satisfactory explanation, is that they were being supplied under one or other of the forms of contract so widely set out in the definition to which we have referred. As nothing was placed before the court to show whether that contract was for exportation or not and no declaration was produced, we think that the committee was justified in its conclusion that there had been a breach of the Order.

Before we leave this point we must deal with a contention on behalf of the appellant based on art. 16 (1) (b) of the Order of 1947 which provides that in relation to any provision controlling the quantity of goods a person who, in the course of supplying goods to another person through an agent, invoices those goods to the agent, shall be deemed to supply those goods to the agent, and the agent shall be deemed to supply the goods to that other person. It is not contended that this article is of direct application, but it is suggested that it can be used as an aid to construction and that we ought not to hold that goods are supplied to an agent within the meaning of the definition unless they are also invoiced to him. We do not find this article of any assistance. It is dealing, not with the definition of supply, but with what is "deemed" to be a supply for a particular and limited purpose. We were not referred to any provisions for controlling the quantity of goods, but it may well be that one of the objects of art. 16 (1) (b) is to prevent a double supply by the seller formally invoicing half the goods to an agent and the other half to his principal.

One other point was taken by the appellant. It was contended that the declaration was unsigned and undated—unsigned because the appellant had put on it, not his own name, but one which purported to be, and was taken by Mr. Hughes as being, the name of his principal, and undated because the date was not on it at the time of signature. So, it is contended, the appellant was not supplied with goods against a declaration in writing signed and dated by him, and, therefore, the case is not brought within the words of art. 3A. The point is quite unmeritorious since, if there was no proper declaration, the appellant not merely aided and abetted, but actively procured, the commission of an offence by the manufacturer under art. 3 (2), but we think that there is nothing in the point. There was a signature by the appellant with the name of his principal, and the document was in fact dated by Mr. Hughes, clearly with the implied authority of the appellant. Accordingly, we answer the question stated by saying that, in our judgment, the appeal committee came to a correct determination and decision in point of law.

Appeal dismissed with costs.

Solicitors: *Temple & Co.* (for the appellant); *Solicitor, Board of Trade* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

NOWELL v. NOWELL.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Karminski, J.), February 1, 2, 1951.]

Infant—Maintenance—Education or training—Continuance of order after sixteen—Matters to be considered—Interests of child—Means of parties—Married Women (Maintenance) Act, 1949 (c. 99), s. 2 (2).

In July, 1938, the wife was granted an order of 30s. a week (later reduced to 20s.) for her own maintenance and one of 10s. a week for the maintenance of her son. In 1945 the marriage was dissolved, and the husband re-married. In November, 1950, the child having attained the age of sixteen, the wife applied to a metropolitan magistrate for the order for his maintenance to be continued under s. 2 (2) of the Married Women (Maintenance) Act, 1949. She proved that the child was still at school and that it was intended that he should remain there until he obtained his school certificate and should thereafter pursue further studies.

HELD: in deciding whether it was "expedient" to make a continuation order under s. 2 (2) the court must consider (a) whether the proposed education or training was or was not in the interest of the child, and (b) the financial position of the parties, and in the circumstances of the present case the order should be continued.

[FOR THE MARRIED WOMEN (MAINTENANCE) ACT, 1949, s. 2, see HALSBURY'S STATUTES, Second Edn., Interim Service, p. 1521.]

Case referred to:

(1) *Bragg v. Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 27 Digest 665, 6242.

APPEAL from an order of the metropolitan magistrate sitting at West London Magistrate's Court.

This appeal arose out of an application under the Married Women (Maintenance) Act, 1949, s. 2 (2), made by the wife for the continuation of a maintenance order of 10s. a week in respect of her son. The son, who attained the age of sixteen in October, 1950, was attending a grammar school and it was intended that he should remain there until he obtained his school certificate and after that pursue further studies. The father opposed the application on the ground of lack of means but the magistrate granted it. The facts are set out fully in the judgment of LORD MERRIMAN, P.

D. E. Peck for the husband.

O'Malley for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from a decision of the metropolitan magistrate sitting at the West London court, given on Nov. 28, 1950, to continue after the age of sixteen a payment of 10s. per week under an existing order of maintenance in respect of a child. As this is the first case, so far as I am aware, in which this particular provision of s. 2 of the Married Women (Maintenance) Act, 1949, has come before this court, and as the direction to himself by the magistrate has been called in question and is said to have vitiated the decision, I propose to say a word or two about the proper construction of the section.

The parties are no longer husband and wife, but in July, 1938, while they were still husband and wife, the Coventry justices made an order of 30s. in favour of the wife and one of 10s. for the maintenance of the child. That order continued in force without variation until 1945 when, the parties still being separated, the wife obtained a decree of divorce on the ground of desertion. Under

A a decision of this court in *Bragg v. Bragg* (1), which has been followed here without question, and, so far as I know, never dissented from by any higher court, the order still remained in force, and has been varied as recently as June 29, 1950, when the whole question was gone into before the justices for the Uckfield petty sessional division of Sussex. The child then was nearing the age of sixteen. He became sixteen in October last. On that occasion no application was made to the justices regarding his maintenance. Though by that time the Married Women (Maintenance) Act, 1949, was in force, and under s. 1 it would have been possible to ask for an increase in respect of his maintenance up to a maximum of 30s., his maintenance was left unchanged. The affairs of the husband were gone into with some elaboration, and the justices decided to reduce the maintenance in respect of the wife from 30s. to 20s. There was a considerable sum of arrears of maintenance payable to the wife in respect both of the 30s. for herself and the 10s. for the child. We are told that a sum earmarked as being the arrears in respect of the child (if, indeed, it is possible to earmark that sum as separate from the arrears payable to the wife under the order as a whole), was paid into court. Be it so. Whatever was left the justices remitted. They thus remitted arrears extending over a period of five years—a very considerable relief to the husband who was in some financial difficulty.

C This also is undisputed. Having served in the Royal Air Force, and having sustained a severe disability resulting in either total or partial deafness, the husband received in respect of that disability a pension of £246 a year, and the wife receives from the Royal Air Force £30 a year in respect of the education of the child. Whatever the husband's financial difficulties may be, I think D we may assume that his pension will remain untouchable. His financial difficulties, as disclosed before the Uckfield justices and again before the metropolitan magistrate, arise in connection with a garage which he is running in partnership with the woman whom he has married since the divorce. One fact about which we know nothing is what her rights under the partnership are, how much money she has, how much she is able to contribute, and so forth, E and I am content to leave it at that. The point of importance is that as recently as June, 1950, the whole financial circumstances of these parties were gone into. It was known that the wife was earning £6 a week, that she was receiving £30 a year from the Royal Air Force, that the husband was in financial difficulties, and that he was receiving a disability pension of £246 a year.

F In November, 1950, the child then having actually attained the age of sixteen, the present application was made under the Act to the metropolitan magistrate to continue the order for his maintenance in view of the fact that the boy was still at school and it was intended to keep him at school with a view to his getting a school certificate and pursuing his studies in science. On the other hand, documents were put before the magistrate relating to the husband's financial difficulties, but no point was taken, in connection with the paramount consideration governing these matters, that the proposed course of education was not in the interests of the child.

G As exception has been taken to the way in which this case was approached by the magistrate, and as I am bound to say plainly that I think he has seriously misdirected himself, I propose to read his own statement of his decision:

I "In this case it is proved that applicant, a married woman, has an order for maintenance of herself and a child who is now just past sixteen and of whom it is proved that he will be engaged in education after sixteen. She asks that maintenance of child shall be continued. Husband resists and only evidence upon which he does is that his means small and worsening. Appears he has minimum income £246 (pension). He asks me in point of law to say that, in view of both financial positions, it is not expedient for this child to receive full-time education after sixteen. Point of law is bad because by the Act I have to consider, when these facts

proved, whether it is expedient for purpose of boy's full-time education that payments should continue. I cannot conceive of circumstances that would make it not expedient for payments to continue. I allow application because (i) I cannot consider anything except whether expedient once education proved; (ii) if anything in this point of powers of payment, I think he can afford it."

It is said that up to the point at which the second proposition is enunciated, the magistrate has misdirected himself, and it is said further that, although in the second proposition he finds that the husband can afford to pay, that is so affected by the misdirection that we ought not to pay any attention to the finding. I think that the magistrate has seriously misdirected himself, and I think it is necessary to point out for the guidance of others wherein he has done so. It seems to me to be wrong to approach the question whether or not to continue payments under the powers of this section by saying that once it is proved that the child either is continuing, or is expected to continue, education after the age of sixteen it is impossible to imagine any circumstances in which it is not expedient that the payments should continue. I can imagine many circumstances in which it might not be expedient for such an order to be made. I do not propose to enlarge on that beyond saying what I think the proper method of approach is, bearing in mind that s. 1 of the Act deals with the power to increase or decrease orders, including an order in respect of a child, but also bearing in mind that that section has not been invoked in this case at any time so far as the child is concerned. The power given by s. 2 (2) is a power to vary an order already in existence, subject to two main conditions. The first condition, which is a condition precedent to the power to make a continuation order at all is (a) that there is a child for whose maintenance provision is made by an existing order—that branch of the condition, manifestly, is here fulfilled; and (b) that the child either is—which is a question of fact—or will be—which is a question of expectation—engaged in a course of education or training after attaining the age of sixteen, and that branch of the condition is fulfilled by proof before the magistrate in this case that the child had attained the age of sixteen and still was at the grammar school where it was expected he would remain for some time.

It is in connection with the second condition that the controversy has arisen. The second condition is—I am transposing the words of the section without altering the sense—that for that purpose—that is, the continuation of the child's education or training after the age of sixteen—it is expedient that the payments required by the order should continue. If that condition is satisfied—and let it be observed that the words are permissive and not compulsory—the court may direct that the payments continue for a period not exceeding two years, with power later on to extend the period. In my opinion, as regards this second condition—and I am not attempting to be exhaustive, but am only proposing to say enough to cover this case—the court may, among other things, take into consideration whether the actual or proposed course of education or training is, or is not, in the interests of the child. I say that because any question concerning the "upbringing" of a child, whether brought before a court of summary jurisdiction under the Guardianship of Infants Act, 1925, or under the Summary Jurisdiction (Married Women) code is subject to the statutory direction to regard as the first and paramount consideration the welfare of the child. It may well be that a magistrate, on an application to continue payments after the age of sixteen, without having any other summons before him, is not able to alter the course of education or training proposed, but it is wrong to suppose that he is obliged to support it, if he thinks it is not in the interests of the child, by ordering the husband to continue payments for that purpose, and, so far from regarding—as the learned magistrate did in this case—that everything follows automatically when once it is proved that the course of

education is being followed, I think that the section not merely permits, but also obliges, him to consider whether the proposed course of education is in the interests of the child. It does not arise here, because nobody suggests that this course of education was not in the interests of the child, or that there was anything which would be more in his interests than what is proposed. To illustrate what I mean, suppose a child who had no very bright academic future was being kept at school by a wife in spite of the fact that the husband, by obtaining an apprenticeship for him in some firm in which, for the sake of argument, the husband had an interest, was able, so far as anyone can ensure anything in this uncertain world, to ensure the child a very prosperous career if he entered the firm young, it clearly would be open to the court to consider whether it was really expedient that the husband should be ordered to continue payments to support a project which the court thought was by no means so favourable to the child as that which the husband was able to offer.

Taking that as an example of one essential point for consideration, the welfare of the child, there is another matter which I think counsel for the husband has established ought to be taken into account, and that is the means of the parties. This section is only part of the scheme which begins with the Summary Jurisdiction (Married Women) Act, 1895, where there is a specific direction that the means of the parties are to be taken into consideration, and it must be open to the court to consider whether, having regard to a decrease, since the original order was made, in the ability of the husband to pay, it is expedient that he should be ordered to pay, and correspondingly whether, perhaps by some prosperous re-marriage, the wife's position had so improved in comparison with the husband's that it is not expedient that the husband should be ordered to pay for the purpose, even assuming the purpose to be beneficial to the child. I have given those two examples, which are not intended to be exhaustive, as showing that the magistrate has misdirected himself, and I am inclined to agree with the submission of counsel for the husband that with so complete a misdirection as that, the finding that the husband can afford to pay is open to criticism, or, at any rate, that we should not regard it as being inviolable. There still remains, however, our own duty, for we are entitled on the evidence to draw any inference which we think ought to be drawn, and it is open for us, on a consideration of all the facts of the case, to make such order as we think ought to be made.

I come back, therefore, to the indisputable facts which obviate the necessity of our sending this case back for further investigation. They are that the whole matter was gone into in great detail as lately as June, 1950, with the results already described. The maintenance payable to the wife has been reduced by 10s. She is earning £6 a week out of which to keep herself, and this child at school, with the addition of £1 a week for herself and, if it is continued, 10s. for the child, and she has also the Air Force grant of £30 for the express purpose of helping the education of the child. That is on the one side. On the other side, there is the husband's pension, untouchable so far as we know, of £246 a year, and his responsibility for a second wife, but with no information whatever vouchsafed about her financial position except that she is his partner in the business. In these circumstances, and having regard, as I think, to the over-riding power of the court at any time to vary the order, even though it is continued, and bearing in mind particularly that nobody has challenged, apart from financial considerations, the propriety of the course of education proposed, I think that this order is one which ought to be continued. The appeal fails and must be dismissed.

KARMINSKI, J.: I agree with everything that has fallen from my Lord. I feel no doubt that the magistrate misdirected himself as to the proper construction of s. 2 (2) of the Married Women (Maintenance) Act, 1949. That

section requires two pre-requisites before an order extending payments to a child beyond the age of sixteen can be made, namely, first, that the child for whose maintenance further provision is sought is already receiving maintenance under an existing order, and, secondly, that the child is, or will be, engaged in a course of education or training after attaining the age of sixteen. Section 2 (2) provides:

“If . . . it appears to the court . . . that it is expedient for [the purpose of the child's education] that the payments required by the order should continue, the court may by order direct that those payments shall continue for such period . . .”

The importance of that section lies in the word “expedient” followed by the permissive word “may.” Expediency may include a variety of considerations which arise from the facts before the court, but, to my mind, the welfare and the interest of the child concerned are paramount. It may well be that there are children who fulfil the two pre-requisites set out in the first part of this section, but who would not derive any real benefit from a continuance of an academic or general education. No doubt, there are many children of that age whose welfare would be better advanced by apprenticeship to a trade or by some functional training of that kind. Secondly, in my view, it is essential, when considering expediency, to consider the means of both the parties and the ability of the husband to pay. The magistrate prevented himself from considering these vital matters when he took the view that he could not consider “anything except whether expedient once education proved.” That is far too narrow a view, and is in conflict with the clear words of the sub-section. Having said that, I have come to the conclusion that in the circumstances the amount ordered is correct. Further, in view of the evidence I think that the magistrate was right in ordering that the order should continue. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Langhams & Letts*, agents for *Dawson & Hart*, Uckfield (for the husband); *Pierron & Morley* (for the wife).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

NOTE.

R. v. BARKER.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Barry, JJ.),
February 5, 1951.]

Criminal Law—Sentence—Committal to quarter sessions by court of summary jurisdiction—Identification of prisoner—Criminal Justice Act, 1948 (c. 58), s. 29 (1).

APPEAL against sentence.

The appellant pleaded Guilty before Newport (Mon.) justices to a charge of false pretences, and, after hearing his antecedents, the justices committed him to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948. At the quarter sessions he asked for thirteen other offences to be taken into consideration and a sentence of five years' imprisonment was passed.

Lucy Griffiths for the appellant.

The Crown was not represented.

LORD GODDARD, C.J., having delivered the judgment of the court dismissing the appeal on the merits, continued: Counsel for the appellant has called our attention to the question of the identification of prisoners at quarter sessions. I think that in these cases the practice should be uniform. When prisoners are committed for sentence to quarter sessions, it is desirable that there should be a formal identification by a police officer of the prisoner as the man convicted by the justices, or that the prisoner be asked if he admits that he is the man mentioned in the conviction and committed for sentence.

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

H.McL.M.

WINKLE v. WILTSHIRE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.),
February 2, 1951.]

Stamp—Possession of fictitious stamp—National insurance stamp—"Lawful excuse"—Purchase in good faith from person not authorised to sell—Post Office Act, 1908 (c. 48), s. 65 (1) (b) (as applied by National Insurance and Industrial Injuries (Stamps) Regulations, 1948 (S.I., 1948, No. 1443), reg. 1).

The respondent, in good faith and without knowledge that they were otherwise than genuine, purchased fictitious national insurance stamps from a person who was not licensed to deal in stamps. On a charge of having possession of fictitious stamps without lawful excuse, contrary to the Post Office Act, 1908, s. 65 (1) (b) (as applied by the National Insurance and Industrial Injuries (Stamps) Regulations, 1948, reg. 1),

HELD: in the absence of proof by the respondent that he acquired the stamps lawfully, *i.e.*, from a post office or a person licensed to deal in stamps, the fact that he did not know that the stamps were fictitious was not a "lawful excuse" within the meaning of s. 65 (1) (b), and he was guilty of the offence charged.

[FOR THE POST OFFICE ACT, 1908, s. 65 (1) (b), see HALSBURY'S STATUTES, Second Edn., Vol. 18, p. 296; and for the NATIONAL INSURANCE AND INDUSTRIAL INJURIES (STAMPS) REGULATIONS, 1948, reg. 1 and Schedule,

see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Vol. 26, pp. 295-300.]

CASE STATED by the West Ham stipendiary magistrate.

At a court of summary jurisdiction sitting at West Ham on Sept. 28, 1950, the appellant, on the order of the Postmaster-General, preferred an information against the respondent, who was the landlord of a public house, charging him with having had in his possession on May 8, 1950, without lawful excuse, seven fictitious 9s. 1d. national insurance stamps, contrary to s. 65 (1) (b) of the Post Office Act, 1908, as applied by the National Insurance and Industrial Injuries (Stamps) Regulations, 1948. The respondent had purchased the stamps from a man named "Tom", who frequented his public house, paying £9 for stamps of the face value of £9 19s. 10d. "Tom" was not in the service or employment of the Post Office or of the Ministry of National Insurance, he had not been appointed to sell or distribute insurance stamps, and he was not licensed to deal in them. When purchasing the stamps, the respondent did not know they were fictitious; he honestly believed them to be genuine. The appellant contended that under the Stamp Duties Management Act, 1891, s. 4 (1) (as applied by the National Insurance and Industrial Injuries (Stamps) Regulations, 1948), it was unlawful for "Tom" to sell the stamps and for the respondent to purchase them from "Tom," irrespective of whether he knew that they were fictitious, and that the respondent was unable to show a lawful excuse (the onus of showing which was on him) for having been in possession of the stamps because he had acquired them by an unlawful transaction. The respondent contended that it was not unlawful to purchase stamps otherwise than from a post office or from a person authorised to deal in stamps, and that he could show a lawful excuse by establishing his belief that the stamps were genuine. The magistrate held that the onus of showing a lawful excuse was on the respondent and that he could not discharge the onus if he had acquired the stamps by means of an unlawful transaction, but that he was not acting unlawfully in buying the stamps, and that he had shown a lawful excuse for possessing them. He, accordingly, dismissed the information, and the appellant appealed.

J. P. Ashworth for the appellant.

Southall for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the learned stipendiary magistrate for West Ham, before whom the respondent was charged with having had in his possession, without lawful excuse, seven fictitious national insurance stamps, contrary to s. 65 (1) (b) of the Post Office Act, 1908, as applied by the National Insurance and Industrial Injuries (Stamps) Regulations, 1948, reg. 1. These regulations applied to national insurance stamps the provisions of the Stamp Duties Management Act, 1891, and the Post Office Act, 1908, which only apply to postage and revenue stamps. The magistrate has found good faith in the respondent, who bought these stamps from somebody he knew as "Tom," a customer at his public house. He said, and the magistrate accepted his statement, that he thought that "Tom" was a sub-contractor at a neighbouring power station, and that "Tom" had shown him the stamps saying that he did not want them. The moral of the case, perhaps, is: Do not buy stamps from a person whose surname you do not even know, and it is dangerous to buy them at a discount of ten per cent., which is what happened in this case.

The learned magistrate has found that the person from whom the respondent bought the stamps was not licensed to deal in stamps. That person would, therefore, be incurring a penalty under the Stamp Duties Management Act, 1891, s. 4 (1), in selling them. He held that the onus of showing a lawful excuse was on the respondent, and if he acquired the stamps by means of an unlawful transaction he could not show a lawful excuse. He said:

"I was of the opinion that, if the respondent was acting unlawfully in this transaction, then everybody buying a postage stamp from a friend was also acting unlawfully, and I could not accept this proposition."

That, I think, is the fallacy of confusing matters which may go very strongly in mitigation with matters which afford a defence. The learned magistrate also said:

"I was satisfied that the [respondent] had shown a 'lawful excuse' for possessing these fictitious stamps and I accordingly dismissed the information."

That decision can only be upheld if the words "without lawful excuse" are the same as "with knowledge." To justify the magistrate's finding, s. 65 (1) would have to read: "A person shall not knowingly have in his possession any fictitious stamp, or shall not have in his possession any stamp which he knows to be fictitious." That is not what the section says. It provides:

"A person shall not . . . (b) have in his possession, unless he shows a lawful excuse, any fictitious stamp."

It cannot be a lawful excuse to say: "I did not know that the stamps were forged," because that could only be a defence if the stamps were bought at a post office or from a licensed dealer, those being the only persons who have authority to sell stamps without incurring a penalty, for by s. 4 of the Stamp Duties Management Act, 1891, it is an offence for an unlicensed person to sell stamps. If a person bought fictitious stamps at a post office he would have a lawful excuse unless he knew the stamps were fictitious. Counsel for the respondent has argued that we ought to construe para. (b) of s. 65 (1) in the same way as para. (a). He says that a person is only guilty under para. (a) as adapted in relation to insurance stamps, if he knowingly uses a fictitious stamp for the purpose of payment of contributions. I think that the answer which counsel for the appellant has made is conclusive on that point. A person may obtain possession of fictitious stamps and have a lawful excuse for having them in his possession, but, if afterwards he is told that they are fictitious and then uses them, he will be guilty of an offence under para. (a) although he will not be guilty of an offence under para. (b). *Mutatis mutandis*, I think he could be guilty of an offence under the first part of the section without being guilty of an offence under the second part, and he could be guilty of an offence under the second part without being guilty of an offence under the first.

In my opinion, where a man can only show that he did not know that the stamps were forged, that in itself is not a lawful excuse. He must go further and show that he acquired them lawfully, because, unless he did so, he would not have a lawful excuse. Although there may be circumstances of mitigation in this case I am clearly of opinion that the offence was complete and that no defence was shown. Therefore, the Case must go back to the magistrate with a direction to convict.

HUMPHREYS, J.: I agree.

DEVLIN, J.: I also agree.

Case remitted to magistrate with direction to convict.

Solicitors: *Solicitor, Ministry of National Insurance* (for the appellant); *Daybells* (for the respondent).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

R. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT
TRIBUNAL. *Ex parte* ZEREK.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, J.J.),
January 25, February 2, 1951.]

*Rent Control—Rent tribunal—Jurisdiction—Determination of question on which
jurisdiction depends—Unfurnished letting—Document signed by tenant
describing letting as furnished alleged to be a sham—Proceedings before tribunal
—Admissibility in evidence of unstamped document—Certiorari—Review of
tribunal's decision—Landlord and Tenant (Rent Control) Act, 1949 (c. 40),
s. 1 (1).*

Under an oral agreement premises were let unfurnished on a tenancy for one year at a weekly rent of 35s. The landlord, however, refused to grant the tenant possession unless he agreed to hire his furniture to the landlord for one year at a rental of £12 and to execute a document certifying, *inter alia*, that the letting was a furnished letting at a rent of 35s. a week. The tenant signed the document and entered into possession. Later, the tenant applied to a rent tribunal to fix a reasonable rent for the premises as an unfurnished dwelling-house under the Landlord and Tenant (Rent Control) Act, 1949. The tribunal accepted the tenant's evidence that the premises were originally let unfurnished, and came to the conclusion that the document signed by the tenant did not constitute a valid agreement and did not modify or replace the earlier oral agreement and that the premises were not *bona fide* let furnished. Accordingly, the tribunal assumed jurisdiction and reduced the rent to 15s. a week. On an application by the landlord for an order of *certiorari*,

HELD: the tribunal was entitled to inquire into the facts to decide whether or not it had jurisdiction, and, therefore, it had power to consider the *bona fides* of the agreement signed by the tenant, and *certiorari* would not issue.

R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats ([1950] 2 All E.R. 138), *explained and distinguished*.

Per LORD GODDARD, C.J.: "I am satisfied that the result in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats* ([1950] 2 All E.R. 138) was right, but the argument in the present case has also satisfied me that the grounds on which the judgment proceeded were wrong. It should have been based on the ground that the finding was one which on the facts this court would not uphold. The mere statement of one of the parties without more was not evidence which would justify any tribunal holding that an agreement was a sham or that a restriction inserted therein was never intended to apply. If, however, the judgment lays down, as I think, in effect, it does, that in no case can a tribunal inquire into the genuineness of an agreement, it goes too far and ought not to be followed."

Semble: a rent tribunal is not entitled to refuse to look at a document which it is sought to put in evidence because it is unstamped or inadequately stamped.

Observations of DEVLIN, J., on the principles applicable in relation to orders of *certiorari*.

[FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1094.]

Cases referred to:

- (1) *R. v. Hackney, Islington and Stoke Newington Rent Tribunal, Ex p. Keats*, [1950] 2 All E.R. 138; 114 J.P. 359.
- (2) *R. v. City of London, etc., Rent Tribunal, Ex p. Honig*, [1951] 1 All E.R. 195; 115 J.P. 42.

- (3) *R. v. Income Tax Special Purposes Comrs.*, (1888), 21 Q.B.D. 313; 53 J.P. 84; *sub nom. R. v. Income Tax Special Comrs., Ex p. Cape Copper Mining Co., Ltd.*, 57 L.J.Q.B. 513; 59 L.T. 455; 2 Tax Cas. 332; 28 Digest 97, 580.
- (4) *R. v. Lincolnshire J.J.*, *Ex p. Brett*, [1926] 2 K.B. 192; 95 L.J.K.B. 827; 135 L.T. 141; 90 J.P. 149; Digest Supp.
- A (5) *R. v. Brighton and Area Rent Tribunal, Ex p. Marine Parade Estates (1936), Ltd.*, [1950] 1 All E.R. 946; [1950] 2 K.B. 410; 114 J.P. 242.
- (6) *R. v. Bolton*, (1841), 1 Q.B. 66; 10 L.J.M.C. 49; 5 J.P. 370; 113 E.R. 1054; 16 Digest 110, 94.
- (7) *Bunbury v. Fuller*, (1853), 9 Exch. 111; 23 L.J.Ex. 29; 23 L.T.O.S. 131; 17 J.P. 790; 156 E.R. 47; 11 Digest 77, 985.
- B (8) *Briscoe v. Stephens*, (1824), 2 Bing. 213; 3 L.J.O.S.C.P. 257; 130 E.R. 288; 21 Digest 232, 629.
- (9) *London Corpn. v. Cox*, (1867), L.R. 2 H.L. 239; 36 L.J.Ex. 225; 16 Digest 101, 23.
- (10) *Symons v. Rees*, (1876), 1 Ex.D. 416; 13 Digest 470, 192.
- (11) *Thompson v. Ingham*, (1850), 14 Q.B. 710; 19 L.J.Q.B. 189; 15 L.T.O.S. 23; 117 E.R. 274; 13 Digest 549, 1049.
- C (12) *Joseph v. Henry*, (1850), 1 L.M. & P. 388; 19 L.J.Q.B. 369; 15 L.T.O.S. 210; 14 J.P. 755; 13 Digest 549, 1046.
- (13) *Brown v. Cocking*, (1868), L.R. 3 Q.B. 672; 37 L.J.Q.B. 250; 18 L.T. 560; 16 Digest 381, 2192.
- (14) *Elston v. Rose*, (1868), L.R. 4 Q.B. 4; 38 L.J.Q.B. 6; 19 L.T. 280; 13 Digest 469, 191.
- D (15) *Turner v. Kingsbury Collieries, Ltd.*, [1921] 3 K.B. 169; 90 L.J.K.B. 1132; 125 L.T. 625; 14 B.W.C.C. 249; 34 Digest 376, 3047.

MOTION for *certiorari*.

The applicant was the landlord of premises let to a tenant at a weekly rent of 35s. On an application by the tenant to the respondent rent tribunal to fix a reasonable rent under the Landlord and Tenant (Rent Control) Act, 1949, the tenant described the premises in question as "basement, front and back, two rooms, unfurnished." At the hearing the landlord's solicitor produced a document, dated Mar. 18, 1950, and signed by the tenant, in which the tenant certified, *inter alia*, that he had taken on hire two furnished front and back basement rooms at a weekly rent of 35s. The tribunal held that the document was a sham, and reduced the rent from 35s. to 15s. For the landlord it was contended that the rent tribunal had no jurisdiction to consider the tenant's application since there was clear documentary evidence that there was a furnished letting and the tribunal could not investigate, on the mere statement of a party that a document signed by him was a sham, the question whether the document was, in fact, not a valid tenancy agreement. The facts appear in the judgment of LORD GODDARD, C.J.

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Finer for the landlord.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

Feb. 2. The following judgments were read.

H LORD GODDARD, C.J.: Counsel for the applicant moves in this matter on behalf of Mr. Boleslaw Zerek for an order of *certiorari* to bring up and quash a determination of the respondent tribunal dated Sept. 8, 1950, whereby, on the application of Mr. George, the tenant, they determined the reasonable rent of certain rooms at 57, Golborne Gardens let to him by the applicant to be 15s. a week. The reference to the tribunal was under the provisions of the Landlord and Tenant (Rent Control) Act, 1949, which deals with unfurnished lettings only, and in substance the ground of this motion is that, inasmuch as

a written memorandum of the tenancy was in existence and was produced before the tribunal in which the tenancy was described as a furnished letting, the tribunal had no jurisdiction.

In the statement furnished to the tribunal in accordance with the Landlord and Tenant (Rent Control) Regulations, 1949 (S.I. 1949, No. 1096), reg. 3, the tenant stated that the rooms were let to him at £1 15s. a week for one year and described them as "basement, front and back, two rooms, unfurnished," and in that part of the form which provides for his giving any other information as to the terms of letting which he wished to bring before the tribunal he wrote: "Agreement signed under duress." It is plain that what he meant was that he was obliged to sign the agreement which he did and when he did in order to get possession. The word "duress" is often used by laymen in ignorance of the very limited meaning which attaches to that word in the law of contract, and its use here has no bearing on the points which we have to decide. In the landlord's statement the letting was described as two basement rooms, furnished, and use of kitchen, lavatory and bathroom. At the hearing the landlord's solicitor produced a document signed by the tenant and dated Mar. 18, 1950, the material portion of which reads:

"I certify that I have taken on hire two furnished front and back basement rooms in the property 57, Golborne Gardens under following conditions, rent per week 35s."

He submitted that this proved the letting to be one of furnished premises, and that, therefore, the tribunal had no jurisdiction under the Act of 1949. The tenant's case, however, was that the premises had been let to him under an oral agreement at 35s. unfurnished, and that the rooms, when he saw and agreed to take them, had no furniture in them and the landlord provided none, but when he went with his own furniture to take possession the landlord refused to let him take possession unless he agreed first to let to him the furniture which he (the tenant) brought with him and which was the subject of a hire-purchase agreement between himself and a company called E. Wheatland & Sons, Ltd., and then to take the rooms with this furniture in them. It is not disputed that there never was any other furniture in the rooms. The tenant was then told he must sign the document dated Mar. 18, to which I have already referred, and also another, which purported to be a receipt and which was in these terms:

"Received from Mr. Boleslaw Zerek £12 in payment of account rendered for hire furniture as follows . . ."

The same articles as were comprised in the hire-purchase agreement which the tenant had with Wheatland & Sons, Ltd., are then set out, followed by the words:

"Due for one year ending in March, 1951."

The tenant said he had never received the £12, and a more patently bogus transaction has, I should think, never been set up before a tribunal of any description

It was said, however, that according to the decision of this court in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal, Ex p. Keats* (1), the tribunal had no jurisdiction to inquire into the *bona fides* of the transaction and as there was a written memorandum describing the letting as one of furnished rooms they could go no further. In my opinion, there is one short and conclusive answer to this contention. The Act of 1949 extends the application of the group of statutes generally referred to as the Rent Restrictions Acts. Throughout the Act of 1949 those Acts are referred to as the "principal Acts" and are defined in s. 18 (2) as the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. Reference is also made in that section to the Furnished Houses (Rent

Control) Act, 1946. The effect of s. 10 (1) of the Rent and Mortgage Interest Restrictions Act, 1923, is that a letting is not to be regarded as a furnished letting unless the amount of rent which is fairly attributable to the use of furniture forms a substantial portion of the whole rent. If, therefore, unfurnished rooms are offered to a tenant at 35s. per week and, thereafter, some furniture, even if it admittedly belongs to the landlord, is put into them, and the rooms are then let furnished at the same rent, it is clear that no part of the rent can possibly be attributable to the use of furniture and the rooms must, for the purposes of the Acts, be regarded as unfurnished, and, therefore, subject to the Act of 1949. Apart, therefore, from the question whether any part of the transaction is bogus or genuine, the tribunal must satisfy itself whether the letting is, for the purposes of the Acts, of furnished or unfurnished rooms, and in this case there could be but one answer. In order to proceed with the reference there was no need for the rectification of the agreement of Mar. 18. A landlord may let a house or rooms in which there is furniture and it may be described as a furnished letting, but, for the purposes of the Rent Acts, it will nevertheless be deemed an unfurnished letting unless the amount of rent fairly attributable to the use of furniture forms a substantial part of the whole rent, and as there was no need for rectification, this fact alone distinguishes the present case from *R. v. Hackney, etc., Rent Tribunal*. *Ex p. Keats* (1).

It was, however, submitted on behalf of the tribunal that, in any event, that case went too far and is inconsistent with the later case of *R. v. City of London, etc., Rent Tribunal*. *Ex p. Honig* (2). In that case this court held that it was competent for the tribunal to inquire whether there was an existing tenancy because that was collateral to the question which the tribunal had to decide, namely, the reasonable rent under an existing tenancy. If there was no tenancy, there was nothing on which the tribunal could adjudicate. The law to be gathered, especially from *R. v. Income Tax Special Purposes Comrs.* (3) and *R. v. Lincolnshire JJ.* *Ex p. Brett* (4), is that, if a certain state of facts has to exist before an inferior tribunal has jurisdiction, it can inquire into the facts in order to decide whether or not it has jurisdiction, but it cannot give itself jurisdiction by a wrong decision on them, and this court may, by means of proceedings for *certiorari*, inquire into the correctness of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends thereon, it is not the main question which the tribunal has to decide.

R. v. Hackney, Islington and Stoke Newington Rent Tribunal. *Ex p. Keats* (1) was certainly an extreme case, so much so that it was not seriously contended that the action of the tribunal could be upheld. An agreement executed after the parties had had professional legal advice was produced whereby the premises were let to the tenant, who undertook to use them only for the purpose of a tailoring business, and made provision for the tenant bearing any development charge which might become payable under the Town and Country Planning Act, 1947. The tribunal, on the mere word of the tenant, held that the agreement was a sham, and, in effect, absolved him from what in a deed would have been a restrictive covenant. I was a party to that decision and delivered the judgment. I am satisfied that the result was right, but the argument in the present case has also satisfied me that the grounds on which the judgment proceeded were wrong. It should have been based on the ground that the finding was one which on the facts this court would not uphold. The mere statement of one of the parties without more was not evidence which would justify any tribunal holding that an agreement was a sham or that a restriction inserted therein was never intended to apply. It was, in fact, just the sort of case envisaged by ATKIN, L.J., in *R. v. Lincolnshire JJ.* *Ex p. Brett* (4). If, however, the judgment in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal*. *Ex p. Keats* (1) lays down, as I think, in effect, it does, that in no

case can a tribunal inquire into the genuineness of an agreement, it goes too far and ought not to be followed. For my part, I would say that, if they do embark on such an inquiry, they must proceed on the principles on which a court of equity would act and on such evidence as the court would require in a suit for rectification, subject, of course, to oral evidence being unsworn, as they have no power to administer an oath. Written agreements, more especially when executed after professional advice and assistance, are not to be lightly set aside. In the present case, for the reasons given earlier in this judgment, no such question arises, and, accordingly, the motion fails.

There is one other matter which, though immaterial for the purpose of the decision, cannot be passed over without notice. The document produced by the landlord, and on which he relied as a memorandum of agreement, was improperly stamped. It may be that he required the tenant to sign over a stamp with a view to impressing on him that it was a formal document, but the document would in any case have required a sixpenny stamp. Had he attempted to put it in before a court of law, an arbitrator, or a referee, it could not have been looked at without requiring him to pay the proper stamp duty and a penalty of £10. These tribunals cannot be described as courts of law for the reasons which this court pointed out in *R. v. Brighton and Area Rent Tribunal. Ex p. Marine Parade Estates (1936), Ltd.* (5), nor are its members arbitrators or referees. We could not say, therefore, that they were not entitled to look at the document, and, as we have to consider whether their decision was within their jurisdiction, it is necessary for us to look at the same evidence as was before them. It will be for the Commissioners of Inland Revenue to determine what, if any, action they should take in view of what appears to be a deliberate understamping of the document, and it will be sent to them by the court.

HUMPHREYS, J.: I agree with the decision come to by my Lord and broadly on the same grounds, but, as this matter has been referred to us as being of some importance, I have put down my own views in a short judgment.

The sole question raised on this application for *certiorari* is one of jurisdiction. No question arises as to the proper determination of a matter of disputed evidence. The submission is, as stated in the affidavit of the applicant's solicitor, that the tribunal had no power to determine the preliminary question whether the letting was a furnished or an unfurnished letting. Counsel for the applicant conceded that the tribunal was entitled, and, indeed, was bound, to satisfy itself that it had jurisdiction to inquire into the facts of the case and to consider the various documents, including the answers of landlord and tenant on the statutory forms and the so-called receipt for £12. I do not think he queried the right of the tribunal to hear statements, though not on oath, by the parties on this question. If authority is needed for that course, it will be found in the judgment in *R. v. City of London, etc., Rent Tribunal. Ex p. Honig* (2). In that case there was no documentary evidence as to the nature of the tenancy, whether it ran from Saturday to Saturday or Monday to Monday. I agree with counsel that when the documentary evidence is clear and unambiguous the tribunal has no power, on the mere statement of a party that the document signed by him is a sham, to disregard the document, nor do I think the tribunal is invested with any power to decide a question of law. I am disposed to agree with him that the question of the limits of the jurisdiction of the tribunal is to some extent a matter of degree. The decision in *Honig's* case (2) may be contrasted with that in *Keats'* case (1), a decision to which I was a party. In that case premises which had been used as a dwelling-house were let for tailoring purposes only. There was no ambiguity in the terms of the lease, which was settled by solicitors for the landlord and tenant respectively. Any other decision than that arrived at by the court would have left it open to any tenant holding under a written agreement to inform the tribunal that the document

was a sham and thereby obtain a reduction of his rent. There are dishonest tenants as well as grasping landlords, and, in my opinion, any such decision would have been unjust as well as illegal. On consideration, my opinion still is that the decision in that case was, on the facts, correct. In the present case, the facts presented to the tribunal, and not contradicted, showed that the premises at the date of the letting were unfurnished, such furniture as was put into them was brought there by the tenant, and such furniture was not at any time the property of the landlord. There were the further facts mentioned in the affidavit of the chairman of the tribunal, and the rent was not increased when, according to the contention of the landlord, the letting became a furnished one. On those facts being brought to their notice, the tribunal was, in my opinion, not acting without jurisdiction in holding that the letting was an unfurnished one.

Having had the advantage of reading the judgment of my Lord, I desire to add that I agree with him that the question in this case might be decided on the short ground that the premises in question were clearly not furnished premises within the meaning of the Rent Restrictions Acts. It follows that they must have been the subject of an unfurnished letting and the tribunal, therefore, had jurisdiction. In my judgment, the application for an order of *certiorari* fails.

DEVLIN, J.: By the Landlord and Tenant (Rent Control) Act, 1949, s. 1 (1), it is provided that where, apart from the section, the standard rent of a dwelling-house would be the rent at which it was let on a letting beginning after Sept. 1, 1939, the landlord or the tenant may apply to the tribunal to determine what rent is reasonable and the tribunal shall determine that rent. It is agreed that the word "dwelling-house" does not apply to furnished premises which are outside the provisions of the Rent Restrictions Acts, 1920 to 1939.

[HIS LORDSHIP stated the facts and continued:] It is not disputed that proof of the fact that this is an unfurnished tenancy is a pre-requisite to the exercise by the tribunal of its jurisdiction under s. 1 (1) of the Act of 1949 to fix a reasonable rent. Likewise, it is agreed that, since the tribunal's jurisdiction depends on the existence of an unfurnished tenancy, it cannot, in the pithy phrase that was used by LORD DENMAN, C.J., in *R. v. Bolton* (6) (1 Q.B. 72), give itself jurisdiction merely by its affirmation of the fact: see also *per* COLERIDGE, J., in *Bunbury v. Fuller* (7) (9 Exch. 140). This has been qualified in the terms laid down by LORD ESHER, M.R., in *R. v. Income Tax Special Purposes Comrs.* (3) (21 Q.B.D. 319); but it is not suggested, and, indeed, the contrary has been settled by this court, that that qualification applies here. It is, therefore, agreed that the finding of the tribunal that the tenancy was unfurnished cannot be conclusive. Counsel for the tribunal submits that it had a right, and, indeed, a duty, to make a finding about the nature of the tenancy, subject to review by this court. Counsel for the applicant agrees that in a proper case there may be such a right, but argues that it must be limited. It cannot extend to require or permit the tribunal to investigate questions for the determination of which they are by their constitution wholly unsuited, such as whether an agreement is a forgery or has been obtained by fraud or is a sham, which last is what they purported to decide in the present case. I do not think that counsel was able to suggest any principle which would show where the line was to be drawn, except the rather vague one that there must be excluded from the investigation questions which it was inconvenient and undesirable that such a tribunal should investigate. For the contention that there must be some limit, he relied on the recent decision in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats* (1), in which this court decided that the tribunal had no power to determine that a provision in a formal tenancy agreement was a sham.

In my opinion, the argument on behalf of the applicant is based on a misconception of what it is that a tribunal in cases such as this is doing. When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. If its jurisdiction depends on the existence of a state of facts, it must inform itself about them, and, if the facts are in dispute, reach some conclusion on the merits of the dispute. If it reaches a wrong conclusion, the rights of the parties against each other are not affected. For, if the tribunal wrongly assumes jurisdiction, the party who apparently obtains an order from it, in reality takes nothing. The whole proceeding is, in the phrase used in the old reports, *coram non iudice*. If, for example, the applicant in the present case wishes (I do not suggest that the facts so far as they have emerged should give him the slightest encouragement), he can sue for his 35s. rent. He will be met with the defence that by the order of the tribunal it has been reduced to 15s. He can reply that that order is bad for want of jurisdiction, and the defendant will have to justify the order on which he relies and so prove the facts which give the tribunal jurisdiction. This seems to me to be what is laid down by the decision in *Briscoe v. Stephens* (8) and to be in accordance with the opinion of WILLES, J., in *London Corpn. v. Cox* (9) (L.R. 2 H.L. 262). In such an action, I apprehend, the findings of the tribunal would be irrelevant and inadmissible. They are findings in a preliminary inquiry whose only object is to enable the tribunal to decide for itself how to act. They are findings, therefore, that cannot ultimately prejudice either party. In these circumstances, I am unable to see why the tribunal should, in making its preliminary inquiry, be restricted to any particular class of case or how it can be restrained from investigating for its own purposes any point which it thinks it necessary to determine so that it can decide on its course of action.

I should, perhaps, say that we have heard no argument about the rights of the parties as between themselves, and the tenant was not represented. I have stated what appears to me, without hearing argument on it, to be the position between the parties, so as to contrast it with the matters with which I believe this court to be concerned when it is asked to make an order of *certiorari*. Orders of *certiorari* and prohibition are concerned principally with public order, it being part of the duty of the High Court to see that inferior courts confine themselves to their own limited sphere. They also afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal. They are not, however, designed to raise issues of fact for the High Court to determine *de novo*. Accordingly, it has never been the practice to put the party who asserts that the inferior court has jurisdiction to proof of the facts on which he relies. It is recognised that the inferior court will have made a preliminary inquiry itself and the superior court is generally content to act on the materials disclosed at that inquiry and to review in the light of them the decision to assume jurisdiction. This is possible only because the court is not, as I conceive it, finally determining the validity of the tribunal's order as between the parties themselves (except, perhaps, in a case such as *Symons v. Rees* (10) where the court investigated for itself the facts and pronounced on them), but is merely deciding whether there has been a plain excess of jurisdiction or not. Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. Where, however, the dispute turns on a question of fact, about which there is a conflict of evidence, the court will generally decline to interfere.

The practice which I have set out above has been settled mainly in relation to orders of prohibition, but I think it is equally applicable to *certiorari*. *Thompson v. Ingham* (11) was a case in which the jurisdiction of a county court was challenged, it being admitted that if the title to land was in question

the court had no jurisdiction. The county court judge heard evidence on both sides and decided that the title was not in question. PATTESON, J., giving the judgment of the court, said (14 Q.B. 719):

" . . . the question must be open to one of the superior courts on motion for a prohibition, by affidavit; and, if that court, as in the present case, directs that the party should declare, then the question becomes one of evidence."

A few months later, however, in *Joseph v. Henry* (12), where a county court's jurisdiction was again in question, COLERIDGE, J., who had been a member of the court which had decided *Thompson v. Ingham* (11), said that it applied only to a case in which the court sees undoubtedly that there was no jurisdiction, but, he said (19 L.J.Q.B. 372), in this case there were conflicting affidavits,

" . . . and if I were to make this rule absolute, I should establish a precedent for reviewing the decision of a judge in every case where his jurisdiction depended upon conflicting evidence, which would be full of inconvenience and contrary to all principle."

Although this last *dictum* was *obiter*, it was made the basis of future practice. In *Brown v. Cocking* (13) it was held that, the county court judge having decided on conflicting evidence that the value of the premises did not exceed £20, the court could not review his decision by prohibition, though on a point going to his jurisdiction only. COCKBURN, C.J., said (L.R. 3 Q.B. 676) that the court could not look to see whether the decision was, on the balance of evidence, right or not.

" When the judge has gone into the evidence we are precluded from going into the matter, and are bound by his decision."

LUSH, J., said (*ibid.*):

" . . . I think the judge's decision is conclusive when there was evidence before him on which he might decide as he has done. We cannot issue a prohibition unless it be clearly shown that the inferior court has done something which it has not jurisdiction to do . . ."

HANNEN, J. (*ibid.*, 677), queried whether the court was actually precluded from reviewing the decision, but thought that in a case of nicety it ought not to interfere. This decision was followed in *Elston v. Rose* (14). COCKBURN, C.J., there put the point a little less strongly. He said (L.R. 4 Q.B. 7):

" If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, the court will not interfere, except upon very strong grounds."

BLACKBURN, J., said (*ibid.*, 8):

" . . . I am quite prepared to hold that if the evidence upon that point was conflicting, that circumstance, though not conclusive upon us, so as absolutely to deprive us of the discretionary power of granting the prohibition, would so far influence us, that we should require very strong grounds before we should interfere."

In *Turner v. Kingsbury Collieries, Ltd.* (15) McCARDIE, J., went further, perhaps too far, in saying ([1921] 3 K.B. 174) that a decision on fact could not be questioned on prohibition. These principles seem to me to be equally applicable to *certiorari*, though there is no case in which they have been applied so explicitly. In *R. v. Lincolnshire JJ., Ex p. Brett* (4), ATKIN, L.J. ([1926] 2 K.B. 202), quoted with approval the passage in HALSBURY'S LAWS OF ENGLAND, now to be found in the Hailsham edition, vol. 9, p. 881, para. 1485, which says:

" . . . the superior court may upon *certiorari* inquire into the correct-

ness of the decision, and may quash the proceedings in the lower court if such decision is erroneous, or at any rate if there is no evidence to support it."

In *R. v. City of London, etc., Rent Tribunal. Ex p. Honig* (2), PARKER, J., said ([1951] 1 All E.R. 198) that the onus was on the applicant to show that the decision of the tribunal was erroneous, and where that depended almost entirely on oral testimony the onus was particularly high. *R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats* (1) was, I think, for the reasons which my lords have given, a very exceptional case. I do not treat it as laying down as a general principle that a tribunal ought never to investigate a suggestion that an agreement is a sham. A formal tenancy agreement, carefully negotiated between the parties, is not lightly to be condemned as a sham, and the burden of proof on him who asserts that it was is very heavy. If the court in that case was satisfied, as I think that it was, that there was really no evidence to discharge that burden, the decision was plainly right.

Although tribunals may, in my view, and in default of any alternative, have to determine for themselves in the first instance the extent of their jurisdiction, nothing that I have said means that they should take on themselves unnecessarily the examination of questions such as those in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats* (1) or in cases where charges of fraud or forgery and the like are raised. Their own good sense will tell them that. While they will not allow every empty threat to their jurisdiction to deter them from their proper business of fixing reasonable rents, they will likewise appreciate that they are not by their nature equipped for the trial of matters which in the ordinary civil courts would be determined after pleading and discovery had been given and evidence on oath tested by cross-examination, and possibly, also, after trial by jury. The tribunal cannot be required to determine summarily such an issue if it involves a point of substance, and, if one or other of the parties is willing to have it determined in the ordinary civil courts, an adjournment can always be granted to allow that to be done. This will avoid an inconclusive inquiry by the tribunal and safeguard the tenant against the danger of being presented with an order which may afterwards turn out to be illusory. It may well be that if the tribunal insists, notwithstanding that there is a practicable alternative offered to it, in going into points of the sort which it purported to determine in *R. v. Hackney, Islington and Stoke Newington Rent Tribunal. Ex p. Keats* (1), there is power in this court to prevent it from doing so. It is unnecessary that I should even consider that in relation to the present case, for this tribunal was quite willing that the validity of the alleged agreement should be determined by the ordinary courts, and I think that that would be the attitude of most tribunals.

I need say little on the facts of the present case, which have been fully dealt with by my lords. Had there been a conflict of evidence, this court would probably not have interfered, but, in fact, the evidence was all one way and ample to justify the tribunal's conclusion that the document was not intended by the parties as a reduction into writing of their oral agreement, but was a bogus document which the landlord had brought into existence for his own purposes. Having regard to the receipt for the hire of the furniture, about which the landlord offered no explanation, the matter was, in my view, so clear as not to raise any serious issue. The tribunal's decision to assume jurisdiction cannot, therefore, be questioned in these proceedings.

Application dismissed with costs.

Solicitors: *Arnold Aaron Finer* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. ALBURY.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Devlin, J.J.), January 29, 1951.]

Criminal Law—Sentence—Corrective training—Power of the court to pass consecutive sentences—Criminal Justice Act, 1948 (c. 58), s. 21 (1).

There is no objection in law to passing a sentence of corrective training to follow another sentence of corrective training.

[AS TO SENTENCES ON SEVERAL CHARGES, see HALSBURY, Hailsham Edn., Vol. 9, p. 228, para. 321; and FOR CASES, see DIGEST, Vol. 14, pp. 476, 477, Nos. 5171-5192.]

Cases referred to:

(1) *R. v. Wilkes*, (1769), 4 Burr. 2527; 98 E.R. 327; *sub nom. Wilkes v. R.*, 4 Bro. Parl. Cas. 360; 2 E.R. 244; 14 Digest 333, 3524.

(2) *R. v. Beamon*, [1948] 1 All E.R. 947; 112 J.P. 302; 2nd Digest Supp.

(3) *R. v. O'Neill*, [1948] 2 All E.R. 761; 112 J.P. 432; 2nd Digest Supp.

REFERENCE by the Home Secretary to the Court of Criminal Appeal under the Criminal Appeal Act, 1907 (c. 23), s. 19 (a).

The appellant, Leonard Alfred Albury, was convicted before justices and committed for sentence to quarter sessions where he was sentenced to two years' corrective training. He then asked for ten other offences to be taken into consideration, and the court passed a second sentence of two years' corrective training, to run consecutively to the first. By the reference the Court of Criminal Appeal was asked to advise the Home Secretary whether in law consecutive sentences of corrective training could be passed, and also whether in the circumstances the sentence passed on the appellant should be altered.

R. M. O. Havers for the appellant.

Buzzard for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court.

This is a reference by the Home Secretary to this court under s. 19 (a) of the Criminal Appeal Act, 1907, under which the court has the same powers as if they were dealing with an appeal. Two questions arise—one a question of law, namely, whether a second sentence of corrective training can be passed to follow an existing sentence of corrective training, and the other—a question of discretion—whether the sentence in the present case should be altered.

With regard to the first point this court does not feel any difficulty. Counsel for the appellant has called our attention to such cases as there are and to the statutes on the subject. At common law the position was clearly indicated in *R. v. Wilkes* (1), where the judges who were consulted by the House of Lords were being asked

“Whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced . . . is good in law”?

As is well known, Wilkes was before the court on a charge of misdemeanour, and, in the days when his case was tried, the judgment passed for treason or felony was death. The judges, in giving judgment, pointed out the difference between treason and felony and misdemeanour, because in the case of treason or felony there was a definite sentence, namely, death, and no question could arise about passing such a sentence to follow a previous sentence. In the case of a misdemeanour, however, the sentence was discretionary, and the answer of the judges to the question propounded by the House of Lords was

“that a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law.”

The alteration effected in the law by the Criminal Law Act, 1827, s. 10, which, on a conviction for felony, enabled a sentence to be tacked on to a sentence which the prisoner was already serving, was made because, by the time that Act was passed, the series of statutes which mitigated the rigours of the criminal law had already begun to appear on the statute book. Instead of sentence of death for felonies there were, by that time, a number of offences for which sentences of imprisonment could be passed. We feel no doubt, therefore, that where a sentence is a discretionary sentence—and a sentence of corrective training is a discretionary sentence—the principle to be applied is the same as was applied in cases of misdemeanours when *R. v. Wilkes* (1) was decided. Consequently, we see no reason in law why it should not be possible to impose a sentence of corrective training to follow immediately after a previous sentence of corrective training.

One point to which counsel for the appellant called our attention was that in sched. III to the Criminal Justice Act, 1948, s. 21 (1) of which first enacted that a sentence of corrective training might be passed, it is provided by para. 1:

“The Prison Commissioners may release on licence a person sentenced to corrective training or preventive detention after he has served such portion of his sentence as may be determined in accordance with rules made under s. 52 of this Act . . .”

That puts sentences of corrective training and preventive detention on the same footing as sentences of imprisonment, that is to say, that when two-thirds of the sentence has been served, if the prisoner has behaved himself in prison, he may be released. When he is released, no doubt he has to report in such circumstances and to such persons as are laid down in the Act. We do not see that that provision raises any difficulty. If the prisoner earns the one-third remission of his first sentence, the second sentence could then begin to run.

Our conclusion, therefore, is that there is no objection in law to the passing of a sentence of corrective training to follow another sentence of corrective training, and the authorities will deal with a prisoner so sentenced in exactly the same way as they would deal with a prisoner who had received two consecutive sentences of imprisonment.

This court has said on several occasions lately, and we desire to repeat it, that as a general rule it is desirable that a sentence of corrective training should not be less than three years. A three years' sentence of corrective training means that the prisoner will be kept, if he behaves himself, only for two years, and it is impossible to suppose that any real reform can be effected in less than that time. We have decided to alter the second sentence so that the appellant will serve a term equivalent to what he would have served if he had been given three years on the first occasion. We do this by altering the second sentence to one of two years and eight months corrective training, to run concurrently with the first sentence. That will result in his discharge, if he behaves himself in prison, at the same time as if he had been sentenced to three years in the first instance.

Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. PEARCE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 31, 1951.]

Criminal Law—Gross indecency—Conviction of both parties—Evidence of action in concert with consent of both—Conviction of one party and acquittal of other—Criminal Law Amendment Act, 1885 (c. 69), s. 11.

Per curiam: If two male persons are to be convicted of gross indecency the prosecution must prove that they were acting in concert and that the offence was committed with the consent of both, but there is no reason why, where two persons are jointly indicted for such an offence and the necessary evidence is not forthcoming, one should not be convicted and the other acquitted.

R. v. Jones ([1896] 1 Q.B. 4), *referred to.*

R. v. Hornby & Peaple ([1946] 2 All E.R. 487), *explained.*

[AS TO GROSS INDECENCY WITH A MALE PERSON, see HALSBURY, Hailsham Edn., Vol. 9, p. 399, para. 676; and FOR CASES, see DIGEST, Vol. 15, pp. 752-754, Nos. 8120-8127, and Digest Supplements.]

Cases referred to:

(1) *R. v. Hornby & Peaple*, [1946] 2 All E.R. 487; 173 L.T. 518; 110 J.P. 391; 2nd Digest Supp.

(2) *R. v. Jones*, [1896] 1 Q.B. 4; 65 L.J.M.C. 28; 73 L.T. 584; 60 J.P. 89; 15 Digest 753, 8122.

APPEAL against conviction.

The appellant, John Pearce, was convicted at the Central Criminal Court of attempting to commit an act of gross indecency with another person. The Recorder of London, the presiding judge at the trial, granted a certificate under s. 3 of the Criminal Appeal Act, 1907, that it was a fit case for appeal.

E. L. Bradley for the appellant.

Elam for the Crown.

HUMPHREYS, J., delivered the following judgment of the court. The appellant was convicted of attempting to commit an act of gross indecency with another person, one Flynn. The sole ground on which a certificate was granted was this:

"The point of law is whether the decision in *R. v. Hornby & Peaple* (1) invalidates a charge of gross indecency under s. 11 of the Criminal Law Amendment Act, 1885, against one only of the participants when the other gives evidence for the prosecution that he did not consent to the act."

That is the first point. The second point is:

"Whether the words 'with another male person' in s. 11 aforesaid mean exclusively 'with the consent of' the other person involved, or whether the decision of the Court for the Consideration of Crown Cases Reserved, in *R. v. Jones* (2), supports a charge in such a case as aforesaid under s. 11 of the Act of 1885."

In the view of this court the fact that the conviction here was for an attempt only differentiates this case entirely from the case of *R. v. Hornby & Peaple* (1), and, indeed, makes this matter unarguable, because the question whether the jury could properly have convicted one of two persons and not the other if they had been indicted together is immaterial. What the jury found in this case was that the appellant tried to commit an act of gross indecency with Flynn, that he failed, and that he was thereby guilty of attempting to commit that offence. Why that should not be an indictable offence we cannot appreciate.

It is necessary, however, to look at *R. v. Hornby & Peaple* (1) to see what really was decided in that case. It was something very different. There two persons were charged with committing an act of gross indecency and with attempted buggery. They were both acquitted on the second charge, but were both convicted of committing an act of gross indecency with each other. The point really raised on the appeal from that conviction was whether physical contact was necessary to constitute the offence of gross indecency. Having dealt with that point, LYNSEY, J., said ([1946] 2 All E.R. 488):

" . . . in this particular case the difficulty we feel in supporting this conviction is that the chairman nowhere directed the jury that they had to find that the two men were acting in concert, that they had to find that the two men were each committing an act, or being a party to an act, of gross indecency the one with the other."

With that this court entirely concurs. Obviously the offence is one which, if two persons are to be convicted of it, must be proved to have been committed with the consent of both of them. They must be proved to have been acting in concert together. There is nothing to support the proposition that where two persons are jointly indicted for such an offence, one cannot be convicted and the other acquitted. On the contrary, *R. v. Jones* (2) is a direct authority to the contrary. *R. v. Hornby & Peaple* (1) decides no more than that, if both are to be convicted, there must be a proper direction to the jury that each person must be proved to have committed the offence with the other person.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, ESQ., *Barrister-at-Law*.]

Reversed. H.L. *sub nom.* ROYAL COLLEGE OF SURGEONS OF ENGLAND *v.* NATIONAL PROVINCIAL BANK, LTD. [1952] 1 All E.R. 984.

Re BLAND-SUTTON'S WILL TRUSTS. NATIONAL PROVINCIAL BANK, LTD. *v.* COUNCIL OF THE MIDDLESEX HOSPITAL MEDICAL SCHOOL AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), January 12, 15, 16, February 2, 1951.]

Charity—Non-charitable object—Gift to Royal College of Surgeons.

Will—Gift to medical school of hospital—Gift over if hospital nationalised or passes into public ownership—Whether gift over takes effect consequent on National Health Service Act—National Health Service Act, 1946 (c. 81), s. 6 (1), s. 8 (1), s. 15 (1).

By her will, dated Jan. 13, 1943, a testatrix, who died on Feb. 10, 1943, gave her residuary real and personal estate on the usual trusts for conversion and directed that the resulting "endowment fund" should be held on "the following charitable trusts" which were, *inter alia*, "to pay the residue of the income of the endowment fund in each year to the treasurer . . . of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital . . . Provided always that should the . . . Middlesex Hospital become nationalised or by any means pass into public ownership or should the [trustees] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the [trustees] shall thereupon pay and transfer the

endowment fund . . . to the Royal College of Surgeons . . ." The Middlesex Hospital was founded in or about 1745. A medical school was founded in 1835, but the school did not form part of the hospital until 1896. The Bland-Sutton Institute was a department of the medical school. On July 5, 1948, under the National Health Service Act, 1946, s. 11 (8), the hospital was designated a teaching hospital, and, by virtue of s. 6 (1) of the Act, the property and liabilities of the hospital were transferred to and vested in the Minister of Health, but the medical school became a separate legal entity with a governing body constituted under s. 15 (1) of the Act. The Royal College of Surgeons claimed that, by reason of the changes brought about by the Act, the gift over took effect.

HELD: the effect of the Act of 1946 was both to nationalise and to bring under public ownership the Middlesex Hospital within the contemplation of the testatrix, notwithstanding that the medical school remained free from national ownership or control; in consequence, the gift to the Royal College of Surgeons, if valid, took effect, but the college was not a charity, and the gift to it failed for remoteness; and, therefore, under the rule in *Lassence v. Tierney* (1849) (1 Mac. & G. 551) the gift for the maintenance and benefit of the Bland-Sutton Institute was absolute.

Re Royal College of Surgeons of England ([1899] 1 Q.B. 871), followed.

Decision of DANCKWERTS, J. ([1950] 2 All E.R. 466), affirmed on different grounds.

[AS TO GIFTS FOR EDUCATIONAL PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 116-118, paras. 153, 154; and FOR CASES, see DIGEST, Vol. 8, pp. 245-248, Nos. 51-73.]

Cases referred to:

- (1) *Lassence v. Tierney*, (1849), 1 Mac. & G. 551; 15 L.T.O.S. 557; 41 E.R. 1379; 44 Digest 554, 3715.
- (2) *Re Royal College of Surgeons of England*, [1899] 1 Q.B. 871; 68 L.J.Q.B. 613; 80 L.T. 611; *sub nom. Royal College of Surgeons of England v. Inland Revenue Comrs.*, 4 Tax Cas. 344; 39 Digest 299, 1781.
- (3) *Young v. Bristol Aeroplane Co.*, [1944] 2 All E.R. 293; [1944] K.B. 718; 113 L.J.K.B. 513; 171 L.T. 113; 37 B.W.C.C. 51; *affd.*, [1946] 1 All E.R. 98; [1940] A.C. 163; 115 L.J.K.B. 63; 174 L.T. 39; 38 B.W.C.C. 48; 2nd Digest Supp.
- (4) *Inland Revenue Comrs. v. Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, 780.
- (5) *Miley v. A.-G.*, [1918] 1 I.R. 455.
- (6) *Institution of Civil Engineers v. Inland Revenue Comrs.*, [1932] 1 K.B. 149; 100 L.J.K.B. 705; 145 L.T. 553; 16 Tax Cas. 158; Digest Supp.
- (7) *Re Bowen*, [1893] 2 Ch. 491; 62 L.J.Ch. 681; 68 L.T. 789; 8 Digest 327, 1102.
- (8) *Christ's Hospital v. Grainger*, (1849), 1 Mac. & G. 460; 19 L.J.Ch. 33; 15 L.T.O.S. 497; 13 J.P. 778; 41 E.R. 1343; 8 Digest 324, 1060.
- (9) *Hancock v. Watson*, [1902] A.C. 14; 71 L.J.Ch. 149; 85 L.T. 729; 43 Digest 644, 792.
- (10) *Inland Revenue Comrs. v. Scott*, [1892] 2 Q.B. 152; 61 L.J.Q.B. 432; 67 L.T. 173; 56 J.P. 632; 3 Tax Cas. 134; 8 Digest 264, 265.
- (11) *General Medical Council v. Inland Revenue Comrs., English Branch Council of General Medical Council v. Inland Revenue Comrs.*, (1928), 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; Digest Supp.

APPEAL by the Royal College of Surgeons and **CROSS-APPEAL** by the Council of the Middlesex Hospital Medical School against an order of DANCKWERTS, J., dated July 7, 1950 ([1950] 2 All E.R. 466).

DANCKWERTS, J., held that the coming into operation of the National Health Service Act, 1946, had not caused the Middlesex Hospital to become

"nationalised" within the meaning of that term as employed in the will of Lady (Edith Goff) Bland-Sutton, and that, accordingly, a defeasance clause in the said will did not defeat the gift therein to the Middlesex Hospital for the benefit of a department of the medical school. DANCKWERTS, J., also held that the Royal College of Surgeons was a charity, so that, if the defeasance clause had operated, the ultimate gift to the college would have been capable of taking effect.

The Court of Appeal now held that the defeasance clause did operate, but that the college was not a charity. Having regard to the rule in *Lassence v. Tierney* (1) the court further held that the gift to the medical school was absolute. The appeal and cross-appeal were, therefore, both allowed, but the substantial result of the judgment of DANCKWERTS, J., was not disturbed.

N. S. S. Warren for the plaintiffs, the executors and trustees of the will.

Pascoe Hayward, K.C., and *R. W. Goff* for the first defendants, the Council of the Middlesex Hospital Medical School.

Sir Andrew Clark, K.C., and *L. J. M. Smith* for the second defendants, the Royal College of Surgeons of England.

Denys B. Buckley for the third and fourth defendants, the Treasury Solicitor and the Attorney-General.

Cur. adv. vult.

Feb. 2. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: By her will, dated Jan. 13, 1943, the late Lady (Edith Goff) Bland-Sutton (who died on Feb. 10, 1943), after the usual trusts for sale and conversion, disposed of the residue of her estate (which she called "the endowment fund") on "the following charitable trusts" for so long as the law should permit, *viz.*, first out of the income to provide annually for a "Bland-Sutton Research Scholarship" at the Royal College of Surgeons, and subject thereto (by cl. 10 (2) of the will)

"to pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the [Middlesex] Hospital."

Clause 11 of the will was as follows:

"Provided always that should the said Bland-Sutton Institute of Pathology cease to be carried on as a pathological research institution or should its name be changed or should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank [the plaintiffs, the National Provincial Bank, Ltd., the trustee of the will] at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund (both as to the capital and the income thereof) to the said Royal College of Surgeons absolutely for the general purposes of the said college . . ."

It is clear from the language which I have quoted that the happening of one or other of the events specified which would operate to determine the trust in favour of the Bland-Sutton Institute (in cl. 10 (2) of the will) might occur at any time; however remote, and from this it follows that the gift over would be void as offending against the rule against perpetuities unless the Royal College of Surgeons can escape the effect of the rule by establishing that it is a "charity" as understood by our law.

On July 5, 1948, as is well known, the position of all the English hospitals was very substantially changed by the coming into operation, as regards them, of the National Health Service Act, 1946. The Royal College of Surgeons said, and say, accordingly, that on July 5, 1948, one of the events specified in cl. 11

of the will occurred, *i.e.*, that the Middlesex Hospital became nationalised and passed into public ownership. The college further said, and say, that they are in truth a "charity" and that, therefore, the gift over in cl. 11 took effect in their favour. On the other hand, it was, and is, alleged by the Council of the Middlesex Hospital Medical School (which, having since 1896 been theretofore a part of the Middlesex Hospital, became by virtue of the Act of 1946 a separate body corporate, part of London University, and of which in turn the Bland-Sutton Institute of Pathology at all materials times was, and is, a part) that the defeasance provisions of cl. 11 have never on their true construction taken effect. The council further contended and contend that in any event the Royal College of Surgeons is not a "charity," so that the gift over in cl. 11 is wholly void, with the further result that, even if one or other of the events specified in the clause should be held to have occurred, nevertheless, by the application of the rule in *Lassence v. Tierney* (1), the original and unlimited gift of income in cl. 10 (2) of the will—to the giving effect of which there is in any case no difficulty or obstacle—persists.

In the circumstances it is clear that on the appointed day under the Act of 1946 (*viz.*, on July 5, 1948) two questions arose for determination under Lady Bland-Sutton's will, namely, (i) had one or other of the events specified in cl. 11 occurred, and (ii) is the Royal College of Surgeons a "charity," and, therefore, capable of asserting in its favour the validity of the gift over in the same clause? The bank as trustee instituted the present proceedings for the determination of the two questions I have stated. They joined as defendants the Council of the Middlesex Hospital Medical School and the Royal College of Surgeons, and also, as third and fourth defendants, the Solicitor for the Affairs of His Majesty's Treasury and the Attorney-General. The reason for the joinder of the third defendant was because, as appears from the evidence, it had not been possible to trace any person entitled to claim under the Administration of Estates Act, 1925, in the event that the testatrix died as to any part of her property intestate. Counsel for the Treasury Solicitor, however, conceded that, if one or other of the specified events had occurred, but the gift over were void, then (as contended by the first defendant) the rule in *Lassence v. Tierney* (1) would preserve the gift in cl. 10 (2) of the will so that no claim could be made on the basis of an intestacy.

DANCKWERTS, J., before whom the matter came to be argued, proceeded to a consideration of the two questions I have already formulated. He dealt with them in the reverse order to that in which I have stated them. He held, first, that the Royal College of Surgeons was a "charity" within the meaning and intendment of the statute of Elizabeth (43 Eliz. c. 4), capable, therefore, of setting up and taking under the gift over in cl. 11 of the will, considering himself not bound to a contrary view by the judgment of this court in *Re Royal College of Surgeons of England* (2). The learned judge, secondly, decided that on the true construction of cl. 11 of the will none of the specified events had occurred, so that, in the result, his decision, first stated, was academic. The Royal College of Surgeons have appealed against the second part of the judgment of DANCKWERTS, J., and we have heard their appeal first. The Council of the Middlesex Hospital Medical School served a notice of cross-appeal against the learned judge's decision in favour of the validity of the gift over, and we heard the arguments on the cross-appeal immediately after the arguments on the appeal. This judgment is on both appeal and cross-appeal, but I deal with the two questions in that order. As will appear, I have on both of them differed from the opinion of DANCKWERTS, J. though, for the reasons already indicated, I arrive in the end at the same conclusion, namely, that the trusts in favour of the Bland-Sutton Institute of Pathology still subsist.

DANCKWERTS, J., has fully and accurately stated in his judgment the history and relevant circumstances of the Bland-Sutton Institute of Pathology (estab-

lished in 1914 as a result of the generosity of Sir John Bland-Sutton), and also the material provisions of the National Health Service Act, 1946. These matters are also fully stated in the judgment of JENKINS, L.J., which I have had the advantage of reading. I do not, therefore, think that I need repeat them at length. It is sufficient to state (i) that, the Middlesex Hospital being a teaching hospital within the meaning of the Act, there was on July 5, 1948, a severance of the functions of the hospital properly and ordinarily so called from those of the medical school (including the Bland-Sutton Institute); (ii) that the school (including the institute) and so much of the buildings which had previously housed all the activities of the old Middlesex Hospital (including school and institute) as were appropriated to the medical school and the institute became vested in the defendant council as a new corporation created pursuant to the Act, in connection with and as part of London University but independent of the Minister of Health; (iii) that the hospital as such and all its property and liabilities (other than its endowments) became vested in the Minister; and (iv) (because the Middlesex Hospital was a teaching hospital) its endowments as defined by the Act became vested in a new board of governors established pursuant to the Act and wholly under the control of the Minister.

These results were in accordance with the scheme of the Act, described in its title as an Act to provide for the establishment of a comprehensive health service for England and Wales. Thereby all the hospitals in England and Wales, both voluntary and of the local authorities (subject only to exceptions immaterial for present purposes), and all their property, rights and liabilities, vested on the appointed day in the Minister of Health, with the exception that in the case of hospitals designated as teaching hospitals (of which the Middlesex Hospital was one) their endowments then vested, not in the Minister, but in new boards of governors for such hospitals wholly subject to the Minister's control. It was further part of the scheme of the Act that there should be a complete severance from the hospitals themselves (regarded as places or institutions for the care of the sick or injured or those requiring medical attention) of the medical schools which had formerly been part of the hospitals. All such schools had (as I assume from the reading of the Act) constituted medical schools of one or other of the universities in England or Wales, and it was the scheme or pattern of the Act that the schools should thenceforth be part of the universities instead of part of the hospitals, their property and liabilities vesting either in the governing bodies of the appropriate universities or (as, for example, in the case of the medical school of the Middlesex Hospital and the medical schools of other London hospitals which had been schools of London University) in bodies corporate independent of the Minister. The result in such a case as that of the Middlesex Hospital is in some respects artificial, for the school and the Bland-Sutton Institute of Pathology continue to occupy a part of the buildings and premises of the hospital properly so called, and, no doubt, patients at the hospital continue to be sent for examination, as hitherto, to the institute as part of their treatment. Nevertheless, the two things are legally and administratively quite distinct and the medical school (including the institute) has in this sense been completely severed from the hospital itself.

In these circumstances, it was contended on behalf of the Royal College of Surgeons that the last event specified in cl. 11 of the will had occurred in that the bank could no longer lawfully apply the income of the endowment fund by paying it to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology or otherwise for the purpose aforesaid. In my view, DANCKWERTS, J., was clearly right in rejecting this argument. It is not open to doubt that the income of the fund can, in existing circumstances, still be applied without difficulty or question "for the maintenance and benefit of the Bland-Sutton Institute of

Pathology." It could not, in my judgment, have been contemplated by the testatrix that in any circumstances the "treasurer or other proper officer of the Middlesex Hospital" would himself have determined the exact method of application of the income, but, even had it been so, the disappearance or disability for such purposes of the "treasurer or other proper officer" would not defeat the trust. I find it unnecessary to add anything further to what was said on the point by DANCKWERTS, J.

There remains, however, the question whether the Middlesex Hospital has become nationalised or otherwise by any means passed into public ownership. In a popular sense there can, I think, be no doubt that the hospital in common with other hospitals has been "nationalised"—in a popular sense that had been the intention and was the effect of the Act of 1946. But DANCKWERTS, J., was of opinion that, notwithstanding "the popular view," the event specified in the will has not occurred according to its true construction on the ground that the *whole* of the institution has neither been nationalised nor passed into public ownership. He said ([1950] 2 All E.R. 474):

"Part of its property and the most relevant part for the purposes of the trusts of the will of the testatrix, that of the medical school, has been transferred to and is in a corporate body, which is not nationalised and is not in public ownership."

It is true, as observed by DANCKWERTS, J.; that we are here considering a defeasance clause and that such clauses must be strictly construed, but that is not to say that such a phrase as that with which we are here concerned should be given an artificial precision foreign to its context.

It is to be noted that the testatrix has distinguished between "nationalisation," on the one hand, and "passing into public ownership," on the other. According to the SHORTER OXFORD ENGLISH DICTIONARY, the first meaning of the word "nationalise" is "to render national in character," and it may, I think, be not unreasonably contended that the effect of the Act of 1946 was to impose such a uniform and national pattern on all the hospital services of the country, including the medical schools, that the testatrix's condition should be treated as satisfied without regard to the distinction in treatment under the Act accorded to the hospital (properly so called), on the one hand, and the medical school (including the Bland-Sutton Institute), on the other. But it is, in my judgment, unnecessary to pursue the argument for I have come to the conclusion that the effect of the Act was both to "nationalise" and to bring under public ownership the Middlesex Hospital, within the contemplation of the testatrix, notwithstanding that the medical school and the institute remained free from national ownership or control. It is true that the whole entity that was formerly described as the Middlesex Hospital was neither nationalised nor publicly acquired, but that part of the entity, which has not, has been severed from the hospital, legally and administratively, and has ceased to be, in truth, a part of it. On the other hand, that which remains and is the Middlesex Hospital and which has continuously been the Middlesex Hospital since its first foundation over two hundred years ago, has, according to the ordinary and proper usage of the language, been both nationalised and passed into public ownership. I add, though I do not desire to attach undue significance to it, that the testatrix seems from the language she has used to have been fully conscious of the distinction between the hospital as such and the institute of pathology associated with her husband's name, for in cl. 10 (2) she refers to the latter as "now carried on in connection with the Middlesex Hospital." And though, as DANCKWERTS, J., observed (*ibid.*), the institute may fairly be referred to as "the most relevant part" of the old hospital for the purposes of the trusts of the will, still the name of Sir John Bland-Sutton is closely associated with the Middlesex Hospital to the service of which he devoted no small part of his skill and reputation.

The question is, as the learned counsel on both sides conceded, a short one, incapable of great elaboration, and, perhaps, largely one of first impression. For the reasons I have given I have felt compelled to a conclusion on it different from that entertained by DANCKWERTS, J., and I think, accordingly, that the appeal ought to succeed.

It becomes then necessary to determine the subject-matter of the cross-appeal, viz., whether the Royal College of Surgeons is a body established and carried on for charitable purposes only within the meaning of the statute of Elizabeth. Again, the relevant facts have been fully stated by the learned judge, and, on the view which I have formed, I find it unnecessary to recapitulate or add to them. For, sympathising, as I am strongly inclined to do, with DANCKWERTS, J.'s own opinion of the nature of the purposes of the college, I am unable to escape the conclusion that, in conformity with the principles recently expounded in *Young v. Bristol Aeroplane Co.* (3), the court is bound by the decision of the Court of Appeal in *Re Royal College of Surgeons of England* (2) to conclude that the college fails to qualify as a charity. In the last-mentioned case it is true, as counsel for the college argued, that the question, and the only question presented to and debated before the Court of Appeal, was of a strictly limited character, viz., whether certain of the college property, excluding such property as, for example, the museum, housing, among other things, the well-known Hunterian Collection, was "legally appropriated and applied . . . for the promotion of . . . science" within the meaning of the Customs and Inland Revenue Act, 1885, s. 11, so as to be exempt from the duty thereby imposed. According to the report of the case in the Reports of Tax Cases (4 Tax Cas. 344) it had been alternatively argued in the court below that the college property was legally appropriated and applied for the promotion of education, but this ground does not appear to have been pursued on behalf of the college before this court, and certainly no argument was presented to the general effect that the purposes of the college were exclusively charitable—the citation of the material part of s. 11 of the Act in the LAW REPORTS ([1899] 1 Q.B. 872) omits therefrom the words which occur in it, "for any charitable purpose." Counsel was, therefore, entitled to contend that, since its purposes plainly tended to improve and encourage the supply of qualified surgeons and therefore to the relief of the sick and injured, the college as an institution was within the scope and intendment of the statute of Elizabeth and that the case in 1899 had not directly decided that point against him.

But the decision of the Court of Appeal proceeded essentially, in my judgment, on the basis of the view taken by the court of the dual character of the purposes of the college, derived from a close examination of the charters of the college and other material facts, including the Medical Acts, 1858 and 1886. The second paragraph of the reserved judgment of the court read by ROMER, L.J., is (*ibid.*, 877):

"It was finally determined by the House of Lords in the case of *Inland Revenue Comrs. v. Forrest* (4), that if the main purpose or object of an institution be the promotion of science, though there may be some subsidiary purposes or objects, then its property, having to be applied and being applied for the purposes of the institution, is legally appropriated and applied for the promotion of science within the meaning of these words as used in the Act, and is accordingly exempt from duty. Now the case before us differs essentially from the case above mentioned of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of sur-

gery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

ROMER, L.J., then passed, for the purpose of establishing the statement which he had made and which I have quoted, to the terms of the charters and other material evidence, and, after referring (*ibid.*, 882) to the fact that removal from being a fellow or member of the college would "have very serious results on the person removed in his practice" and to some other matters affecting the regulation of the profession, he stated (*ibid.*):

"We think that the above facts amply show the dual nature of the object and purpose of the college as above stated by us. Now, so far as concerns property which may be legally appropriated and applied to what we have called the second main function of the college, as distinguished from its other function of the promotion of the science of surgery, it appears to us clear that such property would not come within any of the exemptions from duty mentioned in s. 11 of the Customs and Inland Revenue Act, 1885."

I will assume that counsel is right in saying that the reference to "any of the exemptions . . . mentioned in" the Act of 1885 in the passage last cited ought not to be considered as intended in the circumstances as a direct decision that none of the relevant property of the college was "legally appropriated or applied for any charitable purpose." Even so, I am unable to resist the conclusion that, on the material then before them, the court came to a clear conclusion that (unlike the Institution of Civil Engineers) the college had two main and distinct purposes or functions and that the promotion of the professional interests of surgeons was an essential and not merely a subsidiary part of one of them. It is true that, at the end of the first passage from the judgment which I have quoted, ROMER, L.J., describes the second function or purpose as

"the promotion and encouragement of the practice [as distinct from the 'science'] of surgery including the promotion of the interests of those practising . . . surgery."

But, having regard to the opening sentence of the same paragraph, it seems to me impossible to treat ROMER, L.J., as meaning that the promotion of the professional interests of surgeons was merely subsidiary to a wider purpose, the promotion of the practice of surgery, not as a profession, but as a scientific purpose no less than the promotion of the *science* of surgery. I observe that my reading in this respect of the judgment of ROMER, L.J., was that adopted by the Irish Court of Appeal when that court had to consider the claim to rank as a charity of the Royal College of Surgeons in Ireland in *Miley v. A.-G.* (5): see, for example, the language of SIR IGNATIUS O'BRIEN, C. ([1918] 1 I.R. 461):

"*Re the Royal College of Surgeons of England* (2) is, however, of considerable value in the present case by reason of the manner in which the Court of Appeal approached the question there involved. The charters of the English College of Surgeons are of a somewhat different character from those of the Irish college, but those of the two countries unite on this common ground, that they deal with the establishment of the new colleges as being of great consequence to the commonwealth of the kingdom by the promotion of the art and science of surgery. An examination of the charters, however, in their essential particulars, satisfied the court in that case that there were two main objects contemplated by the charters, one being the promotion of the art and science of surgery, and the instruction of candidates to qualify them for the efficient practice of their profession;

the other a different object, namely, the due regulation of the profession of surgeons and the promotion of the interests, and the discipline of the members of that profession after they had been educated in their art. One object begins where the other ends; one is essentially and purely a charitable object; the other is *prima facie* not a charitable object."

The view taken by the Court of Appeal in 1899 of the construction of the charters of the college and of its corporate purposes was, as I have said, fundamental to the decision then reached by the court, albeit a decision on a question not the same as that which is now presented for this court's determination. In my judgment, we cannot now, without an altogether unjustifiable refinement, and ought not, to reach a conclusion based on a determination of the nature of the college's purposes at variance with that contained in and fundamental to the judgment of ROMER, L.J., unless it can be shown that in the present case new material was before us and evidence which was not considered by the court in 1899. During the course of the argument before us, full and careful consideration was given to the various charters and to the earlier Act, 18 Geo. 2, c. 15, by reference to which the powers and purposes of the college are defined in the charter of 1800. But all these matters, as well as the Medical Acts of 1858 and 1886, were before the court in 1899. It is, therefore, in substance on the last five paragraphs of Lord Webb-Johnson's affidavit in the present proceedings that counsel for the college has relied as supplying the necessary new evidence, and especially the statement that:

"Surgery—the art or practice of treating injuries deformities and other disorders by manual operation or instrumental appliances—is essentially practical. The art and science of surgery cannot be promoted without actual practice and experience which involve necessarily an adequate and competent body of practitioners."

The paragraph properly emphasises the point that the art of surgery is a practical art, but I cannot think that the truth of that proposition was unknown to or unrealised by the court in 1899—flowing as it does essentially from the word "surgery" itself, the OXFORD ENGLISH DICTIONARY definition of which is substantially reproduced by Lord Webb-Johnson in the opening lines of his paragraph. In the preceding paragraph Lord Webb-Johnson draws attention to the disciplinary powers over surgeons which are vested (for the most part) in the General Medical Council rather than in the college; but that appears to have been the position ever since the Medical Acts which were considered by the court in 1899. The burden of the decision of the court in 1899 was that one of the main purposes of the college was the promotion of what may be called the selfish interests of the profession as distinct from the other public or charitable purpose, and for the reasons I have given I am unable to find anything in the evidence of Lord Webb-Johnson which would justify us, without untenable refinements, in holding, as a necessary premise to a conclusion in favour of the college, that the main or only purpose of the college is of a public and charitable character and that any selfish professional purpose is only ancillary or subsidiary to the former.

DANCKWERTS, J., was able to avoid this conclusion. He referred to the two cases relating to the Institution of Civil Engineers, *viz.*, *Inland Revenue Comrs. v. Forrest* (4) and *Institution of Civil Engineers v. Inland Revenue Comrs.* (6), and thought that the conclusions in those cases of the House of Lords and of this court respectively were no less applicable in the case of the Royal College of Surgeons. He was of opinion that the case in 1899 was a decision solely on the application to the college of particular words in the Customs and Inland Revenue Act, 1885, s. 11, and did not, therefore, constrain him to hold otherwise than that

"the real object of the college is the promotion and encouragement of

the study and practice of the art and science of surgery and not the interests of surgical practitioners."

Agreeing with the learned judge that *Re Royal College of Surgeons of England* (2) was a decision on a particular statutory provision, I cannot, I regret, agree that it has in consequence so restricted and negative an effect as regards the present question. For reasons which I have already stated, and which I do not wish to repeat, I think that it was not open to the learned judge to regard the present case as being *in pari materia* with that of the Institution of Civil Engineers, the single purpose of which was contrasted by ROMER, L.J. (who referred expressly to *Inland Revenue Comrs. v. Forrest* (4)) with the dual purpose of the college in the passage from the judgment of this court which I have already read. In defining as he did the purpose of the college, the learned judge in the court below was in fact quoting the language of the charter of 1800, and the words "and not the interests of surgical practitioners" seem to me inconsistent with the construction put by this court on that charter in the light of the other evidence before it. It does not appear that *Re Royal College of Surgeons of England* (2) has ever been questioned or adversely criticised, and I gather that during the half century since it was decided the college has consistently been treated as a non-charitable corporation. In my judgment, this court cannot, and ought not now, to declare the contrary.

The result is—for I agree with DANCKWERTS, J., that the testatrix's general direction that her residuary estate should be held on trusts described as "charitable trusts" cannot affect the matter—that, in my opinion, the gift over in favour of the Royal College of Surgeons is void, but since, as indicated at the beginning of this judgment, the result is that by the operation of the *Lassence v. Tierney* (1) rule the original disposition for the maintenance and benefit of the Bland-Sutton Institute of Pathology remains unimpaired by the later defeasance clause and gift over, the substantial result is the same as that arrived at by DANCKWERTS, J. Nevertheless, the appeal and cross-appeal must be allowed and the order made by the learned judge discharged. Subject to the argument of counsel, I think that the order of the court should be (a) in answer to question 1 of the summons, that the provisions of cl. 11 of the will for payment on the happening of any of the events then specified of the capital and income of the testatrix's estate to the Royal College of Surgeons for the general purposes of the college are void, and (b) in answer to question 4 of the summons that, in the events which have happened, the trusts declared in cl. 10 of the said will for the maintenance and benefit of the Bland-Sutton Institute of Pathology continue in operation.

JENKINS, L.J.: These are an appeal by the Royal College of Surgeons and a cross-appeal by the Council of the Middlesex Hospital Medical School from a judgment of DANCKWERTS, J., dated July 7, 1950, concerning the destination in the events which have happened of the residuary trust fund constituted by the will, dated Jan. 13, 1943, and proved on May 20, 1943, of Lady Bland-Sutton (widow of Sir John Bland-Sutton, the well-known surgeon) who died on Feb. 10 in the same year.

The relevant provisions of the will are contained in cl. 10 and cl. 11. By cl. 10, the testatrix made a general residuary devise and bequest to the National Provincial Bank, Ltd., as trustee of her will on trusts of the usual character for sale and conversion and to stand possessed of the net proceeds and of the investments for the time being representing the same (which she collectively termed "the endowment fund") "upon the following charitable trusts for so long as the law shall permit," and proceeded to declare (by sub-cl. (1)) a trust (as to which no question arises) to pay out of the income of the endowment fund a clear annual sum of £300 to the Royal College of Surgeons for the purpose of maintaining a Bland-Sutton research scholarship on the terms and conditions therein mentioned, and (by sub-cl. 2)) a trust in the following terms:

“to pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the [Middlesex] hospital.”

Clause 11 of the will is in these terms:

“Provided always that should the said Bland-Sutton Institute of Pathology cease to be carried on as a pathological research institution or should its name be changed or should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund (both as to the capital and the income thereof) to the said Royal College of Surgeons absolutely for the general purposes of the said college and the receipt of the treasurer or other proper officer thereof shall be a full and sufficient discharge to the bank therefor.”

The questions argued before the learned judge were in effect (i) whether the gift over provided for in cl. 11 of the will, framed as it was so as to operate on the happening of any of the stipulated events at any distance of time, was a valid provision or void as infringing the rule against perpetuities; and (ii) if the gift over was valid, whether the operation on the Middlesex Hospital of the provisions applicable to it of the National Health Service Act, 1946, was such that the Middlesex Hospital had become nationalised or passed into public ownership within the meaning of cl. 11, with the result that the gift over had taken effect, or alternatively such that the income of the endowment fund could no longer lawfully be applied by the bank to the purposes aforesaid, *i.e.*, the maintenance and benefit of the Bland-Sutton Institute of Pathology. The learned judge answered the first of these questions in the sense that the gift over was valid, and the second in the sense that it had not taken effect because none of the events conditioning its operation under cl. 11 had happened, and, in particular, because in his view the Act of 1946 had not caused the Middlesex Hospital to become nationalised or pass into public ownership within the meaning of the clause, or made it unlawful for the bank to apply the income of the endowment fund for the purposes aforesaid, these being the only events of those specified which were claimed on behalf of the Royal College of Surgeons to have occurred.

As to the validity of the gift over, it is common ground that a provision of this character, if framed to take effect at any distance of time, is void for remoteness unless the objects both of the original gift and of the gift over are charitable objects: see *Re Bowen* (7) and *Christ's Hospital v. Grainger* (8). The charitable character of the original gift in the present case (*i.e.*, the trust in favour of the Bland-Sutton Institute of Pathology contained in cl. 10 (2) of the will) is not in dispute. It is, however, contended on the part of the Council of the Middlesex Hospital Medical School that the learned judge was wrong in holding, as he did, that the gift over “to the Royal College of Surgeons absolutely for the general purposes of the said college” is also a gift for charitable purposes, and, therefore, valid, notwithstanding the rule against perpetuities, as a gift over from one charitable object to another: *Christ's Hospital v. Grainger* (8). That contention, which is the subject of the council's cross-appeal, would, if successful, admittedly have the effect (in accordance with the principle stated in *Hancock v. Watson* (9)) of leaving the trust in favour of the Bland-Sutton Institute of Pathology on foot as an indefinite gift of income discharged from the (on this view) invalid gift over, whether the Middlesex Hospital had or had not become nationalised or passed into public ownership within the meaning of cl. 11. No relative of the testatrix within the degrees entitled to participate in any property

of hers undisposed of by her will under the Administration of Estates Act, 1925, has so far been traced, and it seems probable on the evidence at present available that none survived her, but counsel for the Treasury Solicitor, as representing those interested under any intestacy, expressed himself satisfied that in the event of the gift over being held invalid the result must be as stated above, to the exclusion of any question of intestacy. Inasmuch as a decision against the validity of the gift over would, as appears above, make it unnecessary to decide the question whether the Middlesex Hospital had become nationalised or passed into public ownership within the meaning of cl. 11, it might appear the more logical course to deal first with the question of validity, as was done before the learned judge, but as both questions were fully argued before us, I think it only right in any event to give my views on both of them; and as the appeal of the Royal College of Surgeons, which was opened first in this court, was directed to the question whether the gift over, on the footing that it was rightly held valid by the learned judge, had taken effect, I propose in this judgment to deal with that question first.

To appreciate the argument in support of the Royal College of Surgeons' appeal, certain facts concerning the Middlesex Hospital, and the effect on the hospital, in view of those facts, of the relevant provisions of the National Health Service Act, 1946, must be shortly stated. The Middlesex Hospital was incorporated by Act of Parliament in 1836, but had then already been in existence for more than ninety years. Teaching in the wards of the hospital had begun in 1745, but the medical school associated with it was not founded until 1835. Down to 1896 the school, though associated with, did not form part of, the hospital. In that year it became part of the hospital under a scheme of amalgamation which was adopted by the weekly board of governors of the hospital on July 28, 1896. Under this scheme the hospital took over the property and liabilities of the school and the school became and thereafter down to July 5, 1948 (being the appointed day under the National Health Service Act, 1946), remained a department of the hospital, though in practice it enjoyed a considerable degree of autonomy in the management of its affairs (through a council constituted for the purpose under the scheme), and its accounts were kept separate from those of the hospital. In 1900, on the re-constitution of the University of London, the school became a school of the university. This did not affect the legal position of the school as a department of the hospital, but involved recognition of the school by the university as one where London University medical students might take their training, and the university became the examining body of the school to which it also made grants. The Bland-Sutton Institute of Pathology referred to in the testatrix's will was opened in 1914 as part of the school in a building for which a sum of money had been provided by Sir John Bland-Sutton in 1913. The school has always been housed on the same site as the hospital, and the buildings devoted to the purposes of the school (including the institute building) are physically connected, and one might say intermixed, with those of the hospital as distinct from the school.

The position at the date of the testatrix's will and at the date of her death, and thereafter down to the appointed day under the Act of 1946 (*viz.*, July 5, 1948), therefore, was that the undertaking of the Middlesex Hospital comprised (a) the buildings and other assets devoted to the educational activities carried on in its medical school, and (b) the buildings and other assets devoted to the therapeutic activities of the hospital as opposed to the educational activities of its medical school. The argument against the operation in the events which have happened of the gift over (if valid) to the Royal College of Surgeons is, in effect, founded on the contention that the testatrix's reference to the Middlesex Hospital in cl. 11 means nothing less than the totality of the undertaking above described, *i.e.*, the hospital, including its medical school, the rele-

vance of which contention will appear from a consideration of the special provisions of the Act of 1946 with respect to "teaching hospitals" as therein defined.

I should next refer to the more relevant provisions of the Act. By s. 6:

"(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section . . . (4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section."

Section 7 reads:

"(1) Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals so designated, all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the board of governors constituted under the following provisions of this Part of this Act for the teaching hospital . . . (8) All rights and liabilities acquired or incurred, whether by the governing body or by trustees, solely for the purposes of managing any endowment of a voluntary hospital to which the last foregoing section of this Act applies, being rights or liabilities to which they were entitled or subject immediately before the appointed day, shall—(a) if the hospital has before that day been designated as a teaching hospital or is one of a group of hospitals so designated, be transferred to and vest in the board of governors of the teaching hospital on that day by virtue of this Act; (b) if the endowment is transferred to and vested in a hospital management committee by virtue of this Act, be transferred to and vest in that committee on that day by virtue of this Act; (c) in any other case be transferred to and vest in the Minister on that day by virtue of this Act . . . (10) In this section the expression 'endowment,' in relation to a voluntary hospital, means property held by the governing body of the hospital or by trustees solely for the purposes of that hospital, being property of the following descriptions—(a) interests in or attaching to land other than the premises referred to in sub-s. (1) or sub-s. (5) of the last foregoing section, and in equipment, furniture or other movable property used on or in connection with such land; (b) shares, stocks, bonds, debentures and other securities, and any other personal property held by way of an investment; (c) money, including any credit in a banking account; (d) rights under any bill of exchange, promissory note or gratuitous covenant for the payment of money: Provided that an equitable interest held for the purposes of a voluntary hospital in

trust property in which there are other equitable interests shall not be deemed to be an endowment of that hospital."

Section 8:

"(1) Where a medical or dental school is associated with any hospital to which s. 6 of this Act applies, nothing in that section or the last foregoing section shall be taken as affecting any property or liabilities held or incurred solely for the purposes of that school, and those purposes shall not be deemed to be purposes of the hospital. (2) All property and liabilities held or incurred solely for the purposes of any such school, not being property already vested in the bodies hereafter in this section mentioned or liabilities to which those bodies are already subject, shall, on the appointed day, be transferred by virtue of this Act—(a) in the case of a general medical school of the university of London or any school in the faculty of medicine of that university which is recognised for dentistry only, to the governing body of that school . . ."

Section 11 (8):

"The Minister may, after consultation with the university concerned, by order designate as a teaching hospital any hospital or group of hospitals which appears to him to provide for any university facilities for undergraduate or post-graduate clinical teaching, and the Minister shall, in the case of any hospital or group so designated, by order constitute, in accordance with Part III of sched. III to this Act, a board of governors for the purpose of exercising functions with respect to the administration of that hospital or group; and any group of hospitals so designated shall, as from the appointed day or the date of the designation (whichever last occurs), be deemed for the purposes of this Act to be a single hospital."

Section 12 (3):

"It shall be the duty of the board of governors of every teaching hospital, as from the appointed day, in accordance with regulations and such directions as may be given by the Minister, generally to manage and control the hospital on behalf of the Minister, and in particular—(a) to provide for the university with which the hospital is associated such facilities as appear to the Minister to be required for clinical teaching and research; (b) to appoint officers required to be employed at or for the purposes of the hospital; (c) to maintain any premises forming part of or used in connection with the hospital; (d) to acquire on behalf of the Minister and to maintain equipment, furniture and other movable property required for the purposes of the hospital."

Section 15:

"(1) If any general medical school of the university of London or any school in the faculty of medicine of that university which is recognised for dentistry only is not incorporated at the passing of this Act, the governing body of the school shall, within a period of six months from the passing of this Act, prepare and submit to the governing body of the said university a scheme, to take effect on the appointed day, for constituting a new governing body of the school, which shall be a body corporate with power to hold land without licence in mortmain, and for conferring powers and imposing duties on that body and otherwise for the future management and control of the school; and any such scheme shall make provision for including among the members of the new governing body persons representing the university, the teaching staff of the school, and the board of governors of the teaching hospital with which the school is associated, respectively. (2) A scheme prepared and submitted under the last foregoing sub-section shall not have effect unless it has been approved by the governing body

of the said university, and the said governing body may either approve the scheme without modifications or with such modifications as may be agreed between them and the governing body of the school. (3) Any such scheme may be amended by a new scheme prepared by the governing body of any such school and submitted to and approved by the governing body of the university of London. (4) Any scheme prepared, submitted and approved under this section shall have effect notwithstanding anything in any Act of Parliament, charter, or other document affecting the constitution of the school."

Section 79:

"(1) . . . 'appointed day' means such day as His Majesty may by Order in Council appoint, and different days may be appointed for the purposes of different provisions of this Act and for the repeal or amendment of different enactments by this Act . . . 'hospital' means any institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid, and 'hospital accommodation' shall be construed accordingly . . . 'teaching hospital' means a hospital or group of hospitals designated by the Minister as a teaching hospital by an order in force under Part II of this Act . . . 'voluntary' means not carried on for profit and not provided by a local or public authority . . . (2) References in this Act to the purposes of a hospital shall be construed as referring both to the general purposes of the hospital and to any specific purpose of the hospital."

The Middlesex Hospital was duly designated a teaching hospital by the Minister under s. 11 (8), and, accordingly, by virtue of the provisions to which I have referred of s. 6 and s. 7, on the appointed day (which was duly appointed by Order in Council as July 5, 1948) the property and liabilities of the hospital other than its endowments and the liabilities relating thereto were transferred to and vested in the Minister, while its endowments and the liabilities relating thereto were transferred to and vested in the board of governors constituted for it under the Act. But, in view of s. 8 (1), such vesting and transfer did not include the property and liabilities held or incurred by the hospital solely for the purposes of its medical school, which were, by virtue of s. 8 (2), transferred to and vested in the governing body of the school. As the school was unincorporated, s. 15 applied to it. A scheme under that section was duly prepared and approved before the appointed day, and, accordingly, on the appointed day the assets and liabilities of the school were transferred to and vested in the new incorporated governing body constituted by the joint effect of s. 15 and the scheme so prepared and approved.

It is not seriously disputed that the effect of the relevant provisions of the Act in their application to the Middlesex Hospital was to "nationalise" in the ordinary sense of that expression and within the meaning of cl. 11 of the will the hospital divested (by virtue of s. 8 (1)) of the assets and liabilities of the school. This, I think, is quite clear from the vesting provisions in s. 6, s. 7 and s. 8 and from s. 12 (3), which imposes on the board of governors the duty to manage and control the hospital on behalf of the Minister. I do not pause to consider whether what took place also amounted to a "passing into public ownership," the conception underlying which phrase seems to me to differ little from "nationalisation." It was, perhaps, added by the testatrix to cover the possibility of legislation under which the hospitals were transferred to local authorities, thus passing into public, but not necessarily national, ownership. On the other hand, it seems to me reasonably plain that the school neither became nationalised nor passed into public ownership. Its assets and liabilities were transferred to

and vested in, and it was thenceforth to be carried on by, a new corporate governing body, but that governing body is an autonomous and independent entity free of governmental or other public control. In these circumstances, did the Middlesex Hospital on July 5, 1948, become nationalised within the meaning of cl. 11 of the will?

According to the argument for the council of the medical school, this question should be answered in the negative, because the testatrix, in referring to the Middlesex Hospital, meant the totality of the undertaking above described, i.e., the hospital including the school, while what was nationalised under the Act of 1946 was the hospital minus the school, that is to say, a part only of what the testatrix meant by the Middlesex Hospital. Therefore, it is argued, the relevant condition for the operation of the gift over was not fulfilled. Divesting provisions such as these should be strictly construed, and a gift over expressed to take effect on the nationalisation of a given hospital should be construed as operating only on the nationalisation of the whole, and not a part only, of the institution in question. This argument commended itself to the learned judge, who seems to have felt a doubt, which I confess I do not share, on the question whether even the hospital less the school had been nationalised or passed into public ownership. His conclusion on this part of the case is expressed in the following passage from his judgment ([1950] 2 All E.R. 474):

"It may be that the new board of governors of the Middlesex Hospital are to be regarded as so much the creature of the Minister of Health that in substance it is nationalised, and the property of the hospital (other than that held for the medical school) has become nationalised or has passed into public ownership, but it seems to me that the old Middlesex Hospital has not as a whole been nationalised or passed into public ownership. Part of its property, and the most relevant part for the purposes of the trusts of the will of the testatrix, that of the medical school, has been transferred to and is in a corporate body, which is not nationalised and is not in public ownership. For the purposes, therefore, of this clause of defeasance (and my decision goes no further than that) I hold that the Middlesex Hospital has not become nationalised and has not passed into public ownership."

I find myself unable to agree with that conclusion. There is, in my view, no sufficient ground for holding that the testatrix in referring to "the Middlesex Hospital" used that expression otherwise than in its natural and ordinary meaning as denoting the well-known and old-established institution of that name which had existed as a corporate body since 1836, and previously as an unincorporated association since before 1745. The identity of that institution as "the Middlesex Hospital" cannot, in my view, properly be regarded as having depended on the continued inclusion amongst its assets and liabilities of the assets and liabilities of the medical school carried on in association with it. I ask myself whether the Middlesex Hospital as it existed after taking over the assets and liabilities of the medical school in 1896 was a different institution from the Middlesex Hospital as it had existed from 1835 to 1896, during which period the school, though associated with, did not belong to the hospital, or indeed from 1745 to 1835, during which period there was no school at all. I think the answer to this question must clearly be in the negative. Conversely, if on some date after 1896 the hospital had decided to reorganise the school as a separate entity associated with, but no longer owned by, the hospital, it clearly could not be maintained that the hospital as it stood after such reorganisation had thereby lost its identity as "the Middlesex Hospital." Supposing that between the testatrix's death and the appointed day the hospital had voluntarily reorganised the school in the way above indicated and the hospital thus already divested of the school had been nationalised by virtue of the Act on the appointed day, it would follow from the argument which has so far prevailed that the

Middlesex Hospital would not have become nationalised within the meaning of the will. That seems to me to be clearly wrong, yet I think it does fairly illustrate the implications of the argument. For the argument really comes to this, that nothing short of the nationalisation lock, stock and barrel of the whole—or substantially the whole—of the assets, liabilities and activities of the hospital as they stood at the date of the will, or, perhaps, I should say at the date of the death, could amount to a nationalisation of the hospital within the meaning of the will. I think that is a forced and unreasonable construction of cl. 11, a construction which would, moreover, have been capable of producing the greatest difficulty and uncertainty. What changes in the assets between the date of the will or death and the date of nationalisation, or what exclusions from the scope of the nationalisation would suffice to prevent the operation of the gift over? In the summary of the argument as I have just stated it I have perforce included the qualifying words “or substantially the whole.” That qualification is admittedly necessary, for no one would contend that any minor change in or exclusion of assets would have sufficed to prevent “nationalisation” within the meaning of the will. The matter thus on the argument which prevailed before the learned judge becomes one of degree, with all the difficulties and uncertainties which questions of degree entail.

It is to be observed that the argument becomes still more difficult to maintain if nationalisation within the meaning of cl. 11 is made to depend on the complete nationalisation of all or substantially all the assets and liabilities of the hospital as existing at the date of the event claimed to amount to nationalisation within the meaning of that clause, which seems to me, if anything, the more natural date to select. On this footing the argument would have involved the conclusion that if, as I have supposed above, the hospital had voluntarily reorganised the school as a separate entity before the appointed day, the nationalisation of the hospital less the school on the appointed day would have been nationalisation of the hospital within the meaning of cl. 11, whereas the contemporaneous separation of the school from the hospital and nationalisation of the hospital less the school, which actually took place on the appointed day, did not amount to nationalisation of the hospital within the meaning of cl. 11. This seems to me a wholly unreasonable result. The learned judge says (*ibid.*):

“ . . . it seems to me that the old Middlesex Hospital has not as a whole been nationalised or passed into public ownership.”

I think it must follow as a corollary to that view, that by reason of the separation of the school from the hospital effected by the Act the old Middlesex Hospital ceased to exist. The school in its new guise certainly cannot be regarded as a continuation of the old Middlesex Hospital. The hospital less the school is either the old Middlesex Hospital or it is not. If it is, then the conclusion follows, so far as I can see, that the Middlesex Hospital has become nationalised within the meaning of the will. If it is not, then the old Middlesex Hospital has wholly ceased to exist, or, in other words, the existence and identity of the old Middlesex Hospital is made to depend on the continuance of the school as part of its undertaking, a proposition of which I have already expressed my rejection earlier in this judgment. It is argued that the learned judge's view accords with the probable intention of the testatrix, inasmuch as the Bland-Sutton Institute itself, as part of the school, was not affected by the Act in any relevant respect, but, as against this, if the legislation had taken a different form so as to nationalise school and hospital with the exception of some branch or department of the hospital's undertaking other than the school, the same argument might have led to the conclusion that the gift over had not taken effect because the hospital as a whole had not been nationalised, and the intention imputed to the testatrix by those who argue against the operation of the gift over in the events which actually happened would thus have been palpably defeated.

Apart from the natural meaning of the testatrix's reference to “the Middlesex

Hospital" there are indications in cl. 10 (2) and cl. 11 which seem to me on the whole to support the conclusion to which I have come. She refers, in cl. 10 (2), to "the Bland-Sutton Institute of Pathology now carried on in connection with" the Middlesex Hospital. That form of words seems to me to suggest that she regarded the institute as connected with, but distinct from, the hospital itself; and I think the word "now" in the phrase "now carried on" also holds a suggestion that the institution referred to as "the Middlesex Hospital" had existed, and might continue to exist, as such without the Bland-Sutton Institute, and inferentially without the school of which the institute formed part. Further, cl. 11 contains no reference to the nationalisation of the Institute. The relevant event contemplated is the nationalisation of the hospital. If the testatrix's concept of nationalisation of the hospital had been such as the learned judge has held it to be, it would surely have been more natural for her to refer to nationalisation of the institute itself. As it is, the language she has used seems to contemplate the possibility of the hospital becoming nationalised in the sense in which she uses that expression without nationalisation of the institute "carried on in connection" with it, or inferentially of the school of which the institute formed part. I am, accordingly, of opinion that the Middlesex Hospital did in the events which happened "become nationalised" within the meaning of cl. 11 of the will, with the result that the gift over, if valid, took effect. I should add that, had I agreed with the learned judge on the question whether the Middlesex Hospital became nationalised within the meaning of cl. 11, I would certainly also have agreed with him that nothing had happened to make it unlawful for the bank to apply the income of the endowment fund for the maintenance and benefit of the Bland-Sutton Institute of Pathology and would have found myself quite unable to regard the circumstance that under cl. 10 (2) such income, instead of being directly applicable by the bank for these purposes, was to be paid to the treasurer or other proper officer of the hospital for the maintenance and benefit of the institute, as having any material bearing on the result.

It remains to consider whether the gift over is valid or is void for remoteness. As appears above, the answer to this question depends entirely on the further question, whether the object of the gift over is a charitable object in the legal sense of that expression. Certain preliminary observations are appropriate on this part of the case. First, the gift over can be valid only if the purposes for which it is made are necessarily and exclusively charitable. Secondly, the gift over is to the Royal College of Surgeons, not on any trust, but simply "for the general purposes of the said college." I cannot regard the reference to "the following charitable trusts" in the opening paragraph of cl. 10 as qualifying or restricting the purposes of the gift over in cl. 11. Thirdly, it follows that the gift over can be valid only if, but not unless, the general purposes for which the college can lawfully apply its funds are exclusively charitable.

The history, constitution and activities of the Royal College of Surgeons are reviewed at some length in the judgment of the learned judge. I do not propose to enlarge on them here, because the question for this court as I see it is not whether, had the matter been *res integra*, the learned judge's decision, to the effect that the college is a charity, could have been supported, but whether it was open to the learned judge so to hold in view of the decision of this court in *Re Royal College of Surgeons of England* (2) concerning the nature of the college's objects, which was, of course, binding on the learned judge, as it is on us, as regards all matters fairly within its scope. In *Re Royal College of Surgeons of England* (2) which I will for brevity term "the 1899 case," this court, consisting of A. L. SMITH, COLLINS, and SIR ROBERT ROMER, L.JJ., had to consider a claim by the college to exemption from the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11, the relevant exemption being in favour of:

"(3) Property which, or the income or profits whereof, shall be legally

appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts."

It should be noted that exemption under the head of "any charitable purpose" was not claimed, the head in effect exclusively relied on being "the promotion of science." It was held that the claim to exemption failed, the judgment of the court being delivered by ROMER, L.J., who said ([1899] 1 Q.B. 877):

"It was finally determined by the House of Lords in the case of *Inland Revenue Comrs. v. Forrest* (4), that if the main purpose or object of an institution be the promotion of science, though there may be some subsidiary purposes or objects, then its property, having to be applied and being applied for the purposes of the institution, is legally appropriated and applied for the promotion of science within the meaning of these words as used in the Act, and is accordingly exempt from duty. Now the case before us differs essentially from the case above mentioned of the Institution of Civil Engineers before the House of Lords. That institution had only one main object and purpose. The college has two main objects, each of great importance, in fact, it would be difficult to say which of the two main functions imposed on and discharged by the college is the more important. Neither can be considered as merely subsidiary to the other. The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

He then proceeded to justify the above conclusion as to the nature of the college's objects by a review of its history, the effect of the relevant charters and Acts of Parliament, and the various activities which it carried on.

DANCKWERTS, J., after referring to the 1899 case and citing authorities (some of which I will presently mention) for the proposition that the advancement of those practising a profession or calling is not a charitable purpose, said ([1950] 2 All E.R. 471):

"But, in considering whether a particular society is a charity for the purposes of a gift in a will, at least, it would appear that the test is whether the objects of the society are really charitable, notwithstanding that the carrying out of the objects of the society may incidentally produce benefits to the members of the society. Nor does it appear to be material what are the motives of the members of the society in joining it. Indeed, an impossible investigation into the inner thoughts of the members would seem to be involved in any such consideration, and such a process was rejected (in a revenue case) where the purpose of a society is defined by charter or statute by LORD HANWORTH, M.R., in *Institution of Civil Engineers v. Inland Revenue Comrs.* (6) ([1932] 1 K.B. 166) . . ."

After stating the effect of the latter case, he cited the following passage from the judgment of (SIR MARK) ROMER, L.J. ([1932] 1 K.B. 172):

"Where a society is instituted for a charitable purpose, it is obvious that the membership of the society may confer upon its holder personal advantages of considerable value to him in his profession or in his social standing. He may, for instance, have an exclusive right to affix to his name a certain designation, and will be known to the public as a person belonging to the society. He may have to observe disciplinary rules laid down with a view to ensuring that he does not bring discredit upon other members of the society. But in such cases, although the securing of such advantages to the members may in a sense be regarded as one of the objects of the

society, such object is merely concomitant or incidental to the real objects of the society, and if that real object be charitable, the society is established for charitable purposes only."

Finally, the learned judge expressed his conclusion on this part of the case in the following passage ([1950] 2 All E.R. 472):

- A "It seems to me that those observations apply to the present case, and that, unless I am constrained by the decision of the Court of Appeal in *Re Royal College of Surgeons of England* (2) to hold otherwise, the real object of the college is the promotion and encouragement of the study and practice of the art and science of surgery, and not the interests of surgical practitioners. As has been already observed, that decision of the Court of Appeal
- B was on a particular statute and was directed to different considerations, and I think I am at liberty to hold, for the purposes of the present case, that the Royal College of Surgeons is a charity, and I do so hold."

- Having regard to the decision of this court in the 1899 case as to the nature of the college's objects, I do not think it was open to the learned judge or is now open to this court to deal with the matter in that way. *Institution of Civil Engineers v. Inland Revenue Comrs.* (6), on which the learned judge relied, really did no more than apply in relation to the question whether that institution was a charity the decision of the House of Lords in *Inland Revenue Comrs. v. Forrest* (4) to the effect that the same institution was entitled to exemption from the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11, on the ground that its property was "legally appropriated and applied . . . for the promotion of . . . science . . ." within the meaning of sub-s. (3), the basis of that decision being that the real or substantial purpose of that particular institution was the promotion of science, the advantages accruing to members from the activities of the institution being merely incidental to or consequential on its pursuit of that purpose. It is important to note that
- D the passage I have already quoted from the judgment in the 1899 case begins by distinguishing *Inland Revenue Comrs. v. Forrest* (4), with respect to which ROMER, L.J., says ([1899] 1 Q.B. 877):
- E

"Now the case before us differs essentially from the case above mentioned . . . That institution had only one main object and purpose. The college has two main objects . . ."

- F It is, of course, perfectly true that the 1899 case was not in terms concerned with the question whether the college was a charity, but with the question whether it was entitled to exemption from the duty imposed by the Customs and Inland Revenue Act, 1885, s. 11, under the head of "promotion of science." The absence of any suggestion of a claim to exemption under the head of "any charitable purpose" is, at first sight, significant, but it is possibly accounted for by the restricted (yet undefined) meaning placed on this expression in the somewhat obscure decision of *Inland Revenue Comrs. v. Scott* (10). Be that as it may, I am content to assume for the present purpose that ROMER, L.J., in the 1899 case, when he said (*ibid.*, 882) that
- G

- H "such property would not come within any of the exemptions from duty mentioned in s. 11 of the Customs and Inland Revenue Act, 1885."

was not directing himself to the head of "any charitable purpose."

The learned judge seems to have regarded the fact that the 1899 case was concerned with the particular question of exemption from duty under s. 11 of the Act of 1885, coupled with the omission of any claim under the charitable head of exemption, and the restricted meaning placed on the words "any charitable purpose" in this section by *Inland Revenue Comrs. v. Scott* (10),

as affording sufficient grounds for distinguishing the 1899 case from the present one, and counsel for the college in his argument placed strong reliance on these considerations. But, given the fullest possible weight, they can only go to show that there is nothing in the 1899 case which as a matter of direct decision precludes the college from arguing that it is a charity, and in no way detract from the effect of that case as an authority binding the learned judge and this court so far as the nature of the college's objects is concerned. The decision in the 1899 case on that question in no way depended on the purpose for which it was necessary to decide what the nature of the college's objects was. If the matter in issue had in terms been whether the purposes of the college were charitable, precisely the same inquiry into the nature of the college's objects would have had to be pursued, and there is no justification whatever for assuming that any different result would have been reached. Accordingly, while I am prepared to assume that the 1899 case leaves open to argument the question whether the college is a charity, I think it demands, at all events so far as this court is concerned, that the argument should proceed on the basis that the college has two main objects of the respective kinds stated by ROMER, L.J. Counsel for the college sought to escape this conclusion on the ground that the evidence now before the court includes new matter, which, if it had been before the court in the 1899 case would, or might, have led to a different conclusion. There is, in my view, no substance in that contention. Counsel further contended that, surgery being an essentially practical science, the objects of the college, even as defined in the 1899 case, were charitable because they were (i) for the promotion of the science of surgery, and (ii) for the promotion of that science in its practical application, and thus wholly for the promotion of science, "the promotion of the interests of those practising, or about to practise, surgery as a profession," included by ROMER, L.J., in his statement of the second main object, being merely incidental or consequential, as the advantages accruing to members were held to be in *Inland Revenue Comrs. v. Forrest* (4). I cannot place this construction on the 1899 case, and I think it is inconsistent with the clear distinction drawn by ROMER, L.J., between that case and *Inland Revenue Comrs. v. Forrest* (4). It seems to me really quite plain that ROMER, L.J.'s statement of the first object is intended to embrace the whole of the scientific purposes of the college, whether theoretical or practical, while the second object as defined by him is directed to professional as opposed to scientific matters, the "practice of surgery" there meant being the practice of surgery as a profession, and not "the science of surgery in its practical application."

Counsel for the college also contended, if I understood him rightly, that, even on the construction I have just placed on the second object as stated in the 1899 case, the college should be held to be a charity because (i) it is in the public interest that there should be an adequate supply of skilled surgeons (without whom hospitals could not effectively function); (ii) any association promoting the professional advantage of persons practising surgery tends to encourage people to embark on that profession and thus to keep up the supply of skilled surgeons; and therefore (iii) the college is a charity notwithstanding the character of its second object, because it tends to maintain the supply of persons competent to heal the sick, just as a hospital not carried on for profit is a charity, as fulfilling a purpose analogous to "the relief of aged impotent and poor people" mentioned in the preamble to the statute of Elizabeth. This argument seems to me to enlarge to a wholly unprecedented degree the ambit of legal charity, and I find it impossible to accept. As it seems to me, holding, as I do, that this court is bound by the statement of the objects of the college contained in the 1899 case, the question whether the college is a charity really admits of only one answer. The second of its two main objects as defined by ROMER, L.J., is clearly not charitable. If authority for this proposition is

needed it is to be found in (for example) the decision of this court in *General Medical Council v. Inland Revenue Comrs.* (11) to which may be added the Irish case, *Miley v. A.-G.* (5). The last-mentioned case concerned the Royal College of Surgeons in Ireland, a bequest to which institution was held not to be for charitable uses, and is of particular assistance here not because the Irish college was necessarily comparable in all material respects to the English one—there were in fact considerable differences—but because the Irish Court of Appeal in that case, having placed the same construction on the decision in the 1899 case as I have placed on it above, held that the Irish college's objects were of a similar twofold character, and concluded on that ground that the Irish college was not a charity.

In the result, I am of opinion that the appeal in substance fails, as, although the Middlesex Hospital did, in the view I take, become nationalised within the meaning of cl. 11 of the will, the gift over must be held invalid, and, therefore, incapable of taking effect on the happening of that or any other of the events specified in cl. 11. Conversely, I hold that the cross-appeal should succeed. I would, therefore, discharge the order of DANCKWERTS, J. (except as to costs) and substitute a declaration to the effect that the gift over is invalid.

HODSON, L.J.: I have arrived at conclusions different from those reached by the learned judge on both questions which arise on these appeals.

The first question argued was whether on the true construction of this will the gift for the maintenance and benefit of the Bland-Sutton Institute is effective notwithstanding the language of cl. 10 (2) and cl. 11. The material words of these clauses are:

"10 (2) To pay the residue of the income of the endowment fund in each year to the treasurer or other proper officer of the Middlesex Hospital for the maintenance and benefit of the Bland-Sutton Institute of Pathology now carried on in connection with the said hospital. 11. Provided always that . . . should the Middlesex Hospital become nationalised or by any means pass into public ownership or should the bank at any time become unable lawfully to apply the income of the endowment fund for the purposes aforesaid then and in any of the said events the bank shall thereupon pay and transfer the endowment fund to the Royal College of Surgeons . . ."

I agree with the learned judge that, as regards the last alternative event, "the purposes aforesaid" are the maintenance and benefit of the Bland-Sutton Institute of Pathology and not necessarily the payment of the residue of the income of the endowment fund to the treasurer or other proper officer of the Middlesex Hospital for that purpose. The second alternative in the events which have happened does not, in my opinion, add anything to the first alternative, which is the one which requires consideration.

By s. 6 (1) of the National Health Service Act, 1946, all the premises (that is land and buildings) of the hospital and all the equipment, furniture or other movable property used in connection with such premises were transferred to and vested in the Minister of Health free of any trust. By s. 7 the endowments of the Middlesex Hospital, being a teaching hospital, were transferred to a board of governors to be constituted under the Act. By s. 12 (3) a duty is imposed on the board to manage and control the hospital on behalf of the Minister. In popular language the effect of these provisions is certainly nationalisation, even though the word "nationalisation" does not appear in the Act itself. It is argued, however, that the clause, being a defeasance clause, must be strictly construed before its terms can be said to be satisfied, and, accordingly, since the medical school of which the Bland-Sutton Institute forms part was not nationalised (see s. 8 of the Act), on the strict construction of the clause the Middlesex Hospital has not been nationalised. The clause, it is said, cannot

be satisfied unless and until the Middlesex Hospital as a whole has been nationalised. This construction would be an artificial one and would tend to the conclusion, for example, that, in construing a defeasance clause containing a reference to the nationalisation of the railways, the fact that the surplus lands have not been nationalised would compel the court to hold for this purpose that the railways had not been nationalised. This seems to me to be carrying the rule as to the strict construction of defeasance clauses to an absurdity.

Putting oneself in the position of the testatrix, the widow of a distinguished surgeon long associated with the Middlesex Hospital, with the knowledge that the work of the school including the institute is closely bound up with what is properly regarded as the hospital, one asks oneself what else the testatrix could possibly have meant by the words "should the Middlesex Hospital become nationalised" except the popular meaning. By cl. 10 of the will the Bland-Sutton Institute is treated separately from the hospital and is specifically referred to as *now* carried on in connection with the hospital. The word "now" is apposite to the past since, until 1914, there was no such institute, whereas the hospital itself began its life in or about 1745. Clause 11, which contained the words "should the Middlesex Hospital become nationalised," immediately follows cl. 10, and, read with it, refers expressly, therefore, to the hospital apart from the institute. The work of the hospital and the work of the institute are closely interlocked, the one providing material for the other, and the testatrix must, in her position, have been well acquainted with that fact. In her will in their context and in the surrounding circumstances the words under consideration, in my opinion, refer to the hospital in the popular sense of the word, which, incidentally, is the sense in which the hospital is defined in s. 79 of the Act of 1946. In my opinion, therefore, there is a defeasance provided the gift to the Royal College of Surgeons in cl. 11 of the will is valid.

It, therefore, becomes necessary to consider the question whether or not the Royal College of Surgeons is a charity, since it is conceded that otherwise, on the principle of *Re Bowen* (7), the gift over fails. The question has arisen in a different form in *Re Royal College of Surgeons of England* (2), a decision of the Court of Appeal, and, therefore, binding unless distinguishable for the purpose of this case. There the court had to consider whether the Royal College of Surgeons was exempt from duty under the Customs and Inland Revenue Act, 1885, s. 11. The college claimed exemption, not under sub-s. (2), on the ground that its income or property were legally appropriated and applied for charitable purposes, but under sub-s. (3), on the ground that the sums were applied for the promotion of science. In deciding this question, the court had before it evidence, fully set out in the report (4 Tax Cas. 344), which referred to the charters governing the college, the bye-laws, rules and regulations made thereunder, as well as the statutes affecting and the duties discharged by the college. The judgment of the court, consisting of A. L. SMITH, COLLINS and ROMER, L.JJ., was given, after time had been taken for consideration, by ROMER, L.J., who found that the college had two main objects, neither of which could be considered merely subsidiary to the other. He said ([1899] 1 Q.B. 877):

"The one may be shortly described as the promotion of the science of surgery. The other is the promotion and encouragement of the practice of surgery, including the promotion of the interests of those practising, or about to practise, surgery as a profession, and also including the examination of students and others to qualify for practice or honours in surgery or kindred subjects."

He had previously referred to the case of *Inland Revenue Comrs. v. Forrest* (4), a decision of the House of Lords given on the same section of the Act of 1885. He pointed out that the Institution of Civil Engineers, the society whose objects

were there discussed, was held to be exempt from duty on the ground that its main object and purpose was the promotion of science and that this institution had only one object and purpose.

- Counsel for the college sought to escape from the difficulty presented by the decision of 1899 in several ways. First, he said that the word "charity" was not mentioned in that case, which was decided on the narrow ground only
- A that the sole object of the college was not the promotion of science—in short, that the court had construed the charters with a different purpose in mind. Secondly, he said, even if the charitable purpose mentioned in s. 11 must be taken to have been considered, yet "any charitable purpose" there has a narrower meaning than "charitable purposes" in the ordinary legal sense: see *Inland Revenue Comrs. v. Scott* (10) ([1892] 2 Q.B. 165). Thirdly, he said that
- B the evidence in this case enabled the court to arrive at a conclusion different from that reached by the Court of Appeal in 1899 on the evidence then before it. In the fourth place, he said that, even accepting the construction placed on the charters of the college in the 1899 case, it was open to the court to hold that the practice of surgery was not a private or selfish object such as to be necessarily excluded from the scope of charity.
- C As to the first contention, s. 11 as a whole must be taken to have been considered by the court, since ROMER, L.J., said ([1899] 1 Q.B. 882):

" . . . it appears to us clear that such property [that is to say, property of the college] would not come within any of the exemptions from duty mentioned in s. 11 of the Customs and Inland Revenue Act, 1885."

- D This language covers "any charitable purpose" in s. 11 (2). Even if this passage could be regarded as mere *obiter dictum*, the difficulty clearly remains that in the judgment of the court the two main objects were defined in such a way that one was found to be clearly non-charitable in the legal sense, and in so far as the question depends on the construction of the charters and other matters considered in the 1899 case, the judgment must be taken as authoritative for
- E the construction given. The same answer can be given to the second contention, for the language in which the charters were construed is clearly wide enough to exclude the second main object of the college from the ambit of charitable purposes in the legal sense. In addition, I share the difficulty felt by the learned judge in understanding the distinction drawn in *Inland Revenue Comrs. v. Scott* (10), between "any charitable purpose" and charitable purposes
- F generally. Consideration of the other matters referred to in conjunction with "any charitable purpose" and the order in which the exemptions are set out in s. 11 do not give me any assistance. As to the third ground, *viz.*, the effect of the evidence, the college relies on the evidence of Lord Webb-Johnson, particularly that part of his affidavit already read by the Master of the Rolls. I am bound to say that I find nothing in later charters, bye-laws or affidavit
- G evidence to which the attention of the court has been drawn to enable a different conclusion to be reached from that of the Court of Appeal in 1899. The fourth argument must, I think, be rejected since the language of the definition of the second object in the judgment given in 1899 necessarily takes the object out of the scope of charity.

- H Being of opinion that the court ought to consider itself bound in the circumstances of this case by the opinion expressed by the court in 1899 in *Re Royal College of Surgeons of England* (2), I do not propose to examine in detail the arguments put forward to the effect that the objects of the college are solely charitable. Such an argument was successfully put forward in *Institution of Civil Engineers v. Inland Revenue Comrs.* (6), and it is said that *a fortiori* the college, which has as its main and sole object the relief of sickness, should come within the scope of the definition of a charity. This case was relied on by the learned judge, but, in my opinion, for the reasons given, the distinction between

the two societies as found by the court in the case of 1899 cannot be overlooked. In my judgment, the questions should be answered as indicated by the Master of the Rolls, with the result that, as conceded, the gift over fails and the prior gift takes effect.

Appeal and cross-appeal allowed. Costs of all parties as between solicitor and client to be paid out of the residue of the estate.

Solicitors: *Withers & Co.* (for the plaintiffs); *Wilde, Sapte & Co.* (for the second defendants); *Peake & Co.* (for the first defendants); *Treasury Solicitor.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

CORAL v. KLEYMAN.

[KING'S BENCH DIVISION (Croom-Johnson, J.), January 29, 1951.]

Gaming—Debt—Recovery of money alleged to be won on a wager—New contract—Undertaking to pay by father of loser—Promise by bookmaker not to report to Tattersalls committee—Enforceability of agreement—Consideration—Undertaking not security for gaming liability—Gaming Act, 1710 (c. 19), s. 1—Gaming Act, 1845 (c. 109), s. 18.

As a result of betting transactions with the plaintiff the defendant's son lost £355 15s., and on June 4, 1949, the defendant entered into the following written undertaking with the plaintiff: "In consideration of you not reporting my son to Tattersalls committee as a defaulter, I . . . promise to pay you the sum owing, namely, £355 15s. not later than Dec. 31, 1949." In an action by the plaintiff on the undertaking,

HELD: (i) the document was merely a device to enable to be recovered a sum of money alleged to be won on a wager in contravention of s. 18 of the Gaming Act, 1845, and, therefore, under that section the action was not maintainable.

Hill v. William Hill (Park Lane), Ltd. ([1949] 2 All E.R. 452), applied.

(ii) the sum, to the plaintiff's knowledge, not being recoverable from the defendant's son, the plaintiff's forbearance to report the son's default to Tattersalls committee was not a consideration sufficient to support the contract.

Per CROOM-JOHNSON, J.: I doubt whether the present document is a note, bill, bond, judgment, mortgage or other security or conveyance within the meaning of those words in s. 1 of the Gaming Act, 1710.

[FOR THE GAMING ACT, 1845, s. 18, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 755.]

Cases referred to:

(1) *Hill v. William Hill (Park Lane), Ltd.*, [1949] 2 All E.R. 452; [1949] A.C. 530; [1949] L.J.R. 1383; 2nd Digest Supp.

(2) *Hyams v. Stuart King*, [1908] 2 K.B. 696; 77 L.J.K.B. 794; 99 L.T. 424; 25 Digest 401, 58.

(3) *Coutts & Co. v. Browne-Lecky*, [1946] 2 All E.R. 207; [1947] K.B. 104; 115 L.J.K.B. 508; 2nd Digest Supp.

(4) *Applegarth v. Colley*, (1842), 10 M. & W. 723; 12 L.J.Ex. 34; 7 J.P. 741; 152 E.R. 663; 25 Digest 416, 203.

(5) *Woolf v. Hamilton*, [1898] 2 Q.B. 337; 67 L.J.Q.B. 917; 79 L.T. 49; 6 Digest 147, 960.

ACTION for £355 15s. alleged to be due under a contract.

The plaintiff was a bookmaker to whom the defendant's son had lost the sum claimed as a result of betting transactions. The defendant had signed an undertaking to pay the sum due not later than Dec. 31, 1949, in consideration of the plaintiff not reporting his son to Tattersalls committee. The defendant contended that his promise to pay was not enforceable under the provisions of s. 18 of the Gaming Act, 1845, and that, the sum being irrecoverable from the son, there was no consideration moving from the defendant to the plaintiff. The facts are set out in the judgment.

Weitzman for the plaintiff.

Hawser for the defendant.

B CROOM-JOHNSON, J.: By s. 18 of the Gaming Act, 1845, it is provided that

“ . . . no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager . . . ”

C Those words follow the first part of the section which makes all contracts or agreements, whether by parol or in writing, by way of gaming or wager, null and void. At one time it was thought that an agreement for some extraneous consideration or alleged consideration—as, for example, an agreement to refrain from reporting a defaulting gambler to Tattersalls committee—furnished such consideration as enabled the bookmaker or commission agent to maintain a suit to recover the amount of money from his defaulting customer, but now

D the position is made clear by the decision of the House of Lords in *Hill v. William Hill (Park Lane), Ltd.* (1).

The present action is brought to recover a sum of money alleged to be owed to the plaintiff, a bookmaker, by an erstwhile customer who had made default, but, instead of an undertaking to pay being given by the erstwhile customer himself in consideration of the bookmaker's not reporting him to Tattersalls committee, the document relied on as founding a good cause of action is signed by the customer's father, the defendant in this action. The amount involved is £355 15s. The document is dated June 4, 1949, and is as follows:

E “ In consideration of you not reporting my son to Tattersalls committee as a defaulter, I, L. Kleyman, promise to pay you the sum owing, namely

F £355 15s. not later than Dec. 31, 1949.”

I have to see whether the present action comes within the terms of the second arm of s. 18 of the Act of 1845.

The speeches of the majority of the noble Lords in *Hill v. William Hill (Park Lane), Ltd.* (1) (VISCOUNT SIMON, LORD GREENE, LORD NORMAND and LORD MACDERMOTT) contain observations which bind me and which I find

G sufficient to enable me to reach a decision on the first point involved here. The sum which is referred to in the document is not a debt, payment of which could be enforced by law against the son. A promise by him to pay it would be null and void under the first words of s. 18, as was pointed out by VISCOUNT SIMON ([1949] 2 All E.R. 462). The plaintiff, accordingly, has to establish that, by entering into an agreement with the defendant, he has escaped from

H the fact that he could not enforce payment from the son. VISCOUNT SIMON points out in the *Hill* case (1) (*ibid.*, 461 *et seq.*) that there is a distinction between the two parts of s. 18 and that the first limb did not apply to the matters there under consideration, nor does it apply, in my view, except for the purpose already indicated, to the present case.

The amount due to the plaintiff from the son was won on a wager within the meaning of the language used by VISCOUNT SIMON (*ibid.*, 462), and the following passage seems to indicate what is sought to be done:

"What happens in such a case as this is that by a new contract it is sought to transform an obligation of honour into a legal liability, and the argument against the appellant on this part of the case must be that this transformation turns money which was in the first place won on a wager into something else."

To this I must add that the new contract in the present case is stated to be made with a third party. It is clear that, stripped of *minutiae* and of all attempts artificially to say it is something which it is not, the real object of this action is to recover £355 which is not recoverable in law. VISCOUNT SIMON points out (*ibid.*, 463) that the second limb of the section is framed in terms quite different from and much wider than those of the first, and he expresses this view, which I think is sufficient for the purpose of this judgment (*ibid.*):

"... and, in my opinion, [the second limb of the section] aims at defeating the attempt to recover betting losses by such a device as the present."

I do not think that, in principle, it can make any difference whether the device is one in which the original customer is made to take a part or one to which the father of the original customer is induced to put his name. In my view, the form of the suit does not matter. The words of the section are not that no suit shall be brought to recover any sum of money, but that "no suit shall be brought or maintained ... for recovering any sum of money." I think that means for the purpose of recovering it, and I think that the purpose here was to make recoverable from the defendant that which, under s. 18, was not recoverable from the customer, the son.

It is true that in *Hill v. William Hill (Park Lane), Ltd.* (1) (*ibid.*, 468) LORD GREENE said:

"I must not be understood as suggesting that there can never be a case where a promise by a defaulting backer, given in consideration of a promise by the winner of the bet not to report the default, may be enforced. A promise in order to be obnoxious to the second branch of the section must be a promise to pay the bet, and the prohibition relates only to recovery of money or a valuable thing alleged to be lost."

With the greatest respect, I am not sure that I follow those observations. It is not the promise which has to be obnoxious. It is that the suit which is brought and maintained has to have as its object the recovery of the sum of money or valuable thing alleged to be won on a wager, and that the transaction in which that is alleged to be won was a contract or agreement which was null and void by the first part of the section. LORD GREENE goes on to say (*ibid.*, 469):

"If the loser in terms agrees (as was found by the majority in *Hyams'* case (2)): 'if you will refrain from reporting me, I promise to pay a sum of money equal to the amount of the bet which I lost to you,' I have difficulty in thinking that a tribunal of fact would regard the promise as being anything but a promise to pay the bet. It would indeed be strange if the consequences of the section could be evaded by so patent and artificial a device."

I think that that is exactly what the document in the present case is. It is a patent and artificial device adopted to try to make the sum recoverable in a court of law in contravention of the prohibition contained in the section. Accordingly, I hold that the present action is not maintainable under the second arm of the section.

A second point has been raised by counsel for the defendant who contends that here there was no consideration. He puts his argument, shortly, in the

language of the learned author of CHITTY ON CONTRACTS, 20th ed., p. 51, as follows:

"But forbearance to proceed upon a claim not only not sustainable, but known by the party forbearing not to be so, is not a good consideration; nor is forbearance in pursuance of a dishonest bargain."

- A In that connection the author cited what was at one time thought to be the law, as laid down in *Hyams v. Stuart King* (2). This is almost a statement of first principle, and I am clearly of opinion that there was no consideration for this promise, which, I think, is to abstain from reporting the non-payment of that which was not a debt at all. As a modern application of that principle, counsel cited to me a decision of OLIVER, J., in *Coutts & Co. v. Browne-Lecky* (3). That was a case of a guarantee, and counsel argued that the document in the present case was a guarantee. I am by no means convinced that it is, although the language used "not later than Dec. 31, 1949," would seem to give opportunity to the son time in which to pay, and, accordingly, if he did pay, the defendant would not have to pay. It might be that some courts would think that this was a guarantee. I think, however, that the principle is sufficiently established, whether this is a guarantee or an independent contract not in the nature of
- C a contract to pay a sum of money which the son had omitted to pay.

Finally, it was submitted on behalf of the defendant that in any event this arrangement is not enforceable because it amounts to a security for a gaming liability which the son owed to the plaintiff and by the Gaming Act, 1710, s. 1:

- D " . . . all notes bills bonds judgments mortgages or other securities or conveyances whatsoever given granted drawn or entered into or executed by any person . . . where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming or playing at cards . . . or for the reimbursing or repaying any money knowingly lent or advanced . . . shall be utterly void frustrate and of none effect to all intents and purposes whatsoever any statute law or usage to the contrary thereof in any wise
- E notwithstanding."

Horse-racing is not mentioned in terms in that section, but that Act followed an earlier statute of Charles II (16 Car. 2, c. 7) where, the word "horse-races" does appear, and, accordingly, horse-racing is to be deemed to be within the mischief of the Act of 1710. That was originally laid down in *Applegarth v.*

- F *Colley* (4), and appears to have been recognised as the law in the judgment of A. L. SMITH, L.J. ([1898] 2 Q.B. 338) in *Woolf v. Hamilton* (5). I doubt whether the present document is a note, bill, bond, judgment, mortgage or other security or conveyance, notwithstanding the *ejusdem generis* rule, and I doubt whether this document can be brought within the meaning of those words, and I, therefore, do not base my judgment on that matter. There must be judgment
- G for the defendant.

Judgment for the defendant with costs.

Solicitors: *Hart-Leverson & Co.* (for the plaintiff); *B. A. Perkoff & Co.* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

POST OFFICE *v.* OFFICIAL SOLICITOR.

[KING'S BENCH DIVISION (Barry, J.), January 29, 30, 1951.]

Workmen's Compensation—Indemnity to employer by third party causing injury—Death of third party—Claim against estate—Workmen's Compensation Act, 1925 (c. 84), s. 30 (2)—Law Reform (Miscellaneous Provisions) Act, 1934 (c. 41), s. 1 (3), (4).

In 1933 a postman, while riding his bicycle in the course of his duties, was knocked down and injured through the negligence of the driver of a motor car. His employers recovered from the driver at common law a sum for loss of services. In 1944 the driver died intestate. In 1947 the postman, on his retirement, claimed compensation in respect of a permanent disability resulting from the accident and this was paid by his employers. On a claim by the employers under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, against the Official Solicitor, as administrator of the deceased driver's estate, for indemnity under s. 30 (2) of the Workmen's Compensation Act, 1925,

HELD: (i) when they became liable to pay compensation in 1947, "damage" within the meaning of s. 1 (4) of the Act of 1934 was suffered by the employers by reason of the act or omission of the driver while alive, for which a cause of action did not arise until after his death and which then became subsisting against his estate under the provisions of s. 1 (1).

(ii) the fact that damage had been suffered by the employers before the driver's death giving rise to a claim for the loss of the postman's services at common law, did not prejudice their right to an indemnity, which was a separate cause of action arising after the driver's death.

(iii) although the employers' right to claim an indemnity under s. 30 (2) depended on the postman having a good cause of action against the driver, once that right was established the question whether the employers' claim was to succeed must be considered in the light of the facts affecting the employers, and, although the postman could not show that he had suffered damage after the death of the driver so as to bring him within s. 1 (4), the employers could, and, therefore, they were entitled to recover an indemnity against the driver's estate.

(iv) on the true construction of s. 30 (2) of the Workmen's Compensation Act, 1925, the claim to indemnity was not a claim in tort within s. 1 (3) of the Act of 1934, and, therefore, the employers' right to recover was not subject to the limitations expressed in s. 1 (3) (b).

[FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) ACT, 1934, s. 1 (1), (4), see HALSBURY'S STATUTES, Second Edn., Vol. 9, pp. 792, 793.]

Cases referred to:

- (1) *Tuckwood v. Rotherham Corpn.*, [1921] 1 K.B. 526; 90 L.J.K.B. 341; 124 L.T. 522; 85 J.P. 101; 13 B.W.C.C. 327; 34 Digest 497, 4104.
- (2) *Cory & Son, Ltd. v. France, Fenwick & Co., Ltd.*, [1911] 1 K.B. 114; 80 L.J.K.B. 341; 103 L.T. 649; 34 Digest 496, 4094.

ACTION under the Workmen's Compensation Act, 1925, s. 30 (2) by the plaintiff, the Post Office, against the defendant, the Official Solicitor, for an indemnity in respect of compensation paid to an employee.

The plaintiff was the late employer of a postman, to whom it had granted, on his retirement in 1947, compensation and a supplementary allowance in respect of a permanent disability resulting from an injury suffered in the course of his employment in 1933. The injury had been caused by the negligence of one, Harrison, the driver of a motor car, who had died in 1944. The action was brought under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 1, against the defendant, as administrator of Harrison's estate, to recover an indemnity for the compensation paid. For the plaintiff it was contended

- that the cause of action was to be deemed to be subsisting at the date of Harrison's death by virtue of s. 1 (4) of the Act of 1934, and, accordingly, that there was a right of action against the defendant under s. 1 (1). The defendant contended (i) that the payment of compensation was not covered by the words "where damage has been suffered" in s. 1 (4) and that the plaintiff had suffered damage before Harrison's death in the loss of the postman's services for five months at the time of the accident and so was debarred from claiming under the section; A (ii) that the plaintiff, when invoking s. 1 (4), must show that the postman had a right of action for damages against the defendant and that that right, if any, arose before Harrison's death, whereas s. 1 (4) required the cause of action to have arisen after the death; (iii) that the claim for an indemnity for compensation under the Workmen's Compensation Act, 1925, s. 30, was a "cause of action in tort" within s. 1 (3) of the Act of 1934 and so subject to the limitations B expressed in s. 1 (3) (b).

Winn (I. S. Warren with him) for the plaintiff.

A. S. Diamond for the defendant.

- BARRY, J.:** The plaintiff seeks to be indemnified by the defendant under s. 30 (2) of the Workmen's Compensation Act, 1925, in respect of certain payments of compensation and supplementary allowance which were made by it C under the Workmen's Compensation Acts to a Mr. John Atkinson, who was injured as the result of a collision with a motor car driven by the late Mr. Ronald Gaitskell Harrison. Mr. Harrison died intestate on Sept. 6, 1944, and on June 24, 1949, the defendant was granted letters of administration for the purpose of defending these proceedings.

- D Prior to his retirement in 1947 Mr. Atkinson was employed by the plaintiff as a postman at Bootle. On Nov. 2, 1933, he was riding his bicycle in the course of his duties as a postman and was involved in a collision with a motor car driven by the deceased, Mr. Harrison. Mr. Atkinson sustained a Pott's fracture of the left leg, and was away from work until, approximately, Mar. 23, 1934. Mr. Atkinson himself made no claim at common law against Mr. Harrison, E but he was paid compensation by the plaintiff under the Workmen's Compensation Acts. No question now arises as to these payments as the plaintiff made a claim against Mr. Harrison for loss of Mr. Atkinson's services, and any right to indemnity which it might have had in respect of its payments of workmen's compensation was merged in and satisfied by the ultimate settlement of the claim for loss of services at common law. When he returned to work F in March, 1934, Mr. Atkinson had not entirely recovered from the effects of his accident, and he was admittedly left with a permanent limp. Despite this disability, he continued to serve the plaintiff as a postman until he retired in February, 1947, when he claimed compensation, and his disability was assessed at twenty-five per cent. The plaintiff did not dispute Mr. Atkinson's claim, and it has continued to pay him compensation and supplementary G allowance at the appropriate rate as from Feb. 17, 1947. The total amount thus paid by the plaintiff to Mr. Atkinson up to the date of the writ in this action amounted to £105 18s. 4d. It is admitted that Mr. Atkinson's claim under the Workmen's Compensation Acts was a good one, and that the payments of compensation and supplementary allowance made by the plaintiff to him were properly made.

- H The only issues which now fall to be decided are whether the accident to Mr. Atkinson was solely caused by the negligence of the late Mr. Harrison, and, if so, whether the plaintiff's right to indemnity under s. 30 (2) of the Workmen's Compensation Act, 1925, can be enforced against Mr. Harrison's estate by virtue of the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934.

Section 1 (3) of the Act of 1934 makes certain special provisions as to actions founded in tort, and a subsidiary point arises whether or not the plaintiff's

claim in the present action can be properly so described. The operation of s. 30 (2) of the Workmen's Compensation Act, 1925, under which the plaintiff brings this claim, is admittedly confined to cases in which the workman's injury was caused in circumstances which raised a legal liability in some person other than the employer to pay damages in respect of those injuries. The defendant contends that this fundamental condition has not been satisfied in the present case. Counsel for the plaintiff conceded that proof of contributory negligence on the part of Mr. Atkinson would wholly defeat the plaintiff's claim. Therefore, I first have to consider the facts of this accident, which took place so long ago.

[His LORDSHIP reviewed the evidence, found that the accident to Mr. Atkinson was caused by the negligence of Mr. Harrison, and that there was no contributory negligence on Mr. Atkinson's part, and continued:] In these circumstances, it becomes necessary to consider whether the plaintiff can enforce a claim to indemnity under s. 30 (2) of the Workmen's Compensation Act, 1925, against the estate of the late Mr. Harrison. Section 30 provides:

"Where the injury for which compensation is payable under this Act, or any scheme certified under this Act, was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—(1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act or such scheme for such compensation, but shall not be entitled to recover both damages and compensation; and (2) If the workman has recovered compensation under this Act or such scheme, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under s. 6 of this Act relating to liability in case of workmen employed by contractors, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act."

If Mr. Harrison was still alive there would be no doubt that, in the circumstances which I have found, the plaintiff would be entitled to be indemnified by him in respect of the payments of compensation which it has made to Mr. Atkinson. Since Mr. Harrison is not alive it is clear that, but for the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiff could not recover an indemnity against Mr. Harrison's estate under s. 30 (2) of the Workmen's Compensation Act, 1925.

Section 1 of the Act of 1934 provides:

"(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate . . . (4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

It is common ground between the parties that each payment of compensation made by an employer gives the right to a new and separate cause of action for an indemnity under s. 30 (2) of the Workmen's Compensation Act, 1925, and it is also common ground that the cause of action for an indemnity does not arise until a payment of compensation has, in fact, been made. In applying those admitted principles to the construction of s. 1 of the Act of 1934, counsel for the defendant has made a number of points. He first submitted—and, I

think, rightly submitted—that under the wording of sub-s. (1) the plaintiff cannot recover against Mr. Harrison's estate because, at the date of his death there was no cause of action subsisting against him, as, ignoring the earlier payments in 1933, no payment of compensation had then been made. Counsel for the plaintiff did not contend that on the wording of sub-s. (1), if it stood alone, the plaintiff would be entitled to recover against Mr. Harrison's estate, but

A he submitted that sub-s. (1) must be read in conjunction with sub-s. (4), which gives a wide, and, indeed, artificial, interpretation to the word "subsisting." Counsel contends that the plaintiff's claim was subsisting in the sense referred to in sub-s. (4) at the date of Mr. Harrison's death, and that the circumstances of this case fall entirely within the wording of that sub-section.

Prima facie, there can be no doubt, to my mind, that they do, but counsel

B for the defendant has submitted that the plaintiff cannot avail itself of sub-s. (4) because the payment of compensation for which it now seeks indemnity cannot properly be described by the words "where damage has been suffered." Alternatively, he says that the plaintiff does not fall within the provisions of sub-s. (4), because it had, in fact, suffered damage as a result of the act or omission complained of before the death of the deceased, in that it had lost the

C services of Mr. Atkinson and was, at common law, entitled to damages in respect of that loss. I am unable to accept these arguments. It is true that the payment of compensation cannot be regarded as damage in the legal sense, nor, in my view, can the right to indemnity for such payment under s. 30 (2) of the Workmen's Compensation Act, 1925, but, to my mind, the word "damage" in sub-s. (4) is used in the sense of injury—damage or other injury resulting

D from the act or omission of the deceased person. In my view, when the plaintiff was compelled to make these payments of compensation to Mr. Atkinson, it did suffer damage as a result of the act or omission of the late Mr. Harrison, and, in my judgment, this is one of those cases which was within the minds of the legislature when sub-s. (4) was enacted. This is a case where the act or omission takes place and does not at first cause any injury or damage.

E Until it does, no cause of action arises. Then, after the death of the deceased, injury or damage occurs, and sub-s. (4) operates, and its wording makes it plain that the cause of action then becomes notionally subsisting against the deceased under the provisions of sub-s. (1).

As to the alternative argument of counsel for the defendant that the plaintiff has already suffered damage owing to the loss of Mr. Atkinson's services, and,

F therefore, cannot bring its claim within the provisions of sub-s. (4), I think the short answer is that an act or omission may give rise to two entirely separate causes of action. Here it gave rise to a common law claim by the plaintiff against Mr. Harrison in respect of the loss of Mr. Atkinson's services, but it is not in respect of that claim that the present action is brought. It also gave to the plaintiff a contingent right to indemnity under s. 30 (2) of the Act of

G 1925. It is in respect of that right to indemnity that it now brings its claim, and as regards that right of action, no damage had been suffered and no right of action could have been established until after Mr. Harrison's death. In these circumstances, it seems to me that the facts of this case are wholly covered by s. 1 (4) of the Act of 1934.

Counsel for the defendant submitted a further argument which was, I think,

H based on a misconception as to the true meaning of certain authorities to which I shall presently refer. Those authorities establish that in an action of this kind the plaintiff must show that the workman would have had a right of action for damages against the defendant, or, to put it in another way, that the test of the employer's right to indemnity is whether the workman would have a good cause of action against the defendant. Counsel has suggested that the position of the workman must be regarded when s. 1 (4) of the Act of 1934 falls to be construed, and if one looks, he says,

at the position of this workman, he could not have brought himself within sub-s. (4) because he suffered damage long before Mr. Harrison's death. The difficulty I feel in relation to that argument is that, if the position of the workman, and not that of the employer, has to be considered when construing s. 1 of the Act of 1934, I fail to understand why it must only be considered in relation to sub-s. (4) of that section. If the position of the workman is the only material fact and the employer stands wholly in the workman's shoes, it seems to me that counsel's argument, when carried to its logical conclusion, would bring the employer within the provisions of sub-s. (1), and none of the difficulties which might arise under sub-s. (4) would then arise. Be that as it may, I am satisfied that the whole of this argument is unsupported by authority. I do not think that the authorities establish that in a claim of this kind the employer stands, for all purposes, in the shoes of the injured workman. The employer has, in the first place, to show that he is eligible to make a claim for indemnity under s. 30 (2) of the Workmen's Compensation Act, 1925. To be so eligible, it is necessary for him to show that, in so far as the accident is concerned, the workman would have had a good cause of action against the defendant in respect of injuries caused by him. That is a *sine qua non*. Unless that situation can be established, the employer is wholly unable to bring himself within the provisions of s. 30, and it is in relation to the eligibility of the employer to make a claim that the Court of Appeal have said more than once that the true test is: Would the workman have a good cause of action against the defendant? That test, in my judgment, must be applied to the events of the accident itself. An employer cannot recover an indemnity unless the workman can show that the accident was due to the negligence of the person against whom the indemnity is being sought. If that person was not negligent, the workman could not recover against him. If that person was negligent, but the workman was also negligent, the workman, at the date when this accident occurred, could not have recovered against that person. Other types of defence, such as *volenti non fit injuria*, might be available to the person who caused the injuries to the workman, and if such a defence were available, the workman could not recover, and the employer could not seek an indemnity. It is in relation to those circumstances that the decisions of the Court of Appeal, in my judgment, apply. Once the eligibility of the employer to make a claim for indemnity has been established, the question whether such a claim is to succeed must, in my judgment, be considered in the light of the facts and circumstances affecting the employer himself.

I think that this principle emerges clearly from two of the authorities which have been cited to me by counsel for the defendant. In *Tuckwood v. Rotherham Corpn.* (1) it was held that the Public Authorities Protection Act, 1893, did not apply so as to defeat an employer's claim to indemnity under s. 6 (2) of the Workmen's Compensation Act, 1906, which corresponded with s. 30 (2) of the Act of 1925. If, in truth, the employers' rights were to be judged wholly in the light of the circumstances which would have affected the workman, had the workman been attempting to enforce a common law claim for damages against the defendant at the date when the plaintiff brought its claim for indemnity, a plea under the Public Authorities Protection Act, 1893, being then available to the defendant against the workman, should have defeated the plaintiff's claim. Taking the reverse position, defences are sometimes available against the employers which would not be available against the workman. This is shown by another case cited by counsel for the defendant, *Cory & Son, Ltd. v. France, Fenwick & Co., Ltd.* (2). In that case it was held that the accident, as a result of which the workman was injured, was caused by the combined negligence of the employers and of the person against whom the employers were seeking an indemnity. It was held that, in those circumstances, the indemnity could not be recovered, because a

defence was open to the person causing the injury as against the employers, which clearly would not have been open to him as against the workman. In my judgment, therefore, the authorities cited do not establish the proposition for which the defendant contends. In making a claim for indemnity under s. 30 of the Workmen's Compensation Act, 1925, an employer is not to be regarded as wholly in the same position as that in which the workman would have been if he had commenced an action for damages against the defendant at the date on which the employer issued his writ. The success or failure of the employer's claim will depend on the circumstances affecting him at the time when the action is brought, but his claim cannot succeed unless the circumstances in which the workman's injuries were caused were such as would have given the workman a good cause of action for damages against the defendant immediately after the injuries had been inflicted.

In these circumstances, I am satisfied that s. 1 (1) of the Act of 1934 applies to the present case, and that the plaintiff is entitled to recover an indemnity in respect of the payments of compensation which it made to Mr. Atkinson. Whether or not it can recover the whole of the payments which it has made depends on the true construction of s. 30 (2) of the Workmen's Compensation Act, 1925. Does a claim under that section to indemnity in respect of payments of compensation made to a workman amount to a claim in tort? If it does, under s. 1 (3) (b) the amount of indemnity which the plaintiff can recover in the present case is somewhat restricted, as it would be unable to make any claim in respect of payments of compensation made after Dec. 24, 1949. I do not propose to discuss this subsidiary matter in any detail. I think it is sufficient for me to say that, in my view, a claim of this description is clearly not a claim in tort. It is a claim for indemnity, payable under the provisions of a statute, and is in no sense an action founded in tort. I find that the plaintiff is entitled to recover the compensation it paid to Mr. Atkinson up to the date of the writ, which is £105 18s. 4d., and that it is entitled to a declaration that it shall be indemnified against any subsequent payments made by it up to Sept. 6, 1950, which, by reason of the Limitation Act, 1939, s. 2 (1) (a), is the last date on which it is entitled to claim, being six years from the date on which the plaintiff's cause of action accrued.

Judgment for the plaintiff with costs.

Solicitors: *Sir Clement Thornton Hallam, Solicitor of the Post Office* (for the plaintiff); *Dennes & Co.* (for the defendant).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Re WHITE'S WILL TRUSTS. TINDALL *v.* BOARD OF GOVERNORS OF THE UNITED SHEFFIELD HOSPITALS AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 6, 1951.]

Charity—Benefit to the community—Establishment of home of rest for nurses of institution.

National Health Service—Hospital—Legacy to hospital—“Specific purpose of hospital”—Payment to board of governors—Gift to infirmary “for the purposes of a home of rest for the nurses”—National Health Service Act, 1946 (c. 81), s. 60 (1) (2).

By his will, dated June 25, 1919, a testator, who died on Aug. 8, 1920, gave his residuary estate to be held in trust for his wife during her life, and subject thereto “in trust for the Royal Infirmary, Sheffield, to be applied . . . for the purposes of a home of rest for the nurses of that institution and I desire that after the death of my said wife my . . . residuary estate shall be transferred to the said infirmary or as the same shall direct and that the capital moneys of the said estate be invested by the said infirmary and the income thereof applied as aforesaid in perpetuity.” On Mar. 19, 1949, the testator’s widow died. On the question of the validity of the ultimate residuary bequest,

HELD: (i) the purpose of the gift was to increase the efficiency as a hospital for the healing of the sick of the Royal Infirmary by providing a means of restoring the efficiency of the nurses in the performance of their duties, and, therefore, the gift was charitable.

(ii) on the true construction of the National Health Service Act, 1946, s. 60 (1), as interpreted by s. 79 (2) thereof, the bequest to the infirmary (which was one of a group of hospitals designated a teaching hospital under s. 11 (8) of the Act) fell within its terms because the will required the trustees in the future to apply the trust property for a specific purpose of the infirmary, and, therefore, the residuary estate must be paid over to the board of governors of the group, and, having regard to s. 60 (2), the funds must be applied by the board so far as practicable on the trusts declared in relation thereto by the will.

[AS TO GIFTS FOR PUBLIC PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 122-127, paras. 161-168; and FOR CASES, see DIGEST, Vol. 8, pp. 245, 259, 260, Nos. 40-50, 209-217.]

Cases referred to:

- (1) *Re Estlin*, (1903), 72 L.J.Ch. 687; 89 L.T. 88; 8 Digest 245, 45.
- (2) *Re James*, [1932] 2 Ch. 25; 101 L.J.Ch. 265; 146 L.T. 528; Digest Supp.
- (3) *Re Chaplin*, [1933] Ch. 115; 102 L.J.Ch. 56; 148 L.T. 190; Digest Supp.
- (4) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, 28.
- (5) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of John Sinclair White, deceased, and in the events which had happened, a gift “in trust for the Royal Infirmary, Sheffield, to be applied . . . for the purposes of a home of rest for the nurses of that institution” was a valid charitable bequest, and whether, if so, having regard to the National Health Service Act, 1946, s. 60, the property bequeathed ought to be transferred to the board of governors of the United Sheffield Hospitals.

Winterbotham for the plaintiff, the sole surviving trustee of the will.

J. D. D. Divine for the first defendants, the board of governors of the United Sheffield Hospitals.

D. S. Chetwood for the second and third defendants, interested in any part of the testator's estate undisposed of by his will.

N. S. S. Warren (*Denys B. Buckley* with him) for the Attorney-General.

HARMAN, J.: The testator died in 1920 and he left his residuary estate to his wife for her life. The interest expectant on his wife's death has just fallen into possession. The residuary legatee was the Royal Infirmary, Sheffield.

A In 1920 the Royal Infirmary, Sheffield, was an unincorporated institution carrying on a voluntary hospital, which it had so carried on since 1797. There was another hospital in Sheffield which had been carried on since 1832. The two were amalgamated and incorporated by the Royal Sheffield Infirmary and Hospital Act, 1938 (1 & 2 Geo. 6, c. xxiv), and together called the Royal Sheffield Infirmary and Hospital, and s. 14 of that Act provided that a gift to either
B of the constituent hospitals should take effect as a gift to the new corporation. Under the National Health Service Act, 1946, the corporate body, the Royal Sheffield Infirmary and Hospital, was constituted a member of a group of hospitals, and, under s. 11 (8), was designated a teaching hospital, carried on by, and vested in, the board of governors of the United Sheffield Hospitals.

C By cl. 11 of his will, subject to his wife's interest, the testator left his residuary estate (which is about £27,000)

“in trust for the Royal Infirmary, Sheffield, to be applied by them for the purposes of a home of rest for the nurses of that institution and I desire that after the death of my said wife my said residuary estate shall be transferred to the said infirmary or as the same shall direct and that the capital
D moneys of the said estate be invested by the said infirmary and the income thereof applied as aforesaid in perpetuity.”

The testator's residuary estate was intended, therefore, to form an endowment fund to maintain what he calls “a home of rest for the nurses of that institution.”

E The first question is: Is that a charitable gift? I was inclined to think that *prima facie* it was. I was referred to three cases in which homes of rest of various
F sorts have been held to be charitable. In the first of them, *Re Estlin* (1), there was, according to the headnote, a gift for the support of a “home of rest for lady teachers,” and KEKEWICH, J., came to the conclusion that there was what he called a distinct charity in providing a home for anyone who needs a home. He says that, the persons whom it was intended to benefit being female teachers in need of rest, the purpose was charitable; and I think he came to
G that conclusion because he considered that that object was conducive to the spread of education, although it is not very easy to see, with all deference to the learned judge, what exactly he meant. In 1932 the matter came before SIR CHRISTOPHER FARWELL, J., in a rather different form in *Re James* (2). In that case there was a house and a fund given to establish a home of rest for three classes of persons, the first being the sisters of the Community of the
H Epiphany at Truro, the second, the clergy of the diocese of Truro; and the third, such persons as the mother superior of the Community should nominate. The learned judge said that, in his opinion, the three words “home of rest” *prima facie* suggest a charitable object. Of course, one could imagine a home of rest which would not be such. A home of rest for millionaires I cannot think, and I do not think the learned judge thought, would be a charity. I do not think the term “home of rest” connotes that the home is only to be for persons who are old or worn out and so in need permanently of rest. It suggests rather to my mind a convalescent home to which persons ordinarily actively employed in their various pursuits are enabled temporarily to retire. The learned judge, having found that the provision of a home of rest was, *prima facie*, a charitable object, came to the conclusion that, as the objects of the gift were themselves doing charitable work or were objects of charity, the gift was a good one. The sisters of the

Home of the Epiphany were carrying on, as he said, a charitable work, the clergy of the diocese were objects of charity in the sense of the furtherance of religion, and the persons to be nominated by the mother superior were held by the learned judge to be a class limited to persons being objects of charity who were so nominated. He said that, so confined, there could be no objection to the gift on the ground that it was not a charity.

Thirdly, in *Re Chaplin* (3), MAUGHAM, J., considered the words

"to provide a home of rest that shall afford a means of physical and/or mental recuperation to persons in need of rest by reason of the stress and strain caused or partly caused by the conditions in which they ordinarily live and/or work."

The learned judge found that he could not distinguish *Re James* (2), but he thought *Re Chaplin* (3) was a stronger case because the object there was in the nature of a hospital. The true object of the home was to provide for the relief of sickness, and, therefore, was a charitable object in that sense.

It is submitted to me that the present case is distinguishable because this is not a general bequest for a home of rest for hospital nurses, nor is this a home for poor or worn out hospital nurses, but it is an amenity to be provided for the servants of a certain employer, viz., the Royal Infirmary, Sheffield, and that those persons, being merely employees of that employer, are no more the objects of charity as such than were the employees of the firm in *Re Drummond* (4) or the relations of the lady in *Re Compton* (5). It is said, therefore, that this is not a charity because it lacks the element of public benefit which is essential to validate a charitable gift. If one considers only the nurses, I think there is a great deal of force in that view. If, however, one considers the hospital, it seems to me to lose its force. This is really a gift to increase the efficiency of the Royal Infirmary at Sheffield. Nobody doubts that that institution is a charity carrying on the charitable work of healing the sick, and nobody doubts, I think, that to make a gift which will increase its efficiency, whether it be the provision of an X-ray machine or a bed in the hospital or this present kind of aid, viz., the provision of a place where the nurses can be healed and brought back to efficiency in their duties, must conduce to the efficiency of the hospital. It is said, and it weighed with me rather, that this hospital has never had such a help, but it has managed ever since 1797 without a home of rest for its nurses, and, therefore, there is no evidence that such a home is an essential, or, indeed, a necessary or a reasonably necessary, part of the hospital. I think it would be wrong to shut my eyes to the obvious benefit of such a home where nurses can go and recover from the dreadful strains of their life, quickly and in pleasant surroundings. Consequently, I think it is a good charity because it is conducive to the work of the hospital, and the immediate objects of it, the nurses, are themselves ministering to the relief of sickness and so to a charitable purpose. By virtue of the gift the work of the hospital will be enhanced in its efficiency and that makes the gift a good one.

[HIS LORDSHIP heard further argument.]

HARMAN, J.: Having decided that this gift is charitable, the question arises whether it should be paid over to the first defendants, the board of governors of the group of hospitals of which the Royal Infirmary, Sheffield, is one, or whether it fails because it is impracticable, or whether, if it is not impracticable and it should be paid to the first defendants, there ought to be some scheme for the regulation of the charitable object indicated. As to impracticability, it is for the next of kin to show that, and I think it is manifestly true to say that they have not shown it.

The property the subject of this gift does not come within the National Health Service Act, 1946, s. 7, because in 1946 there was a life interest still subsisting. Section 60 (1) of the Act provides that where property, other than

property transferred under s. 6 or s. 7 of the Act, is held on trust immediately before the appointed day (July 5, 1948)

“and the terms of the trust instrument authorise or require the trustees, whether immediately or in the future, to apply any part of the capital or income of the trust property for the purposes of any hospital to which s. 6 of this Act applies, the trust instrument shall be construed as authorising or, as the case may be, requiring the trustees to apply the trust property, to the like extent and at the like times, for the purpose of making payments, whether of capital or income—(a) in the case of a hospital designated as a teaching hospital or included in a group of hospitals so designated, to the board of governors of that teaching hospital . . .”

- A Having regard to s. 79 (2), for the words “for the purposes of any hospital,”
- B I must read “for any specific purpose of any hospital to which the Act applies.” In my judgment, this gift comes exactly within the words of s. 60 (1), because the terms of this trust instrument do require the trustees in the future to apply the capital for one of the purposes of the hospital. That purpose is the provision of a home of rest for the nurses. It is true that at the time of the bequest and at the time of the vesting under the Act and up till the present moment there
- C is no such home of rest for nurses. Nevertheless, it is within the powers of this hospital to have such a home. It has been pointed out to me that, under s. 58 of the Act, there is power in the Minister to acquire land for residential purposes for employees of a hospital. Quite apart from that, it seems to me that this is a specific purpose of the hospital within s. 60 (1) as interpreted by s. 79 (2). Therefore, it would be right, this being one of a group designated as a teaching
- D hospital, to pay the money to the board of governors of that teaching hospital, who are the first defendants in this case.

- What follows from that? The will directs that the capital shall be transferred to the said infirmary and that the capital moneys shall be invested by the infirmary and the income thereof applied as aforesaid in perpetuity, *i.e.*, for the purposes of a home of rest for the nurses of that institution. Under s. 60 (2)
- E of the Act any sum paid as aforesaid to any such board shall, so far as practicable, be applied by them for the purposes specified in the trust instrument. Therefore, the board to whom the capital of this fund should be paid are bound to retain it and apply it for the purpose declared by cl. 11 of the will so far as practicable—that is to say, in perpetuity for the purposes of a home of rest for nurses of the Royal Infirmary, Sheffield. That hospital, notwithstanding
- F that it is now grouped with others, will have priority. No doubt, the words “so far as practicable” would allow the board to put nurses from the other hospitals in the group into the home if there were room. I propose, therefore, to direct the trustee of the will to hand over the fund to the first defendants to be held by them, so far as practicable, on the trusts declared concerning the same by cl. 11 of the will. Only so far as it is not practicable to do so is the
- G property usable for the general purposes of the group.

Order accordingly. Costs of all parties as between solicitor and client to be raised and paid out of the estate in due course of administration.

Solicitors: *Sharpe, Pritchard & Co.* (for the plaintiff); *Vizard, Oldham, Crowder & Cash* (for the first defendants); *Robertson, Martin & Co.* (for the second and third defendants); *Treasury Solicitor.*

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

MINISTRY OF NATIONAL INSURANCE *v.* BARRS.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), February 6, 7, 1951.]

National Insurance—Contributions—Recovery—Debt due to Crown—Arrears payable under National Health Insurance Act, 1936—National Insurance Act, 1946 (c. 67), s. 54 (1), s. 66 (1) (a).

By the National Health Insurance Act, 1936, s. 140 (1), it was provided that contributions under the Act should be paid into the National Health Insurance Fund, and by s. 144 (1) provision was made for a certain proportion of these contributions to be retained by the Minister to be paid, *inter alia*, into a Central Fund and to an Unemployment Arrears Fund. By s. 173 (1), where an employer had failed to pay a contribution for which he was liable, the amount payable became a debt due from him to the Minister recoverable summarily as a civil debt. On the coming into operation of the National Insurance Act, 1946, the Act of 1936 was repealed, the National Insurance Fund was established, and into it all contributions under the new Act were payable. By s. 66 (1) it is provided: "... on the appointed day [July 5, 1948] the following assets, that is to say—(a) all sums standing to the credit of and other assets of the funds mentioned in sched. X to this Act . . . shall in so far as they are determined in accordance with directions of the Treasury to be of a revenue nature become assets of the National Insurance Fund . . ." Schedule X refers to the National Health Insurance Fund, the Central Fund and the Unemployment Arrears Fund. By directions of the Treasury, dated July 14, 1949, sums due from debtors of the funds mentioned in sched. X, and all other sums due which would otherwise have been payable to these funds were determined to be of a revenue nature. Section 54 (1) provides that all sums due to the National Insurance Fund are recoverable as debts due to the Crown.

On a claim by the Ministry of National Insurance against the defendant in the county court for arrears of contributions payable under the Act of 1936, amounting to £18 14s. 9d., it was contended by the defendant that those arrears were not "assets of the funds" within the meaning of s. 66 (1), since under the Act of 1936 they were debts due to the Minister and not to the National Health Insurance Fund, and because a certain proportion was retained by him and apportioned to other funds.

HELD: the right to recover arrears was an asset of the National Health Insurance Fund within the meaning of s. 66 (1) (a); sums due to the fund had been determined to be of a revenue nature and so had become assets of the National Insurance Fund; and, therefore, under s. 54 (1), they were recoverable as a debt due to the Crown—in the present case in the county court.

[FOR THE NATIONAL HEALTH INSURANCE ACT, 1936, s. 140 (1), s. 144 (1) and s. 173 (1), see HALSBURY'S STATUTES, Vol. 29, pp. 1151, 1153, 1174; and FOR THE NATIONAL INSURANCE ACT, 1946, s. 35 (1), s. 54 (1) and s. 66 (1), see *ibid.*, Second Edn., Vol. 16, pp. 719, 735, 747.]

APPEAL by the defendant from an order of JUDGE DAYNES, K.C., at High Wycombe County Court, dated Oct. 19, 1950, whereby he held that the Ministry of National Insurance were entitled to recover from the defendant under the provisions of the National Insurance Act, 1946, arrears of unpaid contributions payable under the National Health Insurance Acts, 1936 to 1941.

C. Lawson for the defendant.

J. P. Ashworth for the Ministry.

SOMERVELL, L.J.: In this case I have come to the conclusion that the appeal must be dismissed, but for a different reason from that given by the

county court judge. The claim was by the Ministry of National Insurance against the defendant, Mrs. Barrs, for arrears of contributions payable under the National Health Insurance Acts, 1936 to 1941, in respect of Doris Irene Evans who was employed by the defendant during the relevant period. The contributions claimed amount to £18 14s. 9d.

A The point argued below and before us is that there was no jurisdiction to prosecute this claim in the county court. The learned county court judge held that there was. To understand the issue, it is necessary to look, first, at the National Health Insurance Act, 1936. That Act provided for rates of contributions by employers and employees and certain moneys voted by Parliament. Liability was on the employer to pay both contributions in the first instance, recovering the employee's contribution by deduction from his wages. Contributions were to be paid weekly or at other prescribed intervals. There was power to make regulations which brought into operation the procedure by which contributions were collected through stamps which were bought and fixed to a card. The first provision which I propose to consider is s. 140 (1). The heading is "Constitution of National Health Insurance Fund" and the sub-section provides:

C "Subject to the provisions of this Act, all sums received in respect of contributions under this Act, and all sums paid out of moneys provided by Parliament in respect of benefits and the expenses of the administration of benefits, shall be paid into a fund called 'the National Health Insurance Fund,' which shall be under the control and management of the Minister."

Section 144, which is relied on by both sides, provides:

D " (1) Out of each weekly contribution paid by or in respect of an insured person who is a member of an approved society, of the Deposit Contributors Insurance Section or of the Navy, Army and Air Force Insurance Fund, there shall be retained by the Minister [certain sums] . . . (2) Out of the sums retained by the Minister under the last preceding sub-section—
E (a) seventeen-twentieths of a penny in the case of a man and eleven-twentieths of a penny in the case of a woman shall be periodically apportioned by the Minister in the National Health Insurance Fund among approved societies . . . "

A further fraction is to be carried to the Central Fund and the Unemployment Arrears Fund. The importance of that will become apparent when I deal with

F the National Insurance Act, 1946. Section 173 (1) provides:

G "Where an employer has failed or neglected to pay any contribution which under this Act he is liable to pay in respect of any person, the amount which he has so failed or neglected to pay shall be a debt due from him to the Minister and may be recovered by the Minister summarily as a civil debt, if proceedings for the purpose are instituted within three years from the date when the contribution becomes due."

Section 175 provides that the inspector or other official appointed for the purpose may be authorised to take proceedings for the recovery of contributions from an employer summarily as a civil debt. Counsel for the defendant submitted that that was the only method by which arrears of contributions could
H be recovered, and that the Crown could not at that time have issued an information in the High Court. On the view I take of the relevant sections of the National Insurance Act, 1946, it is not necessary to decide this question.

Counsel for the defendant emphasises that under this general statutory scheme contributions do not go straight into the National Health Insurance Fund. They are not described as debts due to the fund, nor are they recoverable on behalf of the fund. They are stated to be recoverable by the Minister and to be regarded as a debt due to the Minister. There is, as it were, in between the

person in arrears and the fund, the Minister who, on the scheme of the section I have read, is to retain certain sums and apportion them in a certain way. Part III of the Act of 1946 is headed "Finance, Administration and Legal Proceedings." Section 35 (1) provides:

"For the purposes of this Act, there shall be established, under the control and management of the Minister, a fund called 'the National Insurance Fund,' into which shall be paid all contributions payable under this Act by employers and insured persons and out of moneys provided by Parliament, and out of which shall be paid all claims for benefit."

That is directed to future contributions to be paid under this Act which came into force on July 5, 1948. Section 36 (1) provides:

"For the purposes of this Act, there shall be established, under the control and management of the Minister, a fund called 'the National Insurance (Reserve) Fund,' to which shall be carried all such assets held for the purposes of the enactments repealed by this Act as are by this Act directed to be held on behalf of the said Fund, and which shall be maintained as a reserve for the National Insurance Fund."

There are, therefore, two funds set up, the National Insurance Fund and the National Insurance (Reserve) Fund. Section 66, on the construction and application of which the present issue depends, provides:

"(1) Subject to the following provisions of this Act, on the appointed day the following assets, that is to say—(a) all sums standing to the credit of and other assets of the funds mentioned in sched. X to this Act (being funds established under or for the purposes of such of the enactments repealed by this Act as are mentioned in the second column of that schedule) . . . shall in so far as they are determined in accordance with directions of the Treasury to be of a revenue nature become assets of the National Insurance Fund, and in so far as they are determined as aforesaid to be of a capital nature become assets of the National Insurance (Reserve) Fund . . . (2) Subject as aforesaid, any liabilities accrued on or accruing after the appointed day to which the assets mentioned in the foregoing subsection would have been applicable but for this Act shall be liabilities of the National Insurance Fund."

The question is whether these arrears are covered by the words "other assets of the funds mentioned in sched. X." There is no question that the relevant funds under the earlier Act are funds mentioned in Part II of sched. X. There is no dispute that the National Health Insurance Act, 1936, was repealed. I agree with the submission of counsel for the Ministry that, reading the relevant parts of this Act and looking at the wording of the schedule and its heading, "Existing Funds absorbed into National Insurance (Reserve) Fund," the intention of this Act was to wind-up—if that is the proper expression—the funds and machinery under the old Act. They were to be relieved of liabilities which were to be taken over by the National Insurance Fund. That being so, I would give the word "assets"—which I think in ordinary language has a wide meaning—a wide meaning in this context. I would have thought that the right to recover arrears, irrespective of the particular procedure available for their recovery, was an asset of the fund within the meaning of s. 66 (1). Does it make any difference, as counsel for the defendant submits, that one has the provision in the earlier Act as to their being recoverable as a debt due to the Minister, and having regard to the section which he relies on providing for the retention of certain sums. I do not think that that displaces what I should regard as the *prima facie* meaning of "assets of the fund." These matters are, in effect, mere matters of machinery. I think that the wording of s. 144 of the Act of 1936 about the retention of weekly sums in some ways

supports the contention of counsel for the Ministry. In s. 144 (2) (a) the fraction retained is to be periodically apportioned by the Minister "in the National Health Insurance Fund." Although the Minister's is the hand which collects if there are arrears—as, I suppose, the Post Office is the hand which collects if stamps are bought in the ordinary way—the destination of money so collected is one or other of the funds which are set out under the Act of 1936. I, therefore, have come to the conclusion that the argument of counsel for the defendant on this point fails. I hold that the right to recover these arrears was an asset within the meaning of s. 66 (1) of the Act of 1946. The learned county court judge decided against the Ministry on this point, but in their favour on another point which it is not necessary to consider.

- A
- The claim by the Ministry was on the basis that these sums had been held in accordance with the directions of the Treasury to be of a revenue nature. These directions which are dated July 14, 1949, state:

"(2) The under-mentioned assets shall be determined to be of a revenue nature (a) . . . sums due from sundry debtors of the respective funds set out in sched. X to the National Insurance Act, 1946 . . ."

- C Then come the words which, I think, are the most apt:

"(c) All other sums accrued due on or accruing due after July 4, 1948, which would otherwise have been payable to the above-mentioned funds, approved societies or special schemes."

- D I am satisfied that that direction which could operate on this subject-matter—which was, as I hold, an asset within the meaning of s. 66 (1) (a)—makes this an asset of a revenue nature. If that is so, that brings us to s. 54 (1) which provides:

"All sums due to the National Insurance Fund shall be recoverable as debts due to the Crown, and without prejudice to any other remedy may be recovered by the Minister summarily as a civil debt."

- E The right to recover these arrears being assets of the funds mentioned in sched. X, and these assets being of a revenue nature, the arrears are, in my view, sums due to the National Insurance Fund, by reason of the provisions of s. 66 (1). On this basis it was not disputed that they could be recovered in the county court, the summary procedure being expressly declared to be without prejudice to any other remedy. For these reasons I think the appeal fails.

SINGLETON, L.J.: I agree.

DENNING, L.J.: I also agree.

Appeal dismissed with costs.

Solicitors: *Tyrrell Lewis & Co.* (for the defendant); *Solicitor, Ministry of Health* (for the plaintiffs).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

PURSELL v. RAILWAY EXECUTIVE.

[COURT OF APPEAL (Cohen, Asquith and Birkett, L.J.J.), February 12, 1951.]

Court of Appeal—Further evidence—Agreed medical report in court below—Change of opinion by doctor—Evidence to modify medical report.

The plaintiff having sued the defendants for damages for personal injuries due to their negligence, the defendants admitted liability and the only question at the trial was quantum of damages. An agreed medical report was put in evidence which indicated that a steady improvement in the plaintiff's condition was likely. After the damages had been assessed by the court, the plaintiff gave notice of appeal, claiming that the amount awarded was inadequate, and she sought to call evidence that the doctor had admitted that his earlier view was mistaken and that her condition was not likely to improve.

HELD: the court could not grant leave to call the evidence.

[AS TO POWER OF COURT OF APPEAL TO RECEIVE FURTHER EVIDENCE, see HALSBURY, Hailsham Edn., Vol. 26, p. 120, para. 238; and FOR CASES, see DIGEST, Practice, pp. 775-779, Nos. 3396-3434.]

MOTION by the plaintiff for leave to call further evidence.

The plaintiff contended that evidence modifying an agreed medical report which had formed the basis of an award of damages to the plaintiff in the court below, and which had become available subsequent to the trial, should now be admitted by the Court of Appeal.

Sir Godfrey Russell Vick, K.C., and *I. F. Reuben* for the plaintiff.

Viscount Hailsham for the defendants.

COHEN, L.J.: I will ask ASQUITH, L.J., to deliver the first judgment.

ASQUITH, L.J.: This is an application to adduce fresh evidence on the ground that the damages awarded to the plaintiff were based on a medical view which those who propounded it now acknowledge to be mistaken.

The plaintiff was a married woman, who, owing to negligence on the part of the defendants, fell out of a railway carriage and was injured. Two days before the trial the defendants admitted liability. The only issue outstanding being quantum of damages, an agreed medical report was put in by Sir Hugh Griffiths, the plaintiff's doctor, in which he expressed the opinion that she was likely to improve steadily, though, it is true, this statement was qualified by certain words about the extreme difficulty of forming a confident prognosis in cases of the kind. The case came on for trial and the plaintiff was awarded damages. Afterwards it appeared that her condition was not likely to improve at all, and the doctor, who was again consulted, admitted that his earlier view was mistaken. In those circumstances it is submitted by counsel for the plaintiff that we ought to grant leave to adduce this medical evidence embodying the later views of the doctor.

If this had not been an agreed medical report there would, I think, have been a good deal to be said for that application, but, there being an agreed medical report, to grant it would stultify the word "agreed" and open a very serious vista. There are cases in which an agreed report has not been treated as unassailably binding in the parties. I have heard LORD GREENE, M.R., say that where there is some gross inconsistency appearing on the face of the report or some gross *non sequitur*, or if the plaintiff went into the box and proved the inaccuracy of the report, to that extent it could not be treated as binding, but when these elements are absent and the medical report which is agreed simply contains a mistake, whether as to the present condition of the plaintiff or the future course which her health is going to take, to allow fresh evidence, based on after events and after knowledge, to be put in at the appeal would deprive the word "agreed" of all meaning. There is no limit

to what might occur in the way of fluctuations of the plaintiff's health in the weeks, months, and possibly years, after the trial. In those circumstances I think that this application should be dismissed.

BIRKETT, L.J.: I agree. It seems to me that the agreed case before the learned judge, in effect, was this. The doctor said: "I think that the circumstances of this case are such that improvement will take place over the next twelve months. That is my view, but, of course, in a case of this kind it is not easy to be dogmatic. It is the kind of case where one must be guarded. It may very well be that this view is not right in the sense that events will not justify it, and I, therefore, desire to guard myself against that contingency. She might get worse." The judge must be supposed to have taken into account what was, in fact, agreed, namely, that this injury was susceptible of improvement within the next twelve months, but that an eminent surgeon could by no means be dogmatic about it. By this application the plaintiff now seeks to say to this court: "We were not satisfied with the assessment of the damages by the learned judge on the agreed statement of facts, but after we had put in our notice of appeal, we had a further opinion from Sir Hugh Griffiths, and we desire to put this opinion before the Court of Appeal: 'In the court below I, Sir Hugh Griffiths, gave it as my opinion that there was a reasonable prospect of improvement, though I did guard myself against future contingencies, but I now find that that opinion was mistaken'." Counsel for the plaintiff says that in view of that statement he desires this court to make a re-assessment of damages, not on the footing that the learned judge dealt in any way wrongly with the agreed facts before him, but on an entirely different state of affairs. If that application was to succeed on appeal I can foresee a perfect sea of litigation in cases of this kind, and "agreed" reports, especially, would become unworthy of the name. For these reasons I agree fully with the judgment delivered by ASQUITH, L.J.

COHEN, L.J.: I agree entirely with what has fallen from my brethren, and I only desire to add one qualification. ASQUITH, L.J., suggested that the task of counsel for the plaintiff might have been easier if the case had been decided on conflicting medical evidence and not on an agreed medical report. I am not sure, however, that the application could succeed even in that event, because it seems to me that if the doctor, having given the evidence which he gave in the court below, had then modified his own views to the extent indicated in the statement that we have before us, the court might well have come to the conclusion, for the reasons which BIRKETT, L.J., gave, that the evidence which it was desired to adduce was not necessarily sufficiently decisive to justify us in re-opening the matter. I would add that, if an application of this kind were to succeed where notice of appeal has been given, it would lead to similar applications where no notice of appeal had been given and it was sought to re-open the matter after the time for appealing had expired. I cannot think this desirable. For these reasons I agree that the application must be dismissed.

Application dismissed with costs.

Solicitors: *Bryan O'Connor & Co.* (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re MEYERS (*deceased*). LONDON LIFE ASSOCIATION *v.*
ST. GEORGE'S HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 25, 26, 30, 1951.]

National Health Service—Hospital—Legacy to hospital—Continuance of work of hospital after National Health Service Act, 1946—Payment of legacy to body administering hospital under Act.

Will—Lapse—Gift to hospitals “to be added to the invested funds” of the hospital—Hospital possessing no invested funds—Receipt of proper officer to be a discharge—Corporation having no officers. A

Will—Gift to corporation described by its correct corporate title—Context showing that despite continued existence of corporation payment not intended to be made to it.

By cl. 6 of his will, dated Aug. 4, 1942, a testator, who died on Jan. 20, 1949, gave “ . . . the following charitable legacies, namely, £500 to the vicar and churchwardens for the time being of the parish church of Ashtead for the benefit of the poor of the parish and of the church and in addition the sum of £500 to each of . . . ” a large number of hospitals some of which at the date of the will were carried on by unincorporated bodies and others of which were carried on by corporations. Some of the incorporated institutions were correctly referred to in the will by their corporate titles. The testator continued by declaring “ that all the above legacies given by this clause [6] are to be added to the invested funds of the respective charities to which they are given and are not to be treated as income, and I further declare that the receipts of the respective persons who profess to be the vicar and churchwardens of the parish church of Ashtead and the treasurer or other proper officer for the time being of the above named charities respectively shall be a sufficient discharge for the legacies given by this clause.” As from July 5, 1948, during the testator's lifetime, under the National Health Service Act, 1946, the hospitals concerned were administered by the appropriate regional hospital boards and hospital management committees or boards of governors. B C D E

HELD: (i) on the true construction of cl. 6 it was not a condition precedent of the gifts to a hospital that each institution should possess invested funds to which its legacy could be an addition, or should have the power to treat its legacy as capital and not as income.

(ii) notwithstanding the fact that there was no officer of the incorporated bodies which, before July 5, 1948, administered some of the hospitals who could give a discharge to the trustee in accordance with the terms of the will, the gifts to those hospitals did not lapse. F

(iii) the gifts to unincorporated hospitals must be construed as being for the furtherance of their work, and, as that work was being continued after the appointed day of the Act of 1946 as it was before that date, the legacies ought to be paid to the bodies administering those hospitals under the Act. G

Re Morgan's Will Trusts ([1950] 1 All E.R. 1097) and *Re Glass' Will Trusts* ([1950] 2 All E.R. 953), *followed*.

(iv) although some of the hospitals formerly administered by incorporated bodies were correctly referred to in cl. 6 by their corporate titles, and although the incorporated bodies remained in existence, having regard to the fact that the work of those hospitals was being continued, the gifts to them ought to be construed in the same way as the gifts to the hospitals which had never been incorporated, and paid, not to the old corporations, but to the bodies administering the hospitals under the Act of 1946. H

Charity—Non-charitable object—Uncertainty—“ Welfare benefit or assistance of members of His Majesty's navy (whether past present or future)”.

The testator gave the residue of his real and personal estate to his

executors on trust to divide the same into three equal parts and "to hold one of such parts for such charitable or benevolent institution or institutions fund or funds having as its or their object the welfare benefit or assistance of members of His Majesty's navy (whether past present or future) or their wives or children and if more than one in such proportions as my executors shall in their absolute discretion select and think proper."

A HELD: on the true construction of the will the residuary estate could be applied solely for the benefit of former members of the Navy; that was not a charitable object; and, therefore, the gift failed for uncertainty.

Re Good ([1905] 2 Ch. 60), applied.

[AS TO THE EFFECT OF CHANGE OF CIRCUMSTANCES AT DEATH, see HALSBURY, Hailsham Edn., Vol. 34, pp. 234, 235, para. 290; and FOR CASES, see B DIGEST, Vol. 8, pp. 308-312, Nos. 895-901, 911-927.]

AS TO NON-CHARITABLE PURPOSES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 136, 137, para. 177.]

Cases referred to:

- (1) *Re Kellner's Will Trusts*, [1949] 2 All E.R. 774; [1950] Ch. 46; 2nd Digest Supp.
- C (2) *Re Morgan's Will Trusts*, [1950] 1 All E.R. 1097; [1950] Ch. 637.
- (3) *Re Glass' Will Trusts*, [1950] 2 All E.R. 953; [1950] Ch. 643.
- (4) *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children*, [1915] A.C. 207; 84 L.J.P.C. 29; 111 L.T. 869; 44 Digest 827, 6786.
- D (5) *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson*, [1944] 2 All E.R. 60; [1944] A.C. 341; 113 L.J.Ch. 225; 171 L.T. 141; 2nd Digest Supp.
- (6) *Re Good*, [1905] 2 Ch. 60; 74 L.J.Ch. 512; 92 L.T. 796; 8 Digest 258, 197.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Augustus Meyers, deceased, and in the events which had happened, and having regard especially to the coming into operation of the National Health Service Act, 1946, gifts to various hospitals, some of which before the coming into operation of the Act of 1946 had been administered by unincorporated bodies and some by incorporated bodies, lapsed or were payable to the bodies by which the said hospitals were administered under the Act, or (in the case of the gifts to hospitals formerly administered by corporations) were payable to the corporations. The court was also asked to determine whether, on the true construction of the said will, the gift of the testator's residuary estate was a good charitable devise and bequest or whether it failed for uncertainty.

P. H. B. W. Foster for the plaintiffs, the executors of the will.

V. M. C. Pennington, J. A. Brightman, H. E. Francis and O. R. W. W. Lodge (R. E. Megarry with him) for various boards of governors of hospitals, regional hospital boards, hospital management committees, and corporations which formerly administered certain hospitals.

Cross, K.C., and Monckton for next of kin.

Denys B. Buckley for the Attorney-General.

H HARMAN, J.: The testator made his will on Aug. 4, 1942. He left a large estate, and, after giving certain pecuniary legacies, by cl. 6 of his will he proceeded:

"I give the following charitable legacies, namely, £500 to the vicar and churchwardens for the time being of the parish church of Ashted for the benefit of the poor of the parish and of the church and in addition the sum of £500 to each of the following, namely . . ."

and there follows from (a) to (z) a list of names of institutions, some of which are juridically incorporated and some unincorporated. He then declares

"that all the above legacies given by this clause are to be added to the invested funds of the respective charities to which they are given and are not to be treated as income, and I further declare that the receipts of the respective persons who profess to be the vicar and churchwardens of the parish church of Ashted and the treasurer or other proper officer for the time being of the above named charities respectively shall be a sufficient discharge for the legacies given by this clause."

A

He gives his residuary estate on other trusts which I shall dismiss at a later stage.

A number of the recipients of his bounty under cl. 6 were hospitals which came within the scope of the National Health Service Act, 1946. The testator was still alive on the appointed day under that Act, July 5, 1948. He died on Jan. 20, 1949. The defendants, of whom there are thirty-one, may be classified in this way: first, the boards of governors of a number of teaching hospitals; secondly, three regional hospital boards; thirdly, the management committees of a number of hospital groups; fourthly, corporations which formerly carried on the activities of the hospitals in question, corporations which, according to the view that is at present taken of the Act of 1946, are still in existence, notwithstanding that in some cases, at any rate, there has been complete destruction of their functions and they have neither officers nor property; fifthly, the next of kin of the testator; and lastly, His Majesty's Attorney-General.

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Two questions arise on cl. 6. The first is whether or not there has been a lapse by reason of the coming into force of the vesting provisions of the National Health Service Act, 1946, before the testator's death. Secondly, if there has been no lapse so far as the incorporated associations are concerned, whether the gifts go to those corporations which would have been the recipients of them before the appointed day or go to the new corporations created by s. 11 of the Act of 1946.

D

The argument for lapse was based largely on the declaration which I have read at the end of cl. 6 providing that the legacies "are to be added to the invested funds of the respective charities to which they are given." It is said that the boards of governors of the teaching hospitals and the hospital management committees of the non-teaching hospitals are not bodies having invested funds, or the power to hold invested funds, even if they are charities. It is admitted for the purposes of this case that they are charities. Having regard to the grouping under the Act of 1946, it is said that the hospitals no longer have the same individual existence as they had before, and it is argued that the testator showed clearly that he did not mean his bounty to go to any charities which could not, or did not, have invested funds earmarked for their own purposes and to be used only as endowments. I cannot take that view of this declaration. It seems to me that it was not intended to be a condition precedent to the validity of these gifts that any of these societies should have invested funds or have the power to treat the bounties given to them as capital and not as income. These are merely directions that the testator gives that the capital, if he can prevent it, is not to be spent. It seems to me, therefore, that there is no lapse for that reason. There is also the further direction that the proper officer can give a good receipt and that those who profess to be and call themselves the vicar and churchwardens of the parish church of Ashted can do likewise, and it is also argued that the gifts lapse because some of the so-called corporations, although having regard to the observations of SIR RAYMOND EVERSHED, M.R., in *Re Kellner's Will Trusts* (1), they have some shadowy existence, have no officer, no board of governors, no management committee, no one who can give a good receipt on behalf of those bodies. I do not think that that, in the case of a charity, could possibly cause the lapse of a gift. The chance that there is no officer at the moment in question enabled to give a receipt could not, I think, ever be held to cause a lapse.

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A Supposing there is no lapse, then, in so far as some of these bodies are unincorporated charities, *e.g.*, the Leatherhead Cottage Hospital, the case seems to come within the decision of ROXBURGH, J., in *Re Morgan's Will Trusts* (2). In that case, there was a gift by will for the benefit of a body called the Liskeard Cottage Hospital. The identity of the institution was clear. The learned judge held that the gift was for the furtherance of the work of that institution which was being carried on when the testator made his will, and that the new body, *viz.*, the hospital management committee appropriate to that locality, was carrying on that work, and was, therefore, the proper recipient of the legacy. In that connection I may point out that the words there were "for the benefit of the Liskeard Cottage Hospital," and that, no doubt, made it easier for the learned judge so to decide. In *Re Glass' Will Trusts* (3), VAISEY, J., followed that decision, although the gift there was direct to the hospital in question. The words there were "to the King Edward VII Memorial Hospital Ealing." There was a hospital of that name being carried on up to the appointed day as a voluntary hospital, and the gift was held to vest in the management committee under the Act of 1946. VAISEY, J., said that it was a case of a gift "of a sum of money to a named hospital, the identity of which seems to be beyond dispute." He then referred to *Re Morgan's Will Trusts* (2), and said ([1950] 2 All E.R. 954):

D "Here we have a gift direct 'to' the named hospital, and, following the decision of ROXBURGH, J., not only because I feel bound to do so in any case, but also because it is, in my opinion, deserving of being followed, I propose, in answer to the first question raised by the summons, to say that this legacy should be paid to [the appropriate management committee] . . . to be applied by them for the purposes "

of the hospital in question. I must come to a like conclusion here in respect of the unincorporated hospitals in favour of which the testator has made these gifts.

E There are, however, a number of hospitals to which he made gifts, all of which are identifiable, but which were incorporated. In some cases, most notably in the case of the North London or University College Hospital, the testator made the gift by the correct corporate title of the hospital in question. It is said that, that being so, the gift was to a corporation which still exists, and that there is no power in the court by way of speculation or for any other reason to give the bounty of the testator to any other corporation than the corporation which exactly answers the description that the testator has given. That seems to me to be a formidable argument. I was referred to *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (4). There EARL LOREBURN said ([1915] A.C. 212):

G "When Mr. Younger opened his argument he laid down as a general proposition that when once a *persona* is accurately named in a will, then the rigid rule descends which forbids under any circumstances any further inquiry or consideration in regard to the person who is to take the benefit. My Lords, I am not prepared to affirm so wide a statement. I do not enter upon it now; if I did so the discussion would be academic, and it is not necessary for the decision of this case. I will only take leave to observe that an extreme danger is apt to lurk in general rules like that. Some unforeseen circumstances may arise. No one can prophesy all the events of the future, and the court may find itself confronted by a rule which, applied in unexpected conditions, might lead to something quite shocking to its sense of justice . . . My Lords, I think the true ground upon which to base a decision in this case is that the accurate use of a name in a will creates a strong presumption against any rival who is not

the possessor of the name mentioned in the will. It is a very strong presumption and one which cannot be overcome except in exceptional circumstances."

There is, therefore, no absolute rule that once you have the right words used to name a given person, whether juridical or natural, that must necessarily exclude all other considerations. Therefore, I am not bound, as I understand it, if I should find it contrary to common sense or to common justice, to hold myself rigidly constrained by a rule which says that if I find a corporation exactly answering the description in the will, that corporation must have the bounty, whatever other considerations may exist. In the present case, some gifts are to hospitals referred to by the name by which the public knew them and by which the testator knew them, but which were incorporated under slightly different names. Some gifts are to hospitals (which are incorporated) by their correct corporate name. Some gifts are to unincorporated hospitals. It seems to me that it would be contrary to common sense not to give a like construction to all the gifts in this clause and not to give the like kind of effect to them. Feeling as I do, and holding as I do, in the case of the unincorporated hospitals, that the gift must be construed as a gift for the work of the hospitals in question, and finding, as I do find, that in the cases of the incorporated hospitals that work is to be carried on in every case by the governors or the hospital management committee appropriate to the locality, I must in this case find that the gift in each case is to the new body constituted under the Act.

It seems to me that it would be a most extraordinary result if in the few cases in which the testator has rightly named the corporate body these shadows of their former selves should alone be able to give a good receipt or be entitled to these gifts. It would be, as it seems to me, equally extraordinary if some of the gifts should go, as it were, to the old corporations, some of which are so ancient as to include among their powers eleemosynary purposes, which are admirable but are not hospital purposes. Some of the shadows which are postulated by the decision of the Court of Appeal frankly say that they would hand over the fund to the new body if it went to them and they could do so. I do not think it right to produce an effect so confusing and so contrary to one's common sense. If some of these gifts go to the new bodies, it is only sensible to suppose that they all do. In my judgment, I am doing no violence to the language that the testator has used in the context in which he has used it in saying that in every case when he gives money to a hospital he does not regard the fact whether it was corporate or not corporate, but he gives for the purposes of the work that that hospital is carrying on. The evidence is not questioned. The work of the hospital to which the testator gave his money was identifiable in these days as being carried on in every case by the appropriate board or committee. Therefore, I shall hold that the gifts are, in each case, to that board or committee, and can be held, having regard to the circumstances of the case, on trust to apply the money, not for the purposes of the whole group, but for the purposes of the particular hospital which was the object of the testator's bounty.

[His LORDSHIP heard further argument.]

HARMAN, J.: It now falls to me to construe the residuary bequest in cl. 10 of the testator's will, which is in these terms:

"I give the residue of my real and personal estate to my executors upon trust to divide the same into three equal parts and to hold one of such parts for such charitable or benevolent institution or institutions fund or funds having as its or their object the welfare benefit or assistance of members of His Majesty's Navy (whether past present or future) or their wives or children and if more than one in such proportions as my executors shall in their absolute discretion select and think proper."

There is an exactly parallel bequest of the other two parts in favour of members of the Army and Air Force.

- A It is familiar to every lawyer by this time that a gift for charitable or benevolent institutions is not charitable: see *Chichester Diocesan Fund & Board of Finance (Incorporated) v. Simpson* (5). In my judgment, however, this case does not turn on that point because the gift does not stop there, and it does not matter that you call an institution or a fund a benevolent institution or a benevolent fund. If it is obvious that it is charitable, it will rank as a charity.
- B There are many associations which are called benevolent, but which have undoubtedly charitable objects. Is an institution having as its object "the welfare benefit or assistance of members of His Majesty's Navy (whether past present or future) or their wives or children," an institution which is one which has charitable objects? First, I am asked to say that an institution having any one of those objects would be one to which the executors could decide to distribute a portion of the one-third available for the Navy. I think that is right. I think "or" in this part of the will must be read throughout as a disjunctive word. It may be a question whether a fund which caters only for the widows of ex-members of the Navy or children of former members of the Navy would be within the objects of the bounty to which I am giving consideration.
- C Whether that be so or not, even supposing the institution or fund must have all the objects enumerated, viz., it must include in those objects not only ex-sailors but present sailors and those who hereafter will be sailors and the wives and families of each class, it is urged that it is not a good charitable bequest.

- D I am not without some guidance here because SIR GEORGE FARWELL, J., there whom there is no better authority, in 1905 decided *Re Good* (6), in which there was considered a gift of residue "to maintain a library and to purchase plate for the officers' mess." The learned judge there found no difficulty in deciding that that was a good charitable object, not because the officers who lived in the mess were the objects of charity and needed books or needed plate, but because it was for the benefit of the public that the servants of the King should be better equipped to perform the important duties which devolved on them. Therefore, the learned judge held—I think this is what it comes to—that anything that improves the efficiency of the army is charitable within the meaning of the statute of Elizabeth (43 Eliz. c. 4) because it is for a public purpose, a purpose in which the public is interested. He also relied on a second ground under the statute of Elizabeth, or by analogy to it,
- F but he preferred the first ground, and, if I may say so with deference to him, so do I. Therefore, it is said in this case that this is a gift which improves the efficiency of the navy and is charitable. It must improve the efficiency of the navy (so goes the argument) if those who join the navy know there is a fund available which can be used for them either when they are in the navy or after they have ceased to be serving in the naval service, or for their wives
- G or their children. That will make the naval service more attractive, and will attract a better type of recruit, and, therefore, it will benefit a public whose interest it is that they should have the best services of that sort. That is an attractive argument which receives, I think, some countenance from the cases to which counsel for the Attorney-General referred under the Companies Acts, where boards of directors have been held not to go beyond their powers in giving
- H donations or gratuities to past servants on the ground that that will in fact increase the efficiency of the company's present servants and will be an attraction for its future servants. In that way, indirectly, no doubt, one can see some advantages accruing to the public.

Counsel for the next of kin urges me, and I think there is much to be said for this, that one must draw the line somewhere. The question is: How wide may the benefit be? It seems to me I am not without aid in answering that question because FARWELL, J., decided a second point in *Re Good* (6). There the testator

used these words "My two houses at Ryde for use of old officers of the regiment at a small rent during their life." It was urged, first of all, that that meant officers who were aged, and, therefore, within the statute. Secondly, it was urged that it was a gift to *personae designatae*, viz., a class representing the former officers of the regiment, but the learned judge rejects both those contentions. Apart from this, counsel for the Attorney-General in that case admitted that if "old" meant former officers of the regiment, the gift was bad. That was tantamount to the Crown admitting that a gift to persons not in the Army, or to anybody who had formerly been in the Army, was bad. It is quite true that there was no argument about that, and counsel for the Attorney-General asked me to take the view that that was because it was not a very attractive proposition and the representative of the Attorney-General there did not think it worth while arguing it. Therefore, he said, the learned judge really should not have considered the matter, and I am free to take my own course. I do not take that view. It seems to me that the decision in *Re Good* (6) was that a gift confined to ex-members of the forces for their benefit is not a good charity. I cannot help thinking that the gift in the present case could be applied exactly in that way, viz., to maintain two houses for ex-naval officers. If that is so, it seems to me that it would offend just as the second gift in *Re Good* (6) offended. Taking that view of the ambit of this bequest, it seems to me that no question of perpetuity is involved here because there is no attempt to tie up the capital for ever. It fails because it is too uncertain. Unless a man gives his property to charity, he may not delegate his testamentary power to his trustees beyond definite and identifiable limits. If he tries to delegate that testamentary power so as to benefit what may comprise an unidentifiable class of persons, then his next of kin are entitled to the property as being undisposed of. I, therefore, hold that the gift of residue fails for uncertainty.

Order accordingly. Costs of all parties as between solicitor and client to be paid out of the residuary estate in due course of administration.

Solicitors: *Druces & Atlee* (for the plaintiff and the next of kin); *Hanbury, Whitting & Ingle*, and *Merrimans*, and *Raymond-Barker, Nix & Co.*, and *Richard Newton* (for other defendants); *Treasury Solicitor*.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

SELLERS v. LONDON COUNTIES NEWSPAPERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Singleton and Birkett, L.J.J.), December 13, 14, 15, 1950, February 7, 1951.]

Master and Servant—Remuneration—Commission—Right to commission on orders obtained by servant before, but executed after, termination of contract of employment—Sale of advertising space.

Under an oral agreement, made in October, 1947, the plaintiff was employed by the defendants to obtain orders for advertising space in the defendants' newspapers. His salary was £3 per week, and, in addition, he was entitled to a commission of $7\frac{1}{2}$ per cent. on orders which he obtained. The commission was not payable until the customers' advertisements were published in the defendants' newspapers. On Apr. 28, 1950, the defendants determined the employment of the plaintiff.

Held: (SIR RAYMOND EVERSLED, M.R., *dissentiente*) in the absence of an express term in the contract of employment that the plaintiff's right to commission should end with the termination of his employment, he was entitled to commission on any orders he obtained while he was employed

by the defendants, even though the advertisements to which those orders related were not published until after the termination of his employment.

[AS TO RIGHT TO REMUNERATION AFTER TERMINATION OF EMPLOYMENT, see HALSBURY, Halsham Edn., Vol. 1, p. 259, para. 434; and FOR CASES, see DIGEST, Vol. 1, pp. 521-523, Nos. 1818-1834.]

Cases referred to:

- A (1) *Levy v. Goldhill & Co.*, [1917] 2 Ch. 297; 86 L.J.Ch. 693; 117 L.T. 442; 1 Digest 523, 1829.
- (2) *Naylor v. Yearsley*, (1860), 2 F. & F. 41; 175 E.R. 950; 1 Digest 522, 1819.
- (3) *Gerahty v. Baines & Co.*, (1903), 19 T.L.R. 554; 1 Digest 522, 1823.
- B (4) *Boyd v. Mathers & South Africa, Ltd.*, (1893), 9 T.L.R. 443; 1 Digest 522, 1821.
- (5) *Cramb v. Goodwin*, (1919), 35 T.L.R. 477; Digest Supp.
- (6) *Bilbee v. Hasse & Co.*, (1889), 5 T.L.R. 677; 1 Digest 522, 1820.
- (7) *Marshall v. Glanvill (Glanville, Granville)*, [1917] 2 K.B. 87; 86 L.J.K.B. 767; 116 L.T. 560; 1 Digest 523, 1834.
- (8) *Crocker Horlock, Ltd. v. Lang & Co., Ltd.*, [1949] 1 All E.R. 526; 2nd Digest Supp.
- C

APPEAL by the plaintiff from an order of His Honour JUDGE LEON, made at Clerkenwell County Court, and dated Oct. 9, 1950, holding that the plaintiff was not entitled to an account of commission in respect of orders for sale of advertising space in the defendants' newspapers effected by him before the determination of his employment with the defendants, but executed by the defendants after the determination of the plaintiff's employment. The facts appear in the judgment of SIR RAYMOND EVERSHERD, M.R.

Sir Godfrey Russell Vick, K.C., and *H. H. Harris* for the plaintiff.
Casswell, K.C., and *J. D. May* for the defendants.

Cur. adv. vult.

- E Feb. 7. The following judgments were read.

SIR RAYMOND EVERSHERD, M.R.: This appeal has raised a difficult question as to the rights and remedies of the plaintiff against his former employers, the defendants. I have had the misfortune to arrive at a different conclusion from that of my brothers, whose judgments I have had the advantage of reading. I feel it, therefore, my duty to state the reasons fully for my opinion, which is in favour of dismissing this appeal.

- The plaintiff was engaged by the defendants in October, 1947—as he says, as a commercial traveller; as the defendants say, as an advertising representative. On Apr. 28, 1950, he was given one week's notice terminating his employment and he left the defendants' service accordingly on May 4 last. In the present action he alleged that he was entitled to three calendar months' notice to terminate his engagement and that he was wrongfully dismissed, and he claimed relief accordingly. The learned trial judge held that the plaintiff was entitled to one calendar month's notice, and that, since he had received one week's notice only, he had been wrongfully dismissed. He awarded the plaintiff ten guineas damages, a sum arrived at as hereafter stated. Neither the plaintiff nor the defendants complain in this court of the propriety of the judge's decision as to the length of notice, and, consequently, as to wrongful dismissal. The contest has concerned the relief to which in the circumstances the plaintiff became entitled. By his notice of appeal, the plaintiff claims to be entitled to
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“an account of commission due to the plaintiff in respect of orders for sales of advertising space in the defendants' newspapers effected by him before the determination of his employment with the defendants and executed by the defendants after the determination of his said employment.”

Putting it, therefore, quite briefly, the plaintiff claims that he is by the terms of his contract with the defendants now entitled to commission at the contract rate in respect of advertisements inserted for advertisers by the defendants' firm (or newspapers owned and controlled by the defendants) since the date of the determination in fact of the plaintiff's employment (that is, May 4, 1950) in so far as such advertisements are, or were, attributable to orders which the plaintiff secured prior to the date of the termination of his engagement. The defendants deny this. They have by their counsel conceded that (having regard to the finding of the judge that the plaintiff was entitled to one calendar month's notice), the plaintiff would be entitled, or would have been entitled (had he not chosen to rest his claim in damages only), to an account of commission in respect of advertisements appearing in any of the defendants' newspapers up to May 28, 1950, *i.e.*, the expiration of one calendar month from the date when notice was given to the plaintiff. They say, however, that from that date the plaintiff ceased to be entitled to make any claim to commission or otherwise, notwithstanding that advertisements appearing thereafter might be properly attributable to orders placed or secured by the plaintiff prior to the time when he left the defendants' service. On the other hand, the plaintiff by his counsel concedes that he is not entitled—or, at any rate, he makes no claim in the present appeal—to what are called "repeat orders," that is, to orders placed by advertisers originally introduced to the defendants by the plaintiff, but placed without any further solicitation on his part.

Before considering the question of the remedies to which the plaintiff is entitled, it is necessary to see what were his rights, and, accordingly, to determine what were the terms of the contract between the plaintiff and the defendants. It is at this point that the first difficulty arises. Although the agreement between the plaintiff and the defendants was oral, there is no finding by the learned county court judge of the terms of the contract. It has been said on the part both of the plaintiff and of the defendants that there was, in fact, no dispute on this point, and it is, no doubt, for that reason that the learned judge in his judgment does not state any view of his own on what were the terms of the bargain. Since the point mainly debated on the appeal is whether the plaintiff is entitled to commission in respect of advertisements inserted after May 28, 1950, attributable to orders obtained by the plaintiff during the term of his service—a point not only of importance to the plaintiff but also to other persons employed on similar terms—and since, as has been pointed out on many occasions in the cases cited to us, the question depends first and last on the particular terms of the particular contract, it must be confessed that it is singularly unfortunate that there is no statement on the part of the learned judge of the terms of the contract in question in this action. I must not be taken, in saying this, to be criticising the learned judge, for, as I have said, it appears that the case was fought on the basis of there being no real dispute on this matter. Indeed, I venture myself somewhat to doubt whether the point as it has been developed in this court was ever fairly and squarely put at the trial in the county court. In any case, it is to be noted that the onus of proof is on the plaintiff.

Before proceeding to see what, on the material before us, is the proper inference to be drawn on the question of the terms of the contract, it may be convenient to note that there is, as I understand it, more than one kind of advertisement with which the present case is, or may be, concerned. There is the simple case of an order obtained for a single advertisement or a limited and specified number of advertisements. In the case of single advertisements the evidence of the plaintiff was that the advertisement itself commonly, if not usually, appeared within one week after the obtaining of the order. There is also the case of an order obtained for a continuing and indefinite series of advertisements appearing at regular weekly or other intervals and going on until stopped by one party or the other. This kind has been referred to as

"until cancelled" or "running" contracts. Finally, there is the case of advertisements placed by advertisers originally introduced by the canvasser, but without any further solicitation on his part. These have been called "repeat orders."

By his particulars of claim the plaintiff alleged that he was employed by the defendants as a commercial traveller

- A "on the terms that he should . . . obtain orders for the sale of advertising space in the defendants' newspapers and that he should be paid by the defendants a weekly salary of £3 and a commission of $7\frac{1}{2}$ per cent. on all orders for such space effected by him, or received direct from his customers."

- B There was also an allegation in regard to expenses allowance, but nothing turns on this particular matter. By their defence the defendants said that the plaintiff was engaged, not as a commercial traveller, but as an advertisement representative. They also said that the commission to which the plaintiff was entitled was only payable to him "if and when the relevant advertisements had actually appeared in the defendants' newspapers."

- C Apart from these qualifications, the allegation I have quoted in the particulars of claim was admitted. Both the plaintiff and the defendants' manager, one Bishop, gave evidence at the trial on the terms of the contract. The learned judge has not made any note of Bishop's evidence, but his note of the evidence of the plaintiff on this matter is, so far as material, as follows. After saying that he was a commercial traveller, the plaintiff is recorded as stating:

- D "At the interview with Bishop it was agreed that I was to receive £3 per week plus a commission of $7\frac{1}{2}$ per cent. on all display space advertisements and $12\frac{1}{2}$ per cent. on all small classified advertisements either obtained by me or on those which I was instrumental in obtaining for the firm. Commission was to be payable on the advertisements appearing in the newspapers, irrespective of payment by the customer, and it was to be payable monthly."

- E Apart, therefore, from the question of the proper description of the plaintiff (either commercial traveller, on the one hand, or advertisement representative, on the other) which, to my mind, is immaterial, there is, I think, no dispute of substance between the two parties regarding the nature of the contract, although I find it difficult to assert with any confidence what were its precise terms. As will be noticed, there appears to be a divergence in the actual rates of commission, but this has been resolved and no point is made on it in this court. It seems to me clear, however, that the second qualification suggested by the defendants in their defence to the pleaded allegation of the plaintiff was conceded, *i.e.*, that the plaintiff became entitled to receive commission only when the relevant advertisements actually appeared in the defendants' papers.
- G From this it seems to follow that the defendants were in a position to refuse to accept any advertisement from an advertiser introduced by the plaintiff and thereby to avoid any liability to him for commission in respect of such advertisements, though he had done the work of procuring them. This, indeed, has been conceded by counsel on the plaintiff's behalf. It seems to me also clear that the terms of the bargain contemplated two types of advertisement
- H in respect of which commission would be payable to the plaintiff. The first is described in the particulars of claim as "sales effected by him" and in the plaintiff's evidence as "advertisements obtained by" him. The second type is described in the particulars of claim as "sales received direct from his customers" and in the plaintiff's evidence as "advertisements which I was instrumental in obtaining for the firm."

In my judgment, although there is a marked difference in the language, the two types of advertisement correspond to the two distinct kinds of orders on

which, in the various decided cases, commission was contracted to be payable to the agents in those cases. The first type may be stated as being advertisements procured directly by the plaintiff, that is, advertisements directly attributable to orders which he got, and this type would, I think, inevitably cover both the ordinary and simple kind of case above described and the "until cancelled" or "running" contracts. All advertisements of both these kinds seem to me necessarily to fall within the first branch of the subject-matter on which commission was payable, whether according to the language of the particulars of claim or according to the plaintiff's language in the witness box, for both can in the ordinary sense of language be said to be "obtained" or "effected" by the plaintiff. In these circumstances, there must be some distinct kind of advertisement properly and fairly described as "placed direct by the advertisers" or which (by contract) the plaintiff was "instrumental in obtaining." I, therefore, think that the second head of advertisements in respect of which the defendants promised to pay commission (whether according to the language of the particulars of claim or to the language of the plaintiff's evidence) must refer to advertisements not attributable directly to orders obtained by the plaintiff. In other words, it seems to me that the second head of advertisements in respect of which commission was promised must refer to what have been called "repeat orders," that is, to the third category of advertisement tabulated above. On this matter I regret to find that my view differs from that of my brethren. The difference emphasises the unfortunate significance of the absence of any finding of fact by the county court judge, particularly since this conclusion, if correct, seems to me to be of great importance in determining the true nature of the plaintiff's rights. I add, however, that if (as my brethren think) the contract does not comprehend "repeat orders," I still arrive, for reasons later appearing, at a conclusion adverse to the plaintiff.

In my judgment, the first point to observe on the character of the agreement as alleged and proved is that in the present case the plaintiff was the whole-time servant of the defendants. Whether he is properly called a commercial traveller or an advertising representative his position is, I think, essentially different from that of an independent contractor like a broker or house agent who is engaged by a principal on commission terms to transact some single piece of business or a specified and limited number of pieces of business. In the latter class of case, if the agent is promised a commission provided that he produces for his principal, *e.g.*, a person ready and willing to buy his house, then, if he does the work for which commission was promised, he becomes entitled to that commission although his principal afterwards purports to put an end to the agency. The case of an employee seems to me, however, fundamentally different. In such a case *prima facie*, I should have thought, the remuneration which the employer promises to pay as consideration for the services to be rendered is payable only during such time as the services are rendered in fact. If the remuneration is by way of fixed salary this would, I imagine, be conceded as clear, but I venture to think that the principle is the same, whether the remuneration is wholly by salary, or partly by salary and partly by commission (as in the present case), and whether the commission is calculated by reference, say, to profits made by the employer or in any other way. It was suggested in the present case, on the true construction of the bargain made, that the commission became payable in each case on the orders being given, though the time of payment might be postponed until the actual advertisement appeared. I cannot accept this argument. As I have already indicated, the qualification suggested in the defence was clearly borne out by the plaintiff himself in his evidence. It was, I think, clear that the right to commission did not depend on whether the advertiser in fact paid the defendant firm. It depended on the defendant firm accepting the advertisement and inserting it in one or other of their newspapers. Thus, I do not myself think that the plaintiff could have made firm contracts on behalf of the defendants

with potential advertisers, and, in any case, as I have already stated, it was conceded on the plaintiff's behalf that nothing became due until the defendants accepted the advertisers' offer by inserting their advertisement. Thus, the defendants could always avoid liability to the plaintiff by refusing to accept the advertiser's advertisement. This view is strongly reinforced if commission was payable on two classes of advertisement (according to my view), namely, advertisements directly attributable to orders obtained by the plaintiff and also

A orders coming from old customers originally introduced by the plaintiff but without any particular solicitation. In the latter class of case it would be impossible to say that commission became payable on the orders being obtained by the plaintiff. *Ex concessis* the particular advertisement was not the result of a particular order so obtained.

I have already stated that, for the purposes of the present appeal, the

B plaintiff has expressly said through his counsel that he makes no claim in respect of "repeat orders." This concession does not, in my judgment, extricate the plaintiff from the difficulties imposed on him by the terms of the contract if I have correctly found them. If, in truth, by the terms of his contract the plaintiff was entitled to commission in respect of "repeat orders" as well as in respect of orders of the first two kinds, which I have stated, then it seems

C to me logically impossible to distinguish between "repeat orders" and other types of advertisement, to commission in respect of both of which he is by the terms of the bargain equally entitled. I do not, on that view, see how he could be disentitled to commission after he had ceased to be employed in respect of one type of advertisement and yet remain entitled to commission after termination of his employment in respect of the other type. In any case, if

D he is entitled to commission at all in respect of advertisements appearing after he had ceased to be employed, then the plaintiff must allege that, for the purpose of giving him a right to such commission, the agreement still to that extent remains in force notwithstanding that his service has come to an end.

It is said that it is just and fair to the plaintiff that, if he has done all the work required, then he should be entitled to the fruit or reward for his labours.

E The question is, however, whether the contract so provided. The argument is as valid in the case of "repeat orders" as in the case of other types of order. In the case of "repeat orders" the advantage gained by the defendants would, on analysis, be attributable to the original introduction by the plaintiff. Still treating the matter as one of principle, there is a further point to be noted. Even if "repeat orders" are out of the way, the plaintiff, nevertheless, asserts

F his right to commission on the "running" contract or "until cancelled" type of advertisement. It is at least possible that such orders might continue to run for a very considerable time after the plaintiff had ceased to be employed by the defendants. Yet, if the plaintiff is right, he would be entitled long after he had ceased to be employed by the defendants to ask for an account of these "running" contracts and to claim on an account that commission was due

G from time to time in respect of them. Such a result may, no doubt, be the consequence of an agreement in appropriate terms. In my judgment, it is a result which is, on the whole, unlikely in the case of a contract between employer and employee, and is a result clearly not justified, to my mind, by any requirements of business efficacy. If, therefore, I have come to a right conclusion of the terms and effect of the contract as a matter of construction, it seems

H to me contrary to principle and good sense that the commission, unlike a fixed salary, should continue to be payable to the plaintiff after the end of his service with the defendants. It remains, however, to see whether, as a result of the numerous authorities which have been quoted to us, any different conclusion emerges.

It is one of the characteristics of the cases on this subject-matter that they are for the most part most scantily reported. It seems also that there is no reported case in which this precise point, or rather the point which emerges

from the terms of this contract, as I have construed it, has been the subject of a clear and direct decision. So far as can be gathered from the reports, the real issue was almost always in regard to repeat orders. For these reasons I do not propose to refer to more than a few of the cases to which we have been referred. The earliest case cited was *Nayler v. Yearsley* (2). The plaintiff in that case alleged that he had been employed by the defendant as an advertising canvasser on terms of being paid by commission (only) on advertisements inserted on his introduction in the "Medical Circular," and on all renewals. On Dec. 28, 1858, the plaintiff had been informed by or on behalf of the defendant that no more advertisements would be accepted from him and "that he would have no renewal orders." The plaintiff's claim in the action was that by his contract he was entitled to a reasonable notice terminating his contract. The claim failed because the alleged contract was found by the jury not to have been proved. The plaintiff admitted that he had been paid all that had been due to him up to Dec. 28, 1858. WIGHTMAN, J., refused leave to the plaintiff to amend his claim by adding a count for commission and he non-suited the plaintiff, but gave him liberty to move to enter a verdict in his favour if there should be any evidence to go to the jury. I have referred at a little length to this case, for it is cited in later cases—particularly by counsel for the defendant in *Gerahty v. Baines & Co.* (3)—as a foundation for the general proposition that *prima facie* in a contract of service all liability to pay remuneration to the servant (whether by way of salary or commission) ceases with the end of the service. The report of *Nayler v. Yearsley* (2) is brief and the case, no doubt, turned to a large extent on the matters of pleading, but, in my opinion, it does support the general proposition above cited.

In *Boyd v. Mathers & South Africa, Ltd.* (4) the claim of the plaintiff as a former advertising canvasser was for commission in respect of advertisements inserted after the settlement of the last account between him and the first defendant, and also in respect of renewal orders. As stated in the report, the latter subject-matter was the main question in the case. LINDLEY, L.J., delivering the first judgment in this court, is reported (9 T.L.R. 443) as saying that he

"... could not read the letters as amounting to a contract that the plaintiff was to be paid a commission on all advertisements appearing in the paper after he had ceased to have anything to do with it. He was to be paid commission in respect of his services, and after he had ceased to be in a position to render any services he was not to receive anything."

In *Gerahty v. Baines & Co.* (3) the plaintiff had been employed on a commission basis (it does not appear whether he had been a whole-time employee) as an advertising canvasser. His service had been terminated by a six months' notice. He claimed commission in respect of renewals after termination of the contract to which counsel for the defendants answered that all right to remuneration ceased with the end of the contract. The jury found in the defendants' favour and LORD ALVERSTONE, C.J. said (19 T.L.R. 555):

"The plaintiff was the defendants' canvasser, and it made no difference that his services were paid for by commission and not by salary . . . the position of the canvasser . . . was that, if he was going to claim commission after the expiration of his employment, there must be a special bargain to that effect . . . the terms of the contract applied to the period during which the plaintiff was canvasser."

It is true that, as appears from the report, the defendants were willing to concede the plaintiff a right to commission on "certain running advertisements," but, in my judgment, the result and the language of LORD ALVERSTONE, C.J., show that the argument of counsel for the defendants was accepted as correct. The same conclusion follows, in my view, from *Cramb v. Goodwin* (5), which came before this court and in which the distinction was observed between the

case of an employee paid by salary or commission or both, on the one hand, and a commission agent who is an independent contractor, on the other. An example of the latter kind of case was *Bilbee v. Hasse & Co.* (6), which was much relied on by counsel for the plaintiff. As appears from the judgment of PETERSON, J., in another case of the same kind, *Levy v. Goldhill & Co.* (1) ([1917] 2 Ch. 299), *Bilbee v. Hasse & Co.* (6) went to the Court of Appeal, which affirmed the judgment in favour of the plaintiff. BOWEN, L.J., then used the phrase (as stated in *Levy v. Goldhill & Co.* (1) [1917] 2 Ch. 300) which counsel for the plaintiff invited us to apply in his client's favour:

"The measure of his [the plaintiff's] 'payment was to be calculated not by the work done by him, but by the fruits of that work, and those fruits might very well accrue to the defendant after the determination of the agency'."

It is, in my judgment, of the essence of the decisions in *Bilbee v. Hasse & Co.* (6) and *Levy v. Goldhill & Co.* (1) that the plaintiff in each case was in the position not of a servant, but of an independent contractor having (accordingly) no contract or term of service at all.

In my judgment, therefore, the authorities support, and are consistent only with, the view which I have already indicated, namely, that in the case of a contract of service between master and servant, all right on the servant's part to remuneration by commission or otherwise will cease with the termination of his service unless by the terms of his contract provision to the contrary is clearly made. In *Marshall v. Glanville* (7) ([1917] 2 K.B. 93) McCARDIE, J., said:

"*Prima facie* the liability to pay commission in cases of this kind ceases as to future trade with the cessation of the employment in the absence of a reasonably clear intention to the contrary."

The language quoted was, it is true, used in reference to a contract whereunder commission was payable in respect of all trade done by the employers within a specified area, whether introduced by the plaintiff or not, but it was, in my view, rightly applied by the learned county court judge to the present case.

Before leaving the authorities, I refer finally to *Crocker Horlock, Ltd. v. Lang & Co., Ltd.* (8), a case of master and servant for payment to the latter of five per cent. on all orders, whether received direct or indirect, and on all repeats, in which, again, the issue, in fact, related to repeat orders received after termination of the contract. In rejecting the plaintiff's claim, MORRIS, J. ([1949] 1 All E.R. 530) put the matter—in my view, rightly—thus:

"... that remuneration was the remuneration payable during the contract period and ... the parties have not provided by this contract for any payment after that period came to an end."

I think, therefore, that the learned county court judge rightly determined the contractual rights of the plaintiff in the present case. There remains the question of the remedy to which, on the basis of those rights, the plaintiff was entitled. If the rights of the plaintiff under his contract were as the county court judge, as I think rightly, held them to be, then on the facts he became entitled (a) to an account of commission due in respect of advertisements attributable to his canvassing and inserted in one or other of the defendants' newspapers between May 4 and May 28, 1950, and (b) to damages for having been deprived during the same period, May 4 to May 28, of the opportunity of obtaining further advertisements which would in the ordinary course have been inserted in the defendants' newspapers within that period. The two heads of claim are distinct. The first is a matter of certain ascertainment on taking the account, the second is a matter of estimate based on previous experience. There is, however, so far as I can see, no reason why a person in the position

of the plaintiff should not rest his claim solely on his common law right to damages for breach of contract—damages which would compensate him both for loss of commission accruing during the relevant period and also for loss of opportunity to earn further commission in the same period. This, as seems to me clear, was exactly done by the judge in arriving at the sum of ten guineas for damages. We know from documents supplied to us how the calculation was made. As appeared from the evidence, the judge proceeded on the basis that the sum of £9 per week would have been received by the plaintiff in commission had he continued in the defendants' service. The weekly fixed salary of £3 must be added to that. The total (including the sum of £28 16s. 9d. for commission due for the month of April but unpaid) came to £80 15s. 3d. The defendants had since paid to the plaintiff the sum of £53 14s. 10d. and, after giving credit for this amount and certain other deductions, the net amount due was £13 12s. 6d. Finally, the judge, to take account of the plaintiff's obligation to mitigate his damages, reduced the figure to the round sum of £10 10s.

I referred at the beginning of this judgment to the form of the plaintiff's notice of appeal. If the plaintiff were entitled to succeed on his argument as to the rights to which he was entitled under his contract, it would, in my view, have been impossible for him to get such an account as he sought while retaining in full the sum of damages awarded. Plainly, the latter covered, and was intended to cover, the commission for which the defendants were accountable for the month of May. We were informed that counsel for the plaintiff asked at the trial for an account as well as for damages, but I cannot help thinking that the account sought must have related to commission in respect of advertisements inserted since the month of May. Since the plaintiff's particulars of damage in the statement of claim proceeded on precisely the same basis as that adopted by the learned judge, it does not seem to me that the plaintiff can easily complain of the form of the relief granted. It is, however, unnecessary for me to pursue further the question how, if the plaintiff succeeded in his claim as to rights, the damages awarded should have been brought into account. On the view which I take of the plaintiff's rights, I am clear that it would be quite wrong now to order an account. The plaintiff has not asked for such a limited account as I think he could have claimed, nor has he offered to give up, or otherwise to bring into account, the damages awarded. In any case, I do not think that, if such an account were taken and the damages limited as above intimated, the result would have been, for the plaintiff, substantially different from (if, indeed, it would have been as favourable as) the result arrived at by the county court judge. For the reasons I have given I think the appeal fails and should be dismissed.

SINGLETON, L.J.: The first difficulty in the present case arises from the fact that the learned judge has not found what were the terms of the contract between the plaintiff and the defendants. It is pleaded in wide terms in para. 1 of the particulars of claim, and para. 1 of the defence admits the terms so alleged

“save that the commission alleged was only payable to the plaintiff if and when the relevant advertisements had actually appeared in the defendants' newspapers.”

In his evidence the plaintiff said:

“It was agreed that I was to receive £3 per week plus a commission of 7½ per cent. on all display space advertisements and 12½ per cent. on all small classified advertisements either obtained by me or those which I was instrumental in obtaining for the firm. Commission was to be payable on the advertisements appearing in the newspapers irrespective of payment by the customer and it was to be payable monthly.”

There does not appear to have been any real dispute as to this. I, therefore, conclude that the plaintiff was employed to get advertisements, or to sell advertising space, for the defendants, and that he was to be paid salary and commission. Sometimes commission earned would be paid in the month in which it was earned, but sometimes it would not be paid until later according to the times at which the advertisements appeared in the defendants' newspapers. There is some uncertainty as to the meaning of the words "which

- A I was instrumental in obtaining for the firm." I take them to cover the case in which the plaintiff did not in the first instance obtain a written order from the advertiser, but the advertiser said he would consider the matter and later sent an order to the defendants as a result of the plaintiff's solicitation. I do not regard the words as covering "repeat orders," though the particulars of claim might lead one to think that counsel for the plaintiff was taking that view. If that be so, it cannot affect the rights of the plaintiff, and, in any event, counsel for the plaintiff made it clear in argument that he did not claim in respect of "repeat orders." If the plaintiff in April obtained an order, accepted by the defendants, for an advertisement in one of the defendants' newspapers in May, June, and July, he did all that was required of him to earn commission on that order, but payment was not to be made to him by the defendants unless and until the advertisement actually appeared. He had done his part in obtaining the order. If the defendants accepted it, and inserted the advertisement, he was then to be paid his commission, and the defendants could not, by terminating the employment, deprive the plaintiff of the commission which he had already earned (subject, of course, to the advertisement appearing).
- D This is the contract between the parties, and it is not necessary to imply any term into it. If the defendants' submission is right, it would be necessary to read into the contract some such term as "but you shall not be entitled to recover any commission, even though earned otherwise, if it is not payable until after your employment with us has ceased." The defendants themselves plead that commission was not payable until the advertisement was inserted.
- E That might be in the month in which the order was obtained, or it might not be until months later, according to the order—and it was for the defendants to determine whether they accepted an order or not. Any other view would have the result of depriving the plaintiff of part of his remuneration for work done during the period of his employment.

- A more difficult question arises in respect of an order for an advertisement to continue "until cancelled." If the defendants accept from the plaintiff an order in these terms and act on it, I take the view that the plaintiff is entitled to commission. It is not a case of a "repeat order" as that expression is normally understood. It is an order obtained by the plaintiff during his employment and accepted by the defendants, and I do not see that a distinction can be drawn between this and an order for, say, twelve monthly or weekly insertions.
- G In each case the insertion is the direct result of the order obtained by the plaintiff, and the defendants accept it with the knowledge that commission will be payable to the plaintiff.

- I do not derive great help from the authorities which were cited to the court, many of which dealt with questions as to "repeat orders." The decision in each case must depend on the contract between the parties. The view which I have expressed seems to me to be in accord with the judgments in *Bilbee v. Hasse & Co.* (6) and *Levy v. Goldhill & Co.* (1). The defendants relied on the decision in *Marshall v. Glanville* (7), in which case McCARDIE, J. ([1917] 2 K.B. 92), said:

"*Prima facie* the liability to pay commission in cases of this kind ceases as to future trade with the cessation of the employment in the absence of a reasonably clear intention to the contrary."

The learned judge was dealing with a case in which commission was payable

on the net amount of trade done in a particular area, independently of whether orders were obtained by the plaintiff or not, quite a different type of case. Moreover, in the present case, the postponement of time of payment of commission (or remuneration) appears to me to show that the parties contemplated that payment might not become due until after the employment had ended from one cause or another. The plaintiff is asking for commission earned by him during his period of employment, and I am of opinion that he is entitled to the account for which he asks, *i.e.*, an account of the orders obtained by him while he was in the defendants' employment and executed by them after he left it.

Apart from this, the plaintiff is entitled to some damages for breach of contract. If he had been given the notice to which the learned county court judge said he was entitled, namely, one month, he would during that time have had the opportunity of earning further commission, part of which might have become payable during the month or part at subsequent dates. Herein lies the second difficulty and one which would not have arisen if the claim for an account had been considered first. The judge rightly held that the plaintiff was entitled to damages, but the amount was arrived at on a wrong basis in so far as it took into account the amount of commission which became due in the month of May. That falls within the account with which I have dealt. The damages should have been assessed according to the loss suffered by the plaintiff through his being deprived of the opportunity of earning further commission during the period in addition to loss of salary or wages. Strictly, there ought to be a new trial so that damages can be assessed on the proper basis, but it may be that the parties can agree on a figure. I should imagine that £20 would cover it. It is impossible to say how the financial position will work out if and when an account is taken. There may be little in it having regard to the amount which the plaintiff received when he left. The real point of difference lies in whether the plaintiff is entitled to commission in respect of orders obtained by him before his employment ended and which have been executed by the defendants since that time. On that issue I am of opinion that the plaintiff is entitled to succeed and I am in favour of allowing the appeal.

BIRKETT, L.J. (read by SINGLETON, L.J.): All the important questions in this appeal depend on the exact terms of the contract made between the parties in October, 1947. It was an oral agreement, and the absence of any written document makes it all the more desirable to have a clear and unambiguous finding by the learned judge of the oral terms. Much of the argument in this court, for example, turned on the question whether the plaintiff's right to be paid commission by the defendants ended on May 28, 1950, or whether he was entitled to an account of commission earned by him before that date, but not due to be paid to him until after that date. The learned judge decided that the plaintiff was entitled to a month's notice from the defendants to determine the contract, and, as the defendants, on Apr. 28, 1950, had only given the plaintiff one week's notice, he had been wrongfully dismissed and was entitled to damages. The defendants could determine the contract on May 28. In the court below the precise terms of the contract do not seem to have been the subject of much controversy, and the learned judge has made no finding about them. This is, to say the least, somewhat surprising, for in cases which relate to the payment of commission the exact terms of the contract are all-important. It does not appear, however, that there was very much doubt about what the plaintiff was employed to do. In his particulars of claim he had said that he was employed to get orders from customers for advertising space in the defendants' newspapers. He was to be paid a salary of £3 a week, and a commission of 7½ per cent. on orders he obtained for such advertising space, and on orders sent direct to the defendants for such space from his customers. The defendants admitted this, only adding that the plaintiff

was not to be paid his commission until the customers' advertisements were actually printed in the defendants' newspapers. In the evidence he gave before the learned judge, the plaintiff repeated the foregoing with an addition about the rate of 12½ per cent. on small classified advertisements obtained by him, or which he was instrumental in obtaining; that he was to be paid on the advertisement being printed in the defendants' newspapers whether the customer paid or not; and the commission was to be paid monthly.

- A** It is, therefore clear, that, so far as commission is concerned, the plaintiff was entitled to it if (a) he had obtained the customer's order himself, or (b) the order had come direct to the defendants from one of the plaintiff's customers and he had been instrumental in obtaining it, and (c) the defendants had printed the advertisement in their newspapers. No doubt, there were different kinds of orders. There was the order for a single insertion obtained direct by the plaintiff; there was the order for a single advertisement which he was instrumental in obtaining and which came direct to the defendants; there were the orders for advertisements that were to appear more than once; and there may have been "repeat orders" sent by the customer without the intervention of the plaintiff. It was made quite clear that the plaintiff made no claim to commission on "repeat orders." It might conceivably have been argued that he
- C** had been instrumental in obtaining them, but that argument was expressly disavowed, and the orders he had been instrumental in obtaining were confined to those orders sent to the defendants from customers whom the plaintiff had seen, but who had not actually given him the order at the time he saw them. The evidence as to the length of time that passed between the taking of the order and the printing of the advertisement was scanty. The plaintiff said
- D** that in the case of the single advertisement it usually appeared within a week of the taking of the order, but in the ordinary way one would have supposed that most single advertisements would have appeared within one month. It may, therefore, very well be that, if the plaintiff is entitled to an account, the money he will be entitled to will only be a very small sum. The advertisements that were to appear more than once, unless they were to appear more than three
- E** or four times, might very well come within the month too. The question, however, is not what the amount of money may or may not be, but whether the plaintiff is entitled to the account for which he asks. The real bone of contention is whether the plaintiff is right in his submission that if advertisements were printed by the defendants after May 28, 1950, which the plaintiff obtained before that date he is entitled to commission under the terms of his contract with them.
- F** The learned judge took the view that after May 28 the plaintiff could not claim any commission from the defendants because his contract of service was wholly at an end. He awarded the plaintiff damages for the wrongful dismissal by the defendants, but refused him an account.

- The damages awarded seem to have contained three elements: (a) the loss of salary up to May 28; (b) the commission accruing to the plaintiff during
- G** the month of May on the orders he had previously obtained and which had been printed; and (c) the commission he might have earned during the month of May if he had not been wrongfully dismissed. I do not think the second item was strictly damages at all, but, in any event, it was a sum to which he was clearly entitled. In a word, the learned judge proceeded on the basis that the plaintiff was a whole-time servant of the defendants, paid, it is true, by
- H** salary and commission, and subject to one month's notice. At the end of the month's notice, the service was wholly determined, and the plaintiff had no more claim on the defendants of any kind. It was exactly the same as if he had been paid a fixed salary only, and the arrangements about the payment of commission could be disregarded after the month's end. If the plaintiff had obtained orders for his employers during his employment, and such orders were printed after May 28, then the plaintiff had no right to any commission on those orders because the employment had ended. For myself, I cannot think that

that is the proper way to regard the particular contract in this case. If there had been a term of the contract that all right to commission ended with the termination of the employment (as there might well have been if that was the intention of the parties), no question could have arisen, but when the terms of the contract which was made are examined, and, in particular, the provisions for the time of payment being postponed until the actual printing of the advertisement, which was a matter entirely for the defendants and quite outside the control of the plaintiff, I find it a little difficult to regard this case as the simple case of master and servant and exactly on the same footing as a case where the remuneration is a fixed sum paid weekly. Having been wrongfully dismissed, as the learned judge found, the plaintiff was entitled to damages for loss of salary and for being deprived of the opportunity to earn commission. He was also entitled in any event to the commission he had earned and which was due under the contract at the end of the month. I think he was also entitled to the commission on any orders he obtained for the defendants while he was employed by them if they were in fact printed by the defendants after May 28. This is, of course, the vital issue in the case. To decide otherwise would be to decide that, although the plaintiff had fulfilled his part of the contract, having obtained the orders in the course of his employment, and although the defendants had printed them and thus had the benefit of his work, nevertheless he was not to have what the contract promised him because when the time for payment came he had been dismissed.

In my view, the plaintiff is entitled to the account for which he asks, and the second element in the learned judge's award of damages should strictly form part of that account. Both my Lord and SINGLETON, L.J., have referred to some of the cases which were cited to us. I do not think they help very much to decide the point of controversy in this case. Both *Naylor v. Yearsley* (2) and *Boyd v. Mathers* (4) turned on the question of "renewals," as did *Gerahty v. Baines & Co.* (3). In *Marshall v. Glanvill* (7) the facts were very different from the present case, and the language of McCARDIE, J., must be read in the light of the special facts of the case with which he was dealing, and MORRIS, J., in *Crocker Horlock, Ltd. v. Lang & Co., Ltd.* (8) was dealing with "repeat orders," and based his judgment on the fact that the parties had not made any arrangement about the payment of commission on "repeat orders" after the ending of the contract. The plaintiff in the present case, apart from the nominal sum of £3 per week, was dependent on the work he did and the success he achieved for his remuneration. This arrangement, no doubt, was to stimulate him to use his best endeavours and thus benefit himself and the defendants. Nothing was said to him to indicate that he was not to have the benefit from his work if, when the moment came for payment, he had left the employment of the defendants, and it seems to me to follow that, if he did obtain orders for advertisements and the defendants in due course printed the advertisements, his commission was to be payable notwithstanding that he had left the employment when the advertisements were inserted. I think he is entitled to the account for which he asks, and I should be in favour of allowing the appeal, much as I regret having to differ from the judgment of the Master of the Rolls, which I do with some diffidence.

Appeal allowed with costs.

Solicitors: *Rollit, Sons & Haydon* (for the plaintiff); *Tucker, Turner & Co.* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

R. v. McCLELLAND.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Devlin and Barry, JJ.), February 5, 1951.]

Criminal Law—Sentence—Conditional discharge—Order not to be made if fine also imposed—Criminal Justice Act, 1948 (c. 58), s. 7 (1), s. 13.

- A *Criminal Law—Costs—Order to pay—Enforcement—No power in court to prescribe method of enforcement—Costs in Criminal Cases Act, 1908 (c. 15), s. 6 (5).*

Under s. 7 (1) of the Criminal Justice Act, 1948, a court can make an order of conditional discharge only when it is of opinion “ . . . that it is inexpedient to inflict punishment and that a probation order is not appropriate . . . ”. A fine (inflicted under s. 13) is a “ punishment ” within s. 7 (1), and, therefore, the court has no power to make an order for conditional discharge at the same time as it inflicts a fine.

- B When a criminal court makes an order for costs against an offender it cannot direct how payment of the costs is to be enforced. Under the Costs in Criminal Cases Act, 1908, s. 6 (5), an order for costs can only be enforced in the same manner as an order for the payment of costs made by the High Court in civil proceedings or as a civil debt in manner provided by the Summary Jurisdiction Acts.

[FOR THE CRIMINAL JUSTICE ACT, 1948, s. 7 (1), see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1948, p. 160.]

- D AS TO ENFORCEMENT OF AN ORDER FOR COSTS, see HALSBURY, Hailsham Edn., Vol. 9, p. 287, para. 423.]

APPEAL against sentence.

The appellant, Alexander McClelland, was convicted at Andover Quarter Sessions of housebreaking, and was fined £10 (with an alternative of six months' imprisonment on default), ordered to pay £10 costs, and conditionally discharged.

- E It was also ordered that the fine and costs should be paid by weekly instalments of £1. The ground of appeal was that the court had no power both to fine and to make an order for the appellant's conditional discharge.

I. S. Hill for the appellant.

The Crown was not represented.

- F LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at the Andover Quarter Sessions of housebreaking and he asked the court to take three other offences into consideration. The recorder fined him £10 under s. 13 of the Criminal Justice Act, 1948, and ordered him to pay £10 costs (with six months' imprisonment in default of the payment of the fine), and at the same time he ordered his conditional discharge.

- G Apparently, the recorder's order for payment by instalments of £1 a week was to apply to the costs as well as to the fine.

The court agrees with the submission of counsel for the appellant that, if a fine is imposed, there is no power to make an order of conditional discharge. A fine is a punishment, and under s. 7 (1) of the Criminal Justice Act, 1948, an order of conditional discharge can only be made where the court does not think it expedient to impose a punishment. There was a previous conviction in this case, and we think it was right to impose the punishment which was imposed. Therefore, we propose to set aside the sentence and to substitute for it a fine of £10, payable by weekly instalments of £1, starting from today and credit being given for anything already paid, and we pass a sentence of six months' imprisonment in default of payment of any instalment of the fine.

- H There will also be an order for the payment of £10 costs, but the court does not say how payment of that sum is to be enforced because it appears to the

court that they have no power to do so. If the appellant does not pay, by the Costs in Criminal Cases Act, 1908, s. 6 (5), payment of the money is to be enforced in the same manner as an order for the payment of costs made by the High Court in civil proceedings or as a civil debt in manner provided by the Summary Jurisdiction Acts. Those responsible for recovering the costs must, if the occasion arises, take the appropriate steps.

Sentence varied. A

Solicitor: *Registrar, Court of Criminal Appeal* (for the appellant).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

B

NOTE.

C

Re DOWSE (deceased). DOWSE *v.* DOWSE AND OTHERS.

[CHANCERY DIVISION (Vaisey, J.), December 7, 1950.]

Will—Option to purchase dwelling-house at value for estate duty purposes—
“Chancellor’s concession” —Purchase at concession value.

D

ADJOURNED SUMMONS.

By her will, dated Sept. 23, 1927, a testatrix, who died on Oct. 2, 1949, gave all her residuary estate to her trustees to sell the same and to hold the proceeds, after payment of funeral and testamentary expenses, debts, and a legacy, on trust for all her children in equal shares. The testatrix further directed “that if any one or more of my . . . three daughters shall within six calendar months after my death by a notice in writing to be given to my trustees or to any one of them offer to purchase my dwelling-house and hereditaments known as Stoneville . . . then and in such case my said dwelling-house and hereditament (*sic*) shall be sold to my said three daughters or to such one or more of them as shall elect to purchase the same at the value placed upon the same at my death for estate duty purposes or a price to be agreed upon by my trustees.” E
 On Nov. 7, 1949, one of the said daughters gave notice to one of the trustees of the intention of herself and of one of the other two daughters to exercise the option to purchase Stoneville, and later indicated that they desired to purchase at the probate valuation. The testatrix had herself occupied Stoneville together with two of her daughters, and, therefore, alternative values were given in the schedule to the Inland Revenue affidavit, *i.e.*, one at £1,400, being the estimated market value of the property as at the date of the death of the testatrix on the basis of a sale with vacant possession, and the other at £800, being the estimated value on the basis indicated in the statement made by the Chancellor of the Exchequer in the House of Commons on May 18, 1944, that in the case of a house owned and occupied by the deceased, where a near relative of the deceased who was ordinarily resident with the deceased at the date of death remains in the house and has no other place of residence available, any increase in the market value above the pre-war value would be disregarded in so far as it could only be realised by a sale with vacant possession. The valuation made on that basis would, however, be reviewed if the house were sold or let within a reasonable period of (say) two years after the death. The figure finally agreed for the value of Stoneville with the Estate Duty Office on the “lower value” basis, *i.e.*, ignoring the advantage of vacant possession, G H

was £1,000. One of the residuary legatees objected to the purchase by the two sisters at that figure.

R. O. Wilberforce for the plaintiff, one of the executors.

Dunbar for the first two defendants, daughters of the testatrix who desired to exercise the option.

G. D. Johnston for the third defendant, the third daughter of the testatrix.

A **VAISEY, J.**, said that the Estate Duty Office, treating this as a "concession" case, had valued the property at £1,000, and there was no need to make an alternative assessment. The house had to be valued according to all the circumstances of the case, including the fact that the beneficiaries were living there. The first two defendants were, therefore, entitled, in the exercise of their option, to call for a conveyance of the house on payment of the sum of £1,000, subject to a charge and covenant for securing payment to the trustees of the will of such sum as would represent the excess (if any) of the value which might thereafter be placed for estate duty purposes on the property over the sum of £1,000.

Solicitors: *Bird & Bird*, agents for *Fawcett & Faber*, Stockton-on-Tees (for the plaintiff and the first two defendants); *Batchelor, Fry, Coulson & Burder* (for the third defendant).

H.McL.M.

D

ST. DAVID'S COLLEGE, LAMPETER *v.* MINISTRY OF EDUCATION.

[CHANCERY DIVISION (Vaisey, J.), February 6, 7, 8, 1951.]

E *Education—University—What constitutes.*

F St. David's College, Lampeter, was founded in 1822 and in 1829 it was incorporated by royal charter. It was further regulated by royal charters granted in 1853, 1865 and 1896. Originally it was exclusively a theological institution, but subsequently it provided instruction in Greek, Latin, Hebrew, mathematics and such subjects as chemistry, botany and zoology. Its students numbered about 170, of whom approximately four-fifths intended to take holy orders. Admission to the college was not limited to persons from any particular locality. In its royal charters the college had been granted the right to confer only the degrees of bachelor of arts and bachelor of divinity.

G **HELD:** the term "university" was not a term of art; the college possessed many of the qualities and attributes associated with a university, but in its charters it had not been expressly or impliedly declared to be a university and it would not generally be considered to fall within the meaning of "university"; and, having regard especially to the limited character of the right of the college to confer degrees, it was not a university.

H [AS TO UNIVERSITIES, see HALSBURY, Hailsham Edn., Vol. 12, pp. 100-107, paras. 225-242; and FOR CASES, see DIGEST, Vol. 19, pp. 580-584, Nos. 142-168.]

WITNESS ACTION.

The principal, tutors and professors of St. David's College, Lampeter, claimed against the Ministry of Education a declaration that the college was a university and that it was providing a university education. The question arose because of the refusal of the Minister of Education to treat the college as a university

for the purposes of the Regulations for State Scholarships and University Supplemental Awards, 1948 (S.I. 1948, No. 1655).

Sir Andrew Clark, K.C., and *McMullen* for the plaintiffs.

Denys B. Buckley for the defendants.

VAISEY, J.: The claim in this action is that I should declare that the plaintiffs constitute a university and are providing university education. A The history of the plaintiff foundation, which is commonly known as St. David's College, Lampeter, is interesting. It was founded in 1822, and one of its earliest benefactors was George IV. It was incorporated by the first of its royal charters in 1829, and it is regulated by that charter and by further royal charters of 1853, 1865, and 1896. It was originally, I think, exclusively a theological institution, but it later acquired wider powers and extended its B activities over a wider range, and, undoubtedly, it now affords instruction in many subjects—Greek, Latin, mathematics, Hebrew, and also 'chemistry, botany and zoology, of which subjects there is a professor on the staff. The number of students at present is about 170. Perhaps four-fifths of the number are destined for holy orders in the church in Wales, but there are students there who are not contemplating taking holy orders, and there is no doubt C that those who resort there for instruction obtain a general education. It is not for me to depreciate in any way the excellence of the instruction which is afforded there. Indeed, the defendants have never suggested, so far as I know, that the instruction or the educational facilities at St. David's College are otherwise than of the first class. The plaintiffs ask me to say whether or no they are a university. Although it has been suggested that that kind of declaration D is not really within the spirit of the rules, I propose to accede to their invitation and to say whether or not I do consider that they are and can properly be described as a university.

In my judgment, the word "university" is not a word of art, and, although for the most part one can identify a university when one sees it, it is, perhaps, not easy to define it in precise and accurate language. There are obviously E universities which are such by common consent, the status of which as such no man could deny. That applies not only to the two ancient universities—Oxford and Cambridge—but to others which have since been founded (I think nearly all of them not earlier than the nineteenth century). There is no question that such institutions as the universities of London, Durham, Manchester and so forth, are universities in the fullest and most proper sense. St. David's F College, Lampeter, is admittedly a borderline institution. One of the witnesses described it as in its nature unique, and I ventured to use a phrase of, perhaps, identical meaning and to call it *sui generis*, i.e., it is an institution which stands in a class by itself. The question which falls for me to decide is: Is that class within the ambit of the definition and proper understanding of the word "university" or is it not? G

Counsel for the plaintiffs has enumerated what he regards as the essential qualities which justify an institution being described as a university, and I do not think that there is much doubt that essentially, with exceptions which I will mention, St. David's possesses those qualifications. He said, in the first place, that it must be incorporated by the highest authority, i.e., by the sovereign power, succeeding, no doubt, to the Papal privilege which was H exercised in Christendom in the middle ages by the proper, and, indeed, only, body which could incorporate and give authority to a great teaching institution. There is no doubt that St. David's College was incorporated and re-incorporated and that its incorporation was confirmed and strengthened by acts of the sovereign power, that is to say, by royal charter. Secondly, it is suggested that, to be a university, an institution must be open to receive students from any part of the world. There, again, there is no suggestion that there is any kind

of bar to students from any locality at St. David's College. It is said further that there must be a plurality of masters, *i.e.*, that there cannot be a university with only one teacher. It is clear from the charters that those who teach in this college are numerous. Again, it was suggested that a university, to be such, must be an institution in which at least one of the higher faculties is taught, those higher faculties being, of course, theology—the queen of sciences

- A —law or philosophy, which in some definitions are regarded as identical, and, thirdly, medicine. Then it is said that there cannot be a university without residents either in its own buildings or near at hand. It is said that residence is a necessary qualification. I have left until last what is stated to be the most obvious and most essential quality of a university, that is, that it must have power to grant its own degrees. Here we find the very curious situation that
- B the royal prerogative of granting degrees in the various faculties and branches of knowledge has been granted to this particular institution subject to a very strict limitation. It is only entitled to grant the degrees of bachelor of arts and bachelor of divinity. It has not of its own essential power any right to grant degrees, but to that limited extent the royal privilege has been acceded to it by royal concession.

- C That being the position, I have no doubt that St. David's College possesses (I will come back to the question of degrees) most of the necessary ingredients that go to make a foundation or institution a university, but, if the word "university" is not one of art, I have to try to see what it means, regard being had to those particular qualities which I have enumerated. I have to see whether or not, in accordance with the ordinary language of mankind,

- D this small college, doing admirable work, is properly to be described as and ought to be regarded as a university. I think that it is very difficult, when you are dealing with a word of general import like this, to lay down the precise criteria, but I ask myself what the ordinary man would say if he were asked whether this college was a university. I am not referring to the man in the street—a man who, perhaps, has had no university education or no experience

- E of what a university is—but to the ordinary man who does know what a university is or who has received his education at a university. I cannot bring myself to believe that such a man would say that St. David's College, Lampeter, was a university. It does not, I think, follow that, if it possesses all or most of the qualities of a university, it necessarily follows that it is a university. I am inclined to think that the onus must lie on this institution,

- F which has never been called a university in any of its charters. It is true it is included among the universities in, for instance, such a well known reference book as CROCKFORD'S CLERICAL DIRECTORY, and it may for some purposes count as a university or be considered as equivalent to a university, or, to use another phrase, to rank as a university or to provide instruction of university standard. I cannot bring myself to think that that is enough. I cannot

- G help feeling that this extraordinarily limited power of granting degrees, which has throughout been regarded during the arguments as being really the test for the solution of this problem, is an indication that this institution falls short of a university properly so called. It was suggested to me that weight must be given to the fact that, in the charters on which its existence depends and by which it was founded, though there are possible slight indications the other

- H way, care is taken not to call this institution a university. It was never incorporated as a university, and, although the word may not have any technical significance and one can imagine a case in which a teaching institution is given such plenary powers of instruction and so forth as would lead irresistibly to the conclusion that the Crown intended to make it a university, I do not think that this is such an institution. Although I must not be supposed for one moment to think that a university has to be judged by its size or the number of its pupils or by the range of instruction which it gives, still, size is a matter of some consideration.

I cannot believe that this one single college, this one single educational establishment, with all its merits and the good work which it does and all the advantages which it gives to those who resort to it for instruction, in any ordinary sense of the word could properly be described as a university.

I agree that since the foundation of the University of Wales with its four constituent colleges there has been some confusion. A great many people, I think, might ignorantly be led to believe that St. David's College was part of the University of Wales. It is nothing of the kind; it is an entirely separate and older foundation. In a sense it might be regarded as a rival and complement of the University of Wales, but the question which I have to decide is whether or not it stands on the same footing and is of the same character and quality as the University of Wales which was incorporated as a university. It has never called itself a university and, although included with the universities in certain books of reference, I have had no evidence to show that anybody has ever referred to it as a university. It may in certain ways be said to give a university education, that its standards are those of a university, and that its teaching is of the quality which is to be found in a university, but there still remains the gap to be bridged, the doubt whether, however closely it approximates in its aims, character, activities and merits to a university, this college can properly be described as a university. Judging the matter both on broad principles and on the narrow principles of its limited powers and the absence of any express intention of making it a university by the sovereign power, I think that the plaintiffs have not discharged the onus of satisfying me that the college ought to be called and to be considered, in accordance with the proper meaning of the English language, a university.

I am also asked to declare that the foundation is providing university education. I do not propose to do that, but I would like to say, though I do not think it is a matter to be put in the form of an order, that it is providing education of the same type and class as is to be found in universities and the teaching is of the highest class, and that I do not wish anything that I have said to limit in any way the high reputation which this college is enjoying.

Declaration that the college not a university.

Solicitors: *Deacons & Pritchard*, agents for *Barker, Morris & Owen*, Carmarthen (for the plaintiffs); *Treasury Solicitor*.

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

TULIP v. TULIP.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), January 31, 1951.]

Husband and Wife—Maintenance—Application to High Court—Wilful neglect to maintain—Deed of separation—Covenant by husband for periodical payments—No default in payments—Improvement in husband's financial position—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 5 (1).

A

In June, 1932, the husband and wife entered into a deed of separation under which the husband covenanted to pay the wife during her life for her separate use £156 a year free of income tax. The deed did not contain an undertaking by the wife not to take any proceedings for maintenance in the future. The husband made no default in payments, but since the deed his financial position had materially improved, while that of the wife had deteriorated, and, in addition, she had become a partial invalid. On an application by the wife under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, for an order for a larger amount of maintenance,

B

C

HELD: for the wife to succeed she must show that the husband had been guilty of some matrimonial misconduct; the husband had carried out the terms of the deed and was not guilty of any "wilful neglect to provide reasonable maintenance" within the provisions of s. 5 (1); the fact that his means had increased did not give the wife the right to ask that the amount payable under the agreement should be increased; and, therefore, her application would be refused.

D

Morton v. Morton ([1942] 1 All E.R. 273), *applied*.

Diggins v. Diggins ([1927] P. 88), *distinguished*.

[FOR THE MATRIMONIAL CAUSES ACT, 1950, s. 23, see HALSBURY'S STATUTES, Second Edn., Interim Service, 1950, p. 321.

AS TO MAINTENANCE, see HALSBURY, Hailsham Edn., Vol. 10, p. 838, para. 1340; and FOR CASES, see DIGEST, Vol. 27, pp. 558, 559, Nos. 6134-6150, and Digest Supps.]

E

Cases referred to:

(1) *Diggins v. Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; Digest Supp.

(2) *Dewe v. Dewe*, *Snowdon v. Snowdon*, [1928] P. 113; 97 L.J.P. 65; 138 L.T. 552; 92 J.P. 32; Digest Supp.

F

(3) *Matthews v. Matthews*, [1932] P. 103; 101 L.J.P. 41; 147 L.T. 240; 96 J.P. 290; Digest Supp.

(4) *Morton v. Morton*, [1942] 1 All E.R. 273; 111 L.J.P. 33; 166 L.T. 164; 106 J.P. 139; 2nd Digest Supp.

G

SUMMONS by the wife on the ground that the husband had wilfully neglected to provide reasonable maintenance for her. The summons was issued under the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, which first conferred on the High Court the power to make maintenance orders on the ground of a husband's wilful neglect to provide reasonable maintenance for his wife and the infant children of the marriage. That section was repealed, and re-enacted as s. 23 of the Matrimonial Causes Act, 1950, which came into operation on Jan. 1, 1951. The facts of the application are set out in the judgment of BARNARD, J.

H

John Latey for the wife.

R. J. A. Temple for the husband.

BARNARD, J.: Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, provides:

"(1) Where a husband has been guilty of wilful neglect to provide

reasonable maintenance for his wife or the infant children of the marriage, the High Court in England, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation. (2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court."

Before the passing of that Act the jurisdiction to order reasonable maintenance on the ground of wilful neglect was confined to justices under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, and the justices had a limited jurisdiction as to the amount they could order a husband to pay if they found him guilty of neglect. This court is now entitled to deal with such a matter, and it has an unlimited jurisdiction as regards amount. Further, it has a discretion to direct that any payment it orders shall be secured.

The parties were married in June, 1916. In July, 1931, a petition by the husband for divorce on the ground of his wife's adultery was dismissed. The parties then entered into a deed of separation, dated June 30, 1932, by cl. 3 of which the husband covenanted with the wife that

"if the wife shall so long perform and observe the stipulations herein on her part contained he during his life will pay to the wife during her life (if he shall so long live) for her separate use without power of anticipation such a sum as after deduction of income tax at the current rate shall amount to and leave the clear net yearly sum of £156."

In the deed there was no clause by which the wife undertook not to take any proceedings for maintenance in any future proceedings. It is conceded that since that deed was entered into the husband's financial position has materially improved. The wife's financial position has deteriorated, and she is also, at any rate to some extent, an invalid, because she is suffering from spinal arthritis. In those circumstances, coupled with other reasons which her counsel has put forward, she now says that, although the husband has paid regularly what he covenanted to pay, in the light of these new circumstances she is entitled to more, and also, if the court thinks fit, to have such payments secured.

I have been referred to a large number of authorities. In *Diggins v. Diggins* (1) it was clear that the husband had stopped all payments under the deed. He sought to justify that by saying that the wife was molesting him, but when he came before the court it was clear that he was not justified in not making the payments. LORD MERRIVALE, P., in his judgment, said that the husband had not fulfilled the agreement, and added ([1927] P. 92):

"It must not be supposed that there is an unlimited right in a wife under the amended statute [*i.e.*, Summary Jurisdiction (Married Women) Act, 1895, s. 4, amended by Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (1)], wherever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question."

That seems to me to be most appropriate to this case. In *Dewe v. Dewe* (2) husband and wife had entered into a separation agreement. The husband

went bankrupt, the wife proved the provisions of the separation deed in the bankruptcy, all she got was a small dividend, and the covenant for payment came to an end. In those circumstances the wife took out a summons for wilful neglect to provide reasonable maintenance, and, once again, the answer was simple—the husband was not paying reasonable maintenance, and, therefore, an order was made. In *Matthews v. Matthews* (3)

A the wife covenanted not to sue in consideration of the payment of a lump sum, but LORD MERRIVALE, P., stated that he saw no cause to hold that the wife was estopped from making the application for maintenance.

The case I am dealing with today is a little different. It is more like the last case to which I was referred, *Morton v. Morton* (4). In that case, in 1930, the wife took out a summons against her husband on the ground of neglect to provide

B reasonable maintenance. The parties came to an agreement, heads of agreement were entered into under which the husband agreed to pay to the wife specified payments, and those sums he paid. In 1941 the wife applied to a magistrate for an order on the ground of the husband's wilful neglect to provide maintenance for her, and it was held that the existence of the heads of agreement were not necessarily a bar to the making of an order, but that in the

C circumstances the husband could not be said to be guilty of wilful neglect. In such a case as the present the wife must show that the husband has been guilty of some matrimonial misconduct. Of what matrimonial misconduct has the husband been guilty? He has faithfully carried out the terms of the deed. He has made his wife an allowance with which she was perfectly satisfied at the time, but in view of the present day cost of living she is not

D now satisfied with it. Can I possibly hold that he has been guilty of some matrimonial misconduct? I do not think I can. If I were to accede to the argument put forward for the wife it would not be safe for any parties to enter into an agreement. What counsel for the wife is seeking is to get the amount varied. The wife wants the best of two worlds. So long as she is satisfied with the agreement, it will remain at the amount specified, but if

E the husband's means increase, she wishes the payments to be increased. He has agreed to pay and the wife has agreed to accept the amount stated in the deed, and so the matter stands. On the facts before me I find it impossible to hold that the husband has been guilty of wilful neglect to provide reasonable maintenance, and in those circumstances the wife's summons must be dismissed.

Application dismissed. No order for costs.

F Solicitors: *Peacock & Goddard* (for the wife); *Hyde, Mahon & Pascall* (for the husband).

[Reported by R. HENDRY WHITE, ESQ., Barrister-at-Law.]

WROTTESLEY v. REGENT STREET FLORIDA RESTAURANT, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys, Hilbery, Pritchard and Devlin, JJ.), January 30, February 13, 1951.]

Wages—Regulation—Catering worker—Minimum remuneration—Exclusion of waiters' "tips"—Catering Wages Act, 1943 (c. 24), s. 9 (2).

The respondents, restaurant proprietors, were the employers of waiters whose statutory minimum remuneration was prescribed by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949. It was a term of the waiters' employment that all amounts received as "tips" by them should be handed to the respondents who would pay each week to the waiters by way of remuneration a certain wage and a proportion of the total amount of the "tips." The waiters placed the "tips" which they had received in a locked box, provided by the respondents, the key to which was kept by the head waiter on behalf of the respondents. The head waiter entered the daily total of the "tips" in a book, and distributed the moneys at the end of each week among the waiters. The wage which each waiter received from the respondents was less than the statutory minimum remuneration prescribed by the order of 1949, but, when its amount was added to the waiter's share of "tips," the total amount exceeded that remuneration.

HELD: "tips" received by a waiter became his property, and "tips" paid into a pool became the joint property of all those entitled to share in the pool, and, therefore, for the purposes of s. 9 (2) of the Catering Wages Act, 1943, the share of the "tips" which each waiter received could not be taken into account in computing the remuneration payable to him by the respondents.

[FOR THE CATERING WAGES ACT, 1943, s. 9 (2), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 111.]

FOR THE WAGES REGULATION (UNLICENSED PLACE OF REFRESHMENT) ORDER, 1949 (S.I., 1949, No. 433), see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Third Binder, Title Employment [14], p. 534.]

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction, sitting at Marylebone on June 22 and 29, 1950, the appellant, an officer appointed by the Minister of Labour and National Service under s. 13 of the Catering Wages Act, 1943, preferred four informations against the respondents, who carried on an unlicensed restaurant at No. 269, Regent Street, London, W.1, charging them, under s. 9 (2) of the Act of 1943, with having failed to pay remuneration not less than the statutory minimum remuneration to workers to whom the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I., 1949, No. 433) applied. The magistrate found that the workers named in the respective informations were employed by the respondents as waiters at their restaurant, and that it was orally agreed between the respondents and the waiters as a term of their employment that all amounts received as tips by the waiters should be paid over to the respondents and that the respondents should each week pay the waiters by way of remuneration a wage of 30s. (£2 in one case) and a certain proportion of the total amount of all tips. In the pay weeks to which the respective informations related the waiters each received their wages and a proportion of the total amount of the tips, which, taken together, exceeded the rate of statutory minimum remuneration fixed by the order of 1949, whereas the wages alone were below that rate. The magistrate was of opinion that where there was an agreed method of distribution of tips, the waiters' share was part of their remuneration; that, provided the total remuneration, *i.e.*, the wages paid out of the coffers of the restaurant plus the tips, exceeded the statutory minimum, it did not matter

for the purposes of the Act of 1943 and the order of 1949 in what proportion the remuneration was made up from these two sources; and that the tips constituted remuneration for the purpose of compliance with the provisions of the Act of 1943. Accordingly, he dismissed the informations. On appeal, it was contended for the appellant that tips given to the waiters did not become the property of the respondents, and, therefore, should not be taken into account in arriving at the total remuneration paid to them for the purposes of the Act of 1943.

The Attorney-General (Sir Hartley W. Shawcross, K.C.) and Winn for the appellant.

Salmon, K.C., and Lester for the respondents.

B *Cur. adv. vult.*
Feb. 13. **LORD GODDARD, C.J.**, read the following judgment of the court.

This is a Special Case stated by a metropolitan magistrate before whom the respondents, who carry on a catering business on unlicensed premises in Regent Street, were charged that they, being employers of workers to whom the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949 (S.I., 1949, No. 433), applied, unlawfully failed to pay remuneration not less than the statutory minimum remuneration to one of their said workers. There were, in fact, four informations, each in respect of a different waiter at the restaurant. The learned magistrate dismissed the informations and stated the present Case. When the Case was first before this court last December, we realised that it raised a question of great importance to the whole catering trade, and, as no appeal lies from this court, we directed that it should be heard before a full court of five judges.

The facts found by the learned magistrate were that the four persons named in the informations were employed at the respondents' restaurant as waiters and were workers to whom the orders made by the Unlicensed Place of Refreshment Wages Board applied. He found that it was orally agreed between these waiters and the respondents as a term of their employment that all amounts received as tips by the waiters should be paid over by them to the respondents, and the respondents should each week pay the waiters by way of remuneration a certain wage and a proportion of the total amount of the tips. The waiters placed the tips which they received in a locked box provided by the respondents for that purpose. In the pay weeks referred to in the summonses, three of the waiters received 30s. and one £2, and they each received a proportion of the total amount of the tips in the box which, with the 30s. or £2, brought the amounts received by them above the minimum sum prescribed in the order. He also found that the key of the box was kept by the head waiter on behalf of the respondents, and that, at the end of each day, he opened the box in the presence of one of the waiters, counted its contents, and entered the amount in a book. The moneys were kept in the box until the weekly share-out in which each of the workers participated, the head waiter getting a somewhat larger share than the others who shared equally. There was no notice in the restaurant referring to tips or the manner in which they would be disposed of or distributed, and, in assessing the income tax paid by the said workers, regard was had to tips as forming part of their emoluments.

In our opinion, it is quite clear, though, perhaps, not precisely stated, that the learned magistrate meant to find that the waiters were engaged on the terms that they received a certain weekly sum from the respondents and a share of the tips or, as it is generally called among waiters, the "*tronc*." As is well known, the *tronc* system is one under which the customers' tips are pooled and shared out between the waiters, and, in some cases, perhaps, also other members of the staff. That this was what the learned magistrate meant

is, we think, put beyond doubt by his finding that, where tipping is recognised, part of the wages of the staff comes from the customers, and, where there is an agreed method of distribution of tips, the worker's share of them is part of his remuneration. The learned magistrate then found that, provided the total remuneration, that is, wages paid out of the coffers of the restaurant plus tips, exceeds the statutory minimum, it does not matter for the purposes of the Catering Wages Act, 1943, or the order of 1949 in what proportion it is made up from these two sources. In other words, the learned magistrate held that, provided the waiter got from one source or another an amount of money not less than the statutory minimum, no offence had been committed. A

It is, we think, clear that the learned magistrate was largely influenced by the fact that both for the purpose of calculating the earnings of a waiter for the purpose of the Workmen's Compensation Acts and for that of computing his profits or gains for assessment of income tax, tips have to be taken into account, but, in our opinion, this is really an irrelevant consideration. The amount of a man's earnings in an employment and the amount of remuneration paid to him by his employer are not necessarily the same thing. The section creating the offence, under which the proceedings are taken, is s. 9 (2) of the Catering Wages Act, 1943. That section provides that, if an employer fails to pay to a worker, to whom a wages regulation order applies, remuneration not less than the statutory minimum remuneration, clear of all deductions, he shall be guilty of an offence. Section 10 contains somewhat elaborate provisions for the computation of remuneration. Not only the short title, but the structure of the Act, setting up a Catering Wages Commission, permitting the establishment of wages boards, and providing for wages regulation orders, clearly indicate that it is with wages that the Act is intended to deal. The word "remuneration" in both s. 9 and s. 10, and, indeed, in other sections, is probably used because there are certain deductions from wages which are authorised by s. 10, so that remuneration is an apt word to indicate the net payment. B C D

What we have to decide is whether, when a waiter receives a payment from the *tronc* in the manner found in the Case, that sum can be regarded as remuneration paid to him by, or as remuneration obtained by him in cash from, his employer. In our opinion, when a customer gives a tip to a waiter the money becomes the property of the latter. The customer has no intention of giving anything to the employer. Counsel for the respondents did not contend that in a case where no *tronc* existed a tip given by a customer could be regarded as remuneration paid by, or obtained from, the employer. Where the *tronc* system obtains, the money given by the customer is paid into a *tronc* or pool by the waiter, so that it then becomes the joint property of all those entitled to share in the pool. In parenthesis, it may be seen, by reference to a French dictionary, that the word *tronc* is applied to a box or receptacle for money contributions and can be used to indicate, for instance, a poor box. It seems to us that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer, he would have no title to the money. The position would be exactly the same as if the owner of some bank notes and coin put them in a bag and handed it to some person to keep for him. When the *tronc* money is shared out, the waiters are dividing up their own money. Accordingly, we hold that the sums received from the *tronc* by the waiters cannot be taken into account in computing the amounts paid by the respondents to them. Whether, in view of this judgment, the respondents have any possible answer is a matter for the learned magistrate to determine, as we remit the case to him with the opinion of the court that there was a case to answer. The appeal is allowed with costs. E F G H

Appeal allowed with costs.

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the appellant); *Mayorcas* (for the respondents).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

ABBOTT v. LONDON COUNTY COUNCIL.

[KING'S BENCH DIVISION (McNair, J.), February 8, 1951.]

Pension—Increase—Pension “payable by local authority solely in respect of local government service”—Transfer of servant to transport board—Continuance as member of pension fund of local authority—“Enactment by which fund regulated”—London Passenger Transport Act, 1933 (c. 14), s. 80 (9)—Pensions (Increase) Act, 1944 (c. 21), sched. I, Part II, para. 1.

An employee of the London County Council was transferred to and became a servant of the London Passenger Transport Board under the London Passenger Transport Act, 1933, and, under s. 80 (9) of the Act, she continued to be a member of the council's pension fund until her retirement in 1938. She claimed to be entitled to an increase of her pension as being “a pension payable by a local authority solely in respect of local government service” within the Pensions (Increase) Act, 1944, sched. I, Part II, para. 1.

HELD: service under the London Passenger Transport Board was not local government service within para. 1 of Part II of the schedule, and, therefore, the pension payable to the employee was not “payable solely in respect of local government service”; the Pensions (Increase) Act, 1944, was not an enactment by which the council's superannuation fund was regulated within the meaning of s. 80 (9) of the Act of 1933, and, therefore, the provisions of the Act of 1944 did not, so far as respected the employee, apply to the council; the words “benefits, rights and privileges” at the end of the sub-section must be construed as relating only to the subject-matter of the previous part of it, *viz.*, benefits, rights and privileges arising under an enactment, etc., regulating the fund; and, accordingly, the employee's claim failed.

Semble: the effect of s. 80 (9) is to give a transferred employee the benefit of the provisions of any enactment, etc., by which a pension fund is regulated coming into operation during the period of his membership, and is not limited to enactments, etc., which were in force when the transfer took place.

[FOR THE PENSIONS (INCREASE) ACT, 1944, s. 1 (1), (7) and sched. I, Part II, para. 1, see HALSBURY'S STATUTES, Second Edn., Vol. 17, pp. 921, 923 and 931, respectively.]

ACTION for a declaration that the plaintiff was entitled to receive an increase of pension under the Pensions (Increase) Acts, 1944 and 1947.

The plaintiff had been in the service of the defendants, the London County Council, until 1933 when she was transferred to the London Passenger Transport Board under the London Passenger Transport Act, 1933. She was employed by the board until 1938 when she retired on a pension under the defendants' superannuation scheme of which she had continued to be a contributory member under provisions in the Act of 1933. The plaintiff contended that she would have been entitled to the increase if she had continued in the service of the defendants, and that, by s. 73 (3), of the Act of 1933 she was not, by reason of the transfer, to be in a worse position as regards *inter alia* pension and superannuation, and, further, that, by s. 80 (9), enactments by which the fund was regulated applied to the county council, the Pensions (Increase) Acts, 1944 and 1947, were such enactments, and she was, therefore, entitled to the same benefits, rights and privileges as if she had remained a servant of the county council. For the defendants it was contended that she was not entitled to an increase of pension under the Acts of 1944 and 1947 since her pension was not payable solely in respect of local government service.

M. R. Nicholas for the plaintiff.

H. E. Francis for the defendants.

McNAIR, J.: This case raises a difficult question of construction arising under the London Passenger Transport Act, 1933, and the Pensions (Increase) Acts, 1944 and 1947. The plaintiff, Mrs. Abbott, entered the service of the London County Council, the defendants, on Aug. 23, 1909. She remained in their service until June 30, 1933, up to which time she had been employed in the tramway undertaking of the authority. On June 30, 1933, by virtue of the provisions of the London Passenger Transport Act, 1933, she was transferred and became a servant of the London Passenger Transport Board. She remained in that service, apparently doing a similar class of work, until Aug. 3, 1938, when she retired as a result of illness. From the commencement of her service with the defendants she had been a contributory member of their superannuation scheme and under the provisions of the London Passenger Transport Act, 1933, she remained a member until the date of her retirement. On her retirement she became entitled under the superannuation scheme to a pension of £86 16s. 8d. per annum based on one-sixtieth of the average of her earnings during her last five years' service multiplied by the number of years of combined service, namely, service under both the defendants and the London Passenger Transport Board. In 1944 Parliament enacted the Pensions (Increase) Act of that year, and if that Act is applicable in the case of the plaintiff she is entitled to have her pension increased by the amount of £21 14s. 2d. from Jan. 1, 1944, until Nov. 30, 1946, and under the Pensions (Increase) Act, 1947, if that Act be applicable, she is entitled to an increase of £30 per annum from Dec. 1, 1946. The question raised in this action is whether under those two Acts the plaintiff is entitled to the increase of pension which she claims.

The Pensions (Increase) Act, 1944, s. 1 (1), provides:

"Subject to the provisions of this section, a pension specified in sched. I to this Act may, in respect of any period after Dec. 31, 1943, be increased by the pension authority by an amount calculated in accordance with the provisions of sched. II to this Act."

Certain conditions are prescribed, and it is agreed that the plaintiff has satisfied them. By s. 1 (7):

"Where any such pension as is specified in Part II of sched. I to this Act may be increased under the provisions of this section, it shall be the duty of the pension authority to increase the pension in accordance with those provisions."

To see to what pensions that section applies, it is necessary to turn to sched. I. Part I of sched. I sets out five classes of pensions which are payable under certain statutes, and in Part II there are four classes of pensions which are payable otherwise. The class which it is submitted applies in the case of the plaintiff is that described in para. 1 of Part II in these words:

"A pension payable by any local authority solely in respect of local government service."

Pausing there, the first question which arises is whether this pension which the plaintiff claims to have increased can be said to be a pension payable solely in respect of local government service inasmuch as the service which gave rise to that pension was service partly with the London County Council and partly with the London Passenger Transport Board. On behalf of the London County Council it is submitted that whatever may be the effect of the London Passenger Transport Act, 1933, the Pensions (Increase) Act, 1944, is quite plain in its terms and, so far as is relevant, confines the pensions in respect of which increases can be made to pensions payable by the local authority solely in respect of local government service. It is further submitted that it is impossible to include in "local government service" any form of service other than one which falls

precisely within the definition of those words in para. 1 of Part II. That definition provides that "local government service" is to include, and to include only, service of three different characters—(i) actual service under a local authority, (ii) service which, by virtue of s. 2 or s. 3 of the Local Government (Emergency Provisions) Act, 1916, or s. 12 (3) of the Local Government Superannuation Act, 1937, or the Local Government Staffs (War Service) Act, 1939, is, for superannuation purposes, treated as service under a local authority, and (iii) any service which, by virtue of s. 1 (1) of the Local Government Superannuation Act, 1939, is to be treated as service for the purposes of the Local Government Superannuation Act, 1937.

In my judgment, it is clear that "local government service" in para. 1 of Part II is so limited, and that the only pensions which, under the Act of 1944, the local authority may increase are pensions which become payable solely in respect of local government services in one of those three classes. On the facts here it is plain that the pension which the plaintiff seeks to have increased was not a pension payable solely in respect of local government service in the sense described, since admittedly it was in part payable in respect of her service as a transferred officer or servant under the London Passenger Transport Board. Accordingly, unless there is anything in the earlier statute which compels the court to adopt some other construction, it seems to me that the defendants are right in their contention that this is a pension in respect of which they have no power to grant any increase.

I turn to the London Passenger Transport Act, 1933, to see whether there is in that Act any provision which compels the court to take a contrary view, bearing in mind that, if there is a conflict between two statutes, the later statute, that of 1944, must be given effect as though it were an implied repeal of the earlier statute. The sections of the Act of 1933 which are relied on are all contained in Part VII which deals with staff and superannuation. Section 73 provides for the transfer of officers and servants solely or mainly occupied in transferred undertakings, of which the plaintiff admittedly was one. Sub-s. (3) provides:

"No existing officer or servant so transferred shall, without his consent, be by reason of such transfer in any worse position in respect of the conditions of his service as a whole as compared with the conditions of service formerly obtaining with respect to him and, in determining whether an officer or servant is, or is not, in a worse position, regard shall be had to all relevant considerations, including tenure of office, remuneration, gratuities, pension, superannuation, sick fund and any other benefits or allowances, whether provided for himself or for his widow, family or representatives and whether obtaining legally or by customary practice of the authority, company or person under whom he held his office or employment."

It is said that inasmuch as, if the plaintiff had remained in the service of the local authority until her retirement, she would undoubtedly have qualified for an increase in her pension under the Act of 1944, she is prejudiced by this transfer. If any such prejudice does arise, then there is provision in s. 73 (4) for a reference to an arbitrator to assess the amount of compensation to be payable in that event by the board. More strictly material are the provisions of s. 80, relating to the superannuation funds. In particular, reliance is placed on sub-s. (9), sub-s. (10) and sub-s. (11). Sub-section (9), on which much of the argument before me has been based, is in these terms:

"Any person who, being an officer or servant of any of the local authorities specified in Part III of sched. II to this Act is transferred to and becomes an officer or servant of the board, and who immediately before the appointed day was a member of any pension, superannuation or

other benefit fund set up by that authority (in this section referred to as 'a local authority's fund') may so long as he remains an officer or servant of the board continue to be a member of that fund and, subject to the provisions of the three next succeeding sub-sections, while he so continues to be a member, the provisions of any enactment or scheme or any rule or regulation by which that fund is regulated shall, so far as respects him, continue to apply to the local authority, and he shall be entitled to the same benefits, rights and privileges and subject to the same obligations, whether obtaining legally or by customary practice, as he would have been entitled or subject to if he had remained an officer or servant of the authority."

That sub-section, in terms, deals with transferred officers during the period during which they remain in the service of the board. It does not, in terms, deal with their position after their retirement, but it is useful to consider it, because, if the court was satisfied that the provisions would have applied literally to the plaintiff had she remained in the board's service up to the date of the coming into force of the Act of 1944, she would have gone a long way towards satisfying the court that her claim was well founded.

Two points are taken against the plaintiff's contentions. First, it is said that the effect of sub-s. 9 is merely to continue in favour of the transferred officer the rights and privileges arising under any enactments, schemes, or rules or regulations by which the local authority's fund is regulated in so far as they were in force at the date of the transfer. Secondly, it is said, however that may be, the Pensions (Increase) Act, 1944, and the Pensions (Increase) Act, 1947, are not enactments by which the local authority's fund is regulated. As to the first objection, I do not feel that it is necessary for me to express any concluded view on it, although the balance of my mind is in favour of the view that the words in the sub-section are apt to attract to the transferred officer the provisions of any enactments, scheme or regulations regulating the fund even though those enactments, schemes or regulations were not in force at the time of the transfer. It seems to me that that construction is preferable in view of the fact that these rights are conferred on the transferred officer so long as he continues to be a member of the fund, thereby indicating, to my mind, that the protection of the enactments, schemes or regulations is to extend to him during the whole period of his membership and is not to be limited to enactments, schemes or regulations which were in force when the act of transfer took place. Any other construction would involve that, if an amendment to the enactment, scheme or regulation was made after the date of the transfer, there would be at least two different classes of persons having different rights in the fund. But I do not think it is necessary to form a concluded view on that, because it seems to me that it is reasonably plain that the Pensions (Increase) Acts of 1944 and 1947 are not enactments which regulate the defendants' fund. The enactments which regulate the defendants' fund are, no doubt, those which are set out at the beginning of the scheme for establishing the fund. They regulate the statutory rights which the contributors and the members have against the fund. The Pensions (Increase) Act, 1944, does not, as it seems to me, regulate any pension fund; it merely provides that the local authority shall be entitled to increase the pension if certain conditions are complied with outside the fund altogether.

Support for that conclusion can, I think, be found in s. 5 of the Pensions (Increase) Act, 1944, which deals with financial provisions and prescribes how increases to pensions are to be defrayed. In the case of the pensions specified in Part I of sched. I to the Act, namely, those pensions which are payable out of public funds, the provision is that the initial expenditure shall be defrayed out of moneys provided by Parliament, but by sub-s. (2) it is provided that

in the case of the pensions specified in para. 1 of Part II of sched. I to the Act (which is the pension said in this case to be relevant)

“ . . . the cost of the increase shall be defrayed by the pension authority . . . ”

A It seems to me that a provision that an increase of pension shall be defrayed by the pension authority—which by the definition in s. 8 (3) means “the authority by whom the pension is payable”—is not a provision regulating the fund within the meaning of s. 80 (9) of the London Passenger Transport Act, 1933. Accordingly, in my judgment, the plaintiff cannot claim the benefit of the Act of 1944 by reliance on those words of s. 80 (9).

B The plaintiff relies further on the concluding words of s. 80 (9) which provides that a transferred officer

“ . . . shall be entitled to the same benefits, rights and privileges and subject to the same obligations, whether obtaining legally or by customary practice, as he would have been entitled or subject to if he had remained an officer or servant of the authority.”

C It is said, putting the case at its broadest, that on the admitted facts it is plain that the plaintiff, if she had remained in the service of the defendants until her retirement, would have become entitled to an increase of pension under the Pensions (Increase) Act, 1944, as soon as that Act came into force. It seems to me, however, that such a construction is putting altogether too broad a meaning on the concluding words of s. 80 (9) of the Act of 1933, that those words must be construed as relating only to the subject-matter which is earlier D dealt with in the sub-section, and that they can only mean that the transferred officer should be entitled to the same benefits, rights and privileges—that is, those arising under enactments, schemes or regulations regulating the fund, rights and privileges obtaining legally or rights and privileges arising by customary practices.

E If there be any conflict between the provisions of the London Passenger Transport Act, 1933, and the Pensions (Increase) Act, 1944, the words of the Act of 1944 are, in my judgment, so plain and unambiguous that effect must be given to them rather than to the provisions of the Act of 1933. I have already referred to the definition in para. 1 of Part II of sched. I to the Act of 1944 as showing how limited is the class of pensions payable by local authorities which may be increased, and I think the same construction is reinforced F by two other provisions of the Act of 1944 and one provision of the Act of 1947. The first is s. 5 (3) of the Act of 1944, which provides that, where the pensionable service has partly been in the service of one local authority and partly in the service of another, the pension is to be paid by the last employing authority with a right of reimbursement from the earlier pension authority. Secondly, G there is a provision in s. 4 (1) which enables His Majesty by Order in Council to apply the Act to certain other classes of pensions not specified in Part II of sched. I to the Act with the result that a use of that power would avoid the apparent anomaly which has been stressed on behalf of the plaintiff that, on the defendants' construction, this Act discriminates against her limited class. A similar provision is to be found in the Pensions (Increase) Act, 1947, which, by s. 5, enables the Treasury to

H “ . . . make regulations empowering any person or body of persons specified in the regulations to pay the like increases of pensions payable by them or in respect of pensions otherwise payable by reference to service with them or to such service and other service, as would be payable if those pensions were pensions specified in sched. I to the principal Act.”

Without expressing any concluded view, it seems to me that, if there is any anomaly in the case of the plaintiff which requires to be dealt with, it can be

dealt with under one or other of those provisions, but the basis of my judgment is that the Pensions (Increase) Act, 1944, is phrased in clear terms, and, so far as it is relevant to the present case, it limits the power of the defendants to pay increases of pensions to the case of a pension which is payable solely in respect of local government service. I have, therefore, come to the conclusion that the pension that the plaintiff was drawing cannot be said to be a pension payable solely in respect of local government service, and, therefore, her claim fails.

Judgment for the defendants.

Solicitors: *Rexworthy, Bonser & Wadkin* (for the plaintiff); *J. H. Pawlyn*, Solicitor to London County Council (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

CASSIDY v. MINISTRY OF HEALTH (FAHRNI, Third Party).

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), January 15, 16, 24, 25, February 15, 1951.]

Hospital—Negligence—Liability for negligence of members of staff—Medical practitioner employed by hospital under contract of service—House surgeon.

The plaintiff, who was suffering from a contraction of the third and fourth fingers of his left hand, was operated on at the defendants' hospital by Dr. F., a whole-time assistant medical officer of the hospital. After the operation, the plaintiff's hand and forearm were bandaged to a splint and they remained so for some fourteen days. During this time the plaintiff complained of pain, but, apart from ordering the administration of sedatives, no action was taken by Dr. F., or by the house surgeon who attended to the plaintiff in the absence of Dr. F. Both Dr. F. and the house surgeon were employed by the hospital authorities under contracts of service. When the bandages were removed, it was found that all four fingers of the plaintiff's hand were stiff and that the hand was practically useless. In an action by the plaintiff against the defendants for negligence in the post-operational treatment which he received,

HELD: the evidence showing a *prima facie* case of negligence on the part of the persons in whose care the plaintiff was which had not been rebutted, the defendants, in view of the terms of the employment of Dr. F. and of the house surgeon, were liable to the plaintiff whether the negligence was that of Dr. F. or the house surgeon or of a member or members of the nursing staff.

Hillyer v. St. Bartholomew's Hospital (Governors) ([1909] 2 K.B. 820), distinguished.

Gold v. Essex County Council ([1942] 2 All E.R. 237), applied.

Collins v. Hertfordshire County Council ([1947] 1 All E.R. 633), approved.

Per DENNING, L.J.: The liability of hospital authorities for the negligence of a doctor on the permanent staff of the hospital does not depend on whether he is employed under a contract of service or under a contract for services. It depends on who employs him. If the patient himself selects and employs the doctor, the hospital authorities are not liable for his negligence, but where the doctor, be he a consultant or not, is employed and paid, not by the patient, but by the hospital authorities, the hospital authorities are liable for his negligence in treating the patient.

[AS TO LIABILITY OF HOSPITAL FOR NEGLIGENCE OF ITS SERVANTS OR AGENTS, see HALSBURY, Hailsham Edn., Vol. 22, p. 320, para. 605; and FOR CASES, see DIGEST, Vol. 34, p. 550, Nos. 86, 87.]

Cases referred to:

- (1) *Gold v. Essex County Council*, [1942] 2 All E.R. 237; [1942] 2 K.B. 293; 112 L.J.K.B. 1; 167 L.T. 166; 106 J.P. 242; 2nd Digest Supp.
- A (2) *Hillyer v. St. Bartholomew's Hospital (Governors)*, [1909] 2 K.B. 820; 78 L.J.K.B. 958; *sub nom. Hillyer v. London Corp'n. (St. Bartholomew's Hospital Governors)* 101 L.T. 368; 73 J.P. 501; 34 Digest 550, 87.
- (3) *Smith v. Martin & Kingston-upon-Hull Corp'n.*, [1911] 2 K.B. 775; 80 L.J.K.B. 1256; 105 L.T. 281; 75 J.P. 433; 34 Digest 40, 163.
- (4) *Collins v. Hertfordshire County Council*, [1947] 1 All E.R. 633; [1947] K.B. 598; [1947] L.J.R. 789; 176 L.T. 456; 111 J.P. 272; 2nd Digest Supp.
- B (5) *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543; 79 L.J.K.B. 395; 102 L.T. 210; 3 B.W.C.C. 200; 34 Digest 21, 15.
- (6) *Yewens v. Noakes*, (1880), 6 Q.B.D. 530; 50 L.J.Q.B. 132; 44 L.T. 128; 45 J.P. 8, 468; 1 Tax Cas. 260; 34 Digest 21, 14.
- C (7) *Walker v. Crystal Palace Football Club, Ltd.*, [1910] 1 K.B. 87; 79 L.J.K.B. 229; 101 L.T. 645; 3 B.W.C.C. 53; 34 Digest 239, 2045.
- (8) *Scott v. London Dock Co.*, (1865), 3 H. & C. 596; 34 L.J.Ex. 220; 13 L.T. 148; 159 E.R. 665; 36 Digest 91, 601.
- (9) *Byrne v. Boadle*, (1863), 2 H. & C. 722; 33 L.J.Ex. 13; 9 L.T. 450; 159 E.R. 299; 36 Digest 51, 315.
- D (10) *Lindsey County Council v. Marshall*, [1936] 2 All E.R. 1076; [1937] A.C. 97; 105 L.J.K.B. 614; *sub nom. Marshall v. Lindsey County Council*, 155 L.T. 297; 100 J.P. 411; Digest Supp.
- (11) *Evans v. Liverpool Corp'n.*, [1906] 1 K.B. 160; 74 L.J.K.B. 742; 69 J.P. 263; 34 Digest 40, 160.
- (12) *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.*, [1946] 2 All E.R. 345; [1947] A.C. 1; 115 L.J.K.B. 465; 175 L.T. 270; 2nd Digest Supp.
- E (13) *Donovan v. Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 63 L.J.Q.B. 25; 68 L.T. 512; 57 J.P. 583; 34 Digest 26, 49.
- (14) *Tarry v. Ashton*, (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; 34 Digest 163, 1274.
- F (15) *Dalton v. Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, 1234.
- (16) *Hughes v. Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 7 Digest 300, 240.
- (17) *Grote v. Chester & Holyhead Ry. Co.*, (1848), 2 Exch. 251; 154 E.R. 485; 34 Digest 161, 1262.
- G (18) *Pickard v. Smith*, (1861), 10 C.B.N.S. 470; 4 L.T. 470; 142 E.R. 535; 34 Digest 162, 1264.
- (19) *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335; 65 L.J.Q.B. 363; 74 L.T. 69; 60 J.P. 196; 34 Digest 31, 89.
- (20) *Woodward v. Mayor of Hastings*, [1944] 2 All E.R. 565; [1945] 1 K.B. 174; 114 L.J.K.B. 211, 218; 172 L.T. 16; 109 J.P. 41; 2nd Digest Supp.
- H (21) *The Neptune the Second*, (1814), 1 Dods. 467; 165 E.R. 1380; 41 Digest 696, 5284.
- (22) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (23) *Mahon v. Osborne*, [1939] 1 All E.R. 535; [1939] 2 K.B. 14; 108 L.J.K.B. 567; 160 L.T. 329; Digest Supp.

APPEAL by the plaintiff from an order of STREATFIELD, J., made at Liverpool

Assizes on June 29, 1950, whereby he held that the defendants, who, by virtue of the National Health Service Act, 1946, s. 6 (2), had taken over a hospital owned by the Liverpool Corporation, were not liable for injuries received by the plaintiff while a patient in the hospital.

In 1948 the plaintiff, who was a general labourer, was suffering from a contraction of the third and fourth fingers of the left hand. He went to the hospital and was seen by Dr. Fahrni, a whole-time assistant medical officer of the hospital, who diagnosed the plaintiff's condition as Dupuytren's contraction. The plaintiff agreed to an operation and on Thursday, Apr. 8, 1948, it was carried out by Dr. Fahrni. Following the operation a nurse bandaged the plaintiff's hand and arm to a splint. The doctor tested the bandage to see if it was too tight, but found that the circulation was satisfactory. Dr. Fahrni did not see the plaintiff again until Apr. 12, but in the interval the plaintiff had complained of exceptional pain and was seen by Dr. Ronaldson, a house surgeon, who gave instructions for morphia to be administered. On the Monday Dr. Fahrni examined the hand and decided to leave the splint and bandage as it was. From this day until the date that the splint was removed, the plaintiff continued to complain of excessive pain, but Dr. Fahrni told the plaintiff that he must put up with the condition. When the splint was finally removed the plaintiff had lost the use of all four fingers. For the defendants it was contended, that, assuming there was negligence, it was either the negligence of Dr. Fahrni, or it was uncertain who was the negligent party, and in either case the defendants were not responsible. STREATFIELD, J., although of the opinion that the defendants would be responsible for the acts of the doctor and house surgeon, held that there was no negligence and found for the defendants.

Sir Noel Goldie, K.C., and J. G. Burrell for the plaintiff.

Blackledge, K.C., and Andrew Rankin for the defendants.

Nield, K.C., and J. S. Watson for the third party, Dr. Fahrni.

Cur. adv. vult.

Feb. 15. The following judgments were read.

SOMERVELL, L.J. (read by DENNING, L.J.): In this case the plaintiff sues the defendants for damages for negligence. The learned judge found for the defendants and the plaintiff appeals. A third party has been cited by the defendants, but the learned judge, having found for the defendants, did not deal with the issue as between these parties.

The plaintiff, a general labourer, now some fifty-nine years of age, was suffering in the early part of 1948 from a contraction of his third and fourth fingers. He consulted a Dr. Flanagan, who diagnosed the condition as one known as Dupuytren's contraction. The doctor sent the plaintiff with a note to Walton Hospital for examination. He was seen by Dr. Fahrni, the third party in these proceedings. Dr. Fahrni was a whole-time assistant medical officer of the Walton Hospital. That hospital was at that date a hospital of the city of Liverpool, the original defendants to these proceedings. By reason of the provisions of s. 6 (2) of the National Health Service Act, 1946, it is common ground that the Ministry of Health have been properly substituted as defendants. Dr. Fahrni was a Canadian who had graduated in Canada in 1940. In 1941 he joined the Canadian army and came to this country in 1942 or early 1943. He had at the material dates specialised to a considerable extent in orthopaedic surgery, in military hospitals and elsewhere. In this country he had received the degree of Fellow of the Royal College of Surgeons, Edinburgh. No attack is made on his qualifications or general competence. Dr. Fahrni confirmed Dr. Flanagan's diagnosis and recommended an operation. The plaintiff agreed to the operation, and it was carried out on Apr. 8, 1948. The nature of the operation involves in the ordinary course the hand and lower arm being kept rigid, or practically rigid, in a splint for some eight to

fourteen days. When the plaintiff's hand was finally released after some fourteen days, the condition of all the four fingers was very bad. Its condition then and its final result at the time of the trial is described by the learned judge, who saw the hand, in the following sentence:

A "Afterwards when it was released, unhappily a very serious state of affairs was revealed, because not only were the two fingers which had been operated on almost completely stiff but the trouble appeared to spread to the other two good fingers as well, and the result now is that after two manipulative operations and after very much pain, some of which Mr. Cassidy still endures, this unhappy man is in the position of having a left hand which is completely useless to him."

B Apart from the two manipulative operations, the plaintiff attended as an out-patient down to January, 1949. He was treated by Mr. Moroney, the senior consultant surgeon of the orthopaedic branch of the hospital. Mr. Moroney was not called. The plaintiff said Mr. Moroney told him it was no good his coming any more.

C I have gone straight to the result because, in my opinion, on the basis that the hospital was responsible for all those in whose charge the plaintiff was, the surgeon, doctor, and nurses, the result seems to me to raise a case of *res ipsa loquitur*. A jury would have been entitled to find negligence on the facts as I have stated them. As will appear, it is disputed whether the defendants were responsible for the surgeon and house doctor. The learned judge, who found for the defendants, considered the matter in his judgment on the basis that the defendants were so responsible, reserving to them the right to raise D the further point if it arose on his decision. In the result, it did not. I propose to consider the issue first on the same basis as the learned judge.

The relevant allegations of negligence may be summarised as follows:—
(i) that the hand was bandaged too tightly and so caused the damage; (ii) that no heed, or no sufficient heed, was paid to the plaintiff's complaints that he was suffering intense and excessive pain; and (iii) that the splint should have been loosened or the hand inspected. The third is, in effect, particularising the action which should have been taken as the result of his complaints of pain. It was not disputed that the plaintiff made complaints of intense pain from the outset and throughout the period. It will be seen that it is not alleged that the operation itself was negligently conducted. The plaintiff called Dr. McAusland who saw the hand in August, 1948, and described its condition. E There was stiffness and swelling of all the fingers, scars and abrasions and marks on the flesh. He gave as his opinion of the cause; F

"Too tight and too prolonged bandaging in that splint. Too tight immobilisation and too prolonged immobilisation in that splint."

G He considered that in view of the plaintiff's bitter complaints, the bandage ought to have been removed to see whether some destructive process was going on which gave the man more pain than one would expect to have from the operation.

[His LORDSHIP reviewed the evidence, found that there was evidence of negligence on the part of the persons in whose care the plaintiff was, said that the plaintiff must succeed if the defendants were responsible for this negligence, and continued:] The question whether the defendants are so responsible depends H in the first instance on examination of the decision of this court in *Gold v. Essex County Council* (1). To appreciate the problem it is necessary to go back to *Hillyer v. St. Bartholomew's Hospital (Governors)* (2). That case is fully analysed and considered in *Gold's* case (1), and it is unnecessary to repeat in any detail all that is there set out. In his judgment in *Hillyer's* case (2) KENNEDY, L.J., expressed the view ([1909] 2 K.B. 829) that a hospital, though responsible for the exercise of due care in selecting its professional staff, whether

surgeons, doctors or nurses, was not responsible if they or any of them acted negligently in matters of professional care or skill. The other reasoned judgment, that of FARWELL, L.J., was based on narrower grounds. The Court of Appeal in *Gold's* case (1), after considering that case and other authorities, and certain *dicta* in the House of Lords, decided that the statement of KENNEDY, L.J., so far as it related to nurses or those in the position of nurses, should not be followed. The question of doctors on the staff did not directly arise in *Gold's* case (1).

In *Hillyer's* case (2) the plaintiff was injured in the operating theatre while under examination. A Mr. Lockwood, a consulting surgeon attached to the hospital, was in charge. Two other surgeons, one described as a house surgeon, were present, and also an anaesthetist and nurses. The plaintiff relied on the fact that his arm was burnt and injured while he was under examination. In one part of his judgment FARWELL, L.J., said that, in his view, all the surgeons and the anaesthetist were clearly not servants of the hospital so as to make the hospital liable for any professional negligence. So far as the nurses were concerned, he held that in the operating theatre they ceased to be servants of the hospital as the operating surgeon was alone entitled to give orders. In a later part of his judgment he based his decision alternatively on the fact that the plaintiff had not shown that the negligence was not that of "the surgeon," presumably referring to Mr. Lockwood for whom the hospital was plainly not liable. It may be that he had in mind all the surgeons, but this part of the judgment would stand if it was only Mr. Lockwood for whom the hospital was not liable. In *Smith v. Martin & Kingston-upon-Hull Corpn.* (3) FARWELL, L.J. ([1911] 2 K.B. 784) seems to have treated this latter ground as the real reason for his decision.

As in *Gold's* case (1) the court preferred the judgment of FARWELL, L.J., it is necessary to see whether they regard the statement that I have referred to with regard to all the surgeons and the anaesthetist from the first part of his judgment as part of the *ratio decidendi*. I think it is clear that they did not regard it as deciding the position with regard to those on the permanent staff of the hospital. With regard to the position of surgeons or doctors, LORD GREENE, M.R., says ([1942] 2 All E.R. 242) that the relationship of a consulting surgeon or physician precludes the drawing of an inference that the hospital authorities are responsible for his negligent acts. He treats the position of a house physician or surgeon as open. MACKINNON, L.J., says (*ibid.*, 245) that the senior surgeon, Mr. Lockwood, was certainly not a servant of the hospital, the others probably not. GODDARD, L.J., said (*ibid.*, 250) that he was not considering the position of doctors on the permanent staff. That must depend on whether there is a contract of service and the facts of any particular case.

The evidence as to Dr. Fahrni's position in the present case is that he was an assistant medical officer, that he received a sum in lieu of residential emoluments, which indicates that, if there had been accommodation, or, perhaps, if he had been a bachelor, he would have lived in, and that he was employed whole time. His engagement was subject to the standing orders of the council, but these are not before us. Dr. Ronaldson was a house surgeon working under Dr. Fahrni. The first question is whether the principles as laid down in *Gold's* case (1) cover them. In considering this, it is important to bear in mind that nurses are qualified professional persons. It is also important to remember, and MACKINNON, L.J., emphasised this (*ibid.*, 244), that the principle of *respondet superior* is not ousted by the fact that a "servant" has to do work of a skilful or technical character, for which the servant has special qualifications. He instanced the certified captain who navigates a ship. On the facts as I have stated them, I would have said that both Dr. Fahrni and Dr. Ronaldson had contracts of service. They were employed like the nurses as part of the permanent staff of the hospital. LORD GREENE, M.R., in *Gold's* case (1), in considering (*ibid.*, 242) what a patient is entitled to expect when he knocks at the

door of the hospital, comes to the conclusion that he is entitled to expect nursing, and, therefore, the hospital is liable if a nurse is negligent. It seems to me the same must apply in the case of the permanent medical staff. A familiar example is an out-patient's ward. One may suppose a doctor and a sister dealing with the patients. It seems to me the patient is as much entitled to expect medical treatment as nursing from those who are the servants of the hospital. I agree that, if he is treated by someone who is a visiting or consulting surgeon or physician, he is being treated by someone who is not a servant of the hospital. He is in much the same position as a private patient who has arranged to be operated on by "X."

In *Collins v. Hertfordshire County Council* (4) HILBERY, J., found that there had been negligence on the part of a house surgeon and a surgeon who had undertaken part-time attendance at the hospital. He found the defendants liable by reason of a negligent system, but he considered the question of the defendants' liability for the surgeons. He found that they were liable for the negligence of the house surgeon. He thought on the whole that they were not liable for the part-time surgeon, but his exact relationship to the hospital was obscure. As will be seen, I agree with his conclusion as to the house surgeon whom he regarded as covered by the *ratio decidendi* in *Gold's* case (1). In considering the distinction to be drawn between a contract of service and a contract for services, he referred to *Simmons v. Heath Laundry Co.* (5). In that case the question of what constituted a contract of service was considered by this court in relation to the Workmen's Compensation Act, 1906. HILBERY, J., referred ([1947] 1 All E.R. 638) to the citation by BUCKLEY, L.J. ([1910] 1 K.B. 552) of a statement by BRAMWELL, L.J., in *Yewens v. Noakes* (6) (6 Q.B.D. 530) that:

"A servant is a person subject to the command of his master as to the manner in which he shall do his work."

HILBERY, J., summarised the distinction in this way:

"... in a contract for services the master can order or require what is to be done, while in the other case [a contract of service] he can not only order or require what is to be done but direct how it shall be done."

With respect, I think that in the first case the word "master" is inappropriate, and the later test would, I think, if applied in the ordinary meaning of the words, exclude many cases where the relationship of master and servant clearly exists. To take the example given by MACKINNON, L.J., in *Gold's* case (1) of a certified captain of a ship, the owner can, of course, tell him where to go, but he cannot tell him how to navigate. BUCKLEY, L.J., in *Simmons' case* (5) referred ([1910] 1 K.B. 552) to the football player in *Walker v. Crystal Palace Football Club, Ltd.* (7) who, though under a contract of service, had in certain respects to exercise his own judgment uncontrolled by anybody. Later (*ibid.*, 553) he puts various tests, one of which I find difficult. He gives as a test for a contract for services:

"... was he employed to exercise his skill and achieve an indicated result in such manner as in his judgment was most likely to ensure success?"

These words would seem to cover the ship's master, an engine driver, and many who are admittedly servants. Later he says (*ibid.*), and one, perhaps, cannot get much beyond this:

"Was his contract a contract of service within the meaning which an ordinary person would give to the words?"

Simmons' case (5) was concerned with a claim by a girl aged nineteen who was admittedly employed by the defendants in their laundry and was entitled to workmen's compensation. She also gave music lessons, and the question was whether these earnings could be taken into account. This was held to

depend on whether *qua* music mistress she was under a contract of service. The county court judge held that she was not, and the Court of Appeal held there was evidence on which he could so find. FLETCHER MOULTON, L.J., referred (*ibid.*, 549) to masters in a boarding school as plainly under contracts of service. At the other end of the scale he held that where a person goes to a music or singing master for lessons, it would be absurd to hold that the person giving the lessons was the servant of the person taking them. He said that between these two cases lies an infinite number of intermediate cases where the special circumstances point towards one conclusion or the other. He added that, in his opinion, it was impossible to lay down any rule of law distinguishing the one from the other, and said:

"It is a question of fact to be decided by all the circumstances of the case."

I have thought it right to refer to these passages because they seem to me to indicate that the test as set out by HILBERY, J., might, if applied literally and generally, lead to results which are not in accordance with the law generally and as laid down in that case.

In my opinion, the appeal should be allowed. The learned judge reserved to the third party the right to call further evidence if and when the defendants were held liable to the plaintiff. I think, with respect, that it might have been better in this case if the learned judge had had all the evidence called at the trial. If, however, the defendants desire to proceed with their claim against the third party, that issue must be the subject of a further trial. There must in any case be a fresh hearing on the question of damages.

SINGLETON, L.J.: Until the coming into force of the National Health Service Act, 1946, Walton Hospital was vested in and managed by the Liverpool Corporation under the provisions of the Public Health Act, 1936. The hospital was taken over by the Ministry of Health by virtue of s. 6 (2) of the Act of 1946, and it is not disputed that the Ministry is responsible in damages if the plaintiff establishes that he suffered injury through negligence on the part of anyone for whose acts the Liverpool Corporation were responsible. STREATFIELD, J., gave judgment for the defendants in the action, holding that no negligence was proved.

The plaintiff, Michael Cassidy, was a labourer, fifty-six years old, when in April, 1948, he found himself impeded in the use of his left hand by the fact that the little finger and ring finger were becoming stiff and bent inwards. He consulted his panel doctor, Dr. Flanagan, who diagnosed Dupuytren's contraction and sent him for treatment to Walton Hospital. The plaintiff attended at the hospital and this diagnosis was confirmed by Dr. Fahrni, who arranged that the plaintiff should go into the hospital for an operation. On Apr. 8, 1948, the plaintiff was operated on by Dr. Fahrni. His hand and forearm were in a splint for some fourteen days. It was then discovered that all four fingers of the left hand had become stiff and were bent into the hand so that the hand is almost useless for the purposes of his work which involves the use of pick and shovel. Such an untoward happening might well seem to call for an answer from the hospital authorities. To carry the matter a stage further, Dr. Flanagan said that he had no idea that an operation could possibly affect the good fingers or that the post-operational treatment could affect them in any way at all. Dr. McAusland, who was called on behalf of the plaintiff, said that, if the operation had been performed properly, it should not have had any effect on the good fingers. As the complaint was directed to the post-operational treatment, it is to be assumed that he meant that or at least included it. The plaintiff's witnesses were cross-examined by counsel for the Ministry, and by counsel for Dr. Fahrni, who had been brought in by the defendants as third party. No question was put by either of them to suggest

that that which happened to the plaintiff was the sort of thing which might happen if due care was taken. Indeed, there was no suggestion of a like case ever having happened before. In such circumstances it lies on the defendants to show that the damage occurred without negligence on their part. As was stated by ERLE, C.J., in *Scott v. London Dock Co.* (8) (3 H. & C. 601):

A "... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

See also *Byrne v. Boadle* (9).

B I do not overlook the words of FARWELL, L.J. ([1909] 2 K.B. 827) in *Hillyer v. St. Bartholomew's Hospital (Governors)* (2), approved by LORD GREENE, M.R. ([1942] 2 All E.R. 241) in *Gold v. Essex County Council* (1):

C "But even if the nurses and carriers were persons for whose negligence the defendants would be liable, the plaintiff would still fail, because it is clear that they are not liable for the negligence of the surgeon. The plaintiff has to prove his case against the defendants, but he does not do so by showing that he has been injured by the negligence of A., B., C., and D., or of one of them, when the defendants are liable for the negligence of C. and D. only, and not for that of A. and B. He must prove that the defendants are liable, and does not do so by showing that if C. and D. were the negligent persons they would be liable, but if it is A. and B., then they are not. He must prove affirmatively that the negligence was that of the persons for whom the defendants are liable."

D In *Hillyer's* case (2) the plaintiff's arm was burned when he was on an operating table. The examination was conducted by a consulting surgeon attached to the hospital, and it was admitted that the relationship of master and servant did not exist between the defendants and the consulting surgeon. FARWELL, L.J., E assumed that the nurses and carriers were servants of the defendants for general purposes, but added ([1909] 2 K.B. 826):

F "... as soon as the door of the theatre or operating room has closed on them for the purposes of an operation . . . they cease to be under the orders of the defendants, and are at the disposal and under the sole orders of the operating surgeon until the whole operation has been completely finished; the surgeon is for the time being supreme, and the defendants cannot interfere with or gainsay his orders."

G The present case is quite different on the facts. Dr. Fahrni was a full-time employee of the corporation. He was appointed assistant medical officer at the hospital on Dec. 3, 1947. He was allowed to live out and he was given a sum in lieu of residential emoluments. His engagement was subject to the standing orders of the council. No doubt, the corporation could not interfere with him in the operating theatre even if they had wished to do so, but I know of nothing to prevent them making rules as to visiting, or seeing, patients after an operation, or as to the passing on of information or of complaints, or as to what should be done if the surgeon is absent.

H The case for the plaintiff set up negligence, not in regard to the operation itself, but in regard to the post-operational treatment. I do not think that the words of FARWELL, L.J., to which I have referred, can be applied to the facts of this case. The plaintiff was in the care of the hospital authorities. Those responsible for the post-operational treatment were all full-time employees of the corporation and it seems to me that it is not necessary for the plaintiff to establish precisely which individual employee was negligent. He made out a *prima facie* case of negligence against the defendants. In such circumstances

they may be able to rebut that case by showing that there was no negligence or that the negligence was on the part of someone for whose acts they are not responsible. I do not agree with the submission of counsel for the defendants that, if the negligence may have been that of Dr. Fahrni, the defendants are entitled to succeed. This submission was based on two grounds—(i) that Dr. Fahrni was in the same position as was the consulting surgeon in *Hillyer's* case (2), and (ii) that FARWELL, L.J., made it clear that, in his view, the plaintiff in that case had to prove that the negligence was of an individual for whom the defendants were responsible. I have dealt with the second point, and it is now necessary to look into the position of Dr. Fahrni in a little more detail.

I do not find that his duties are laid down further than in the resolution of the Health Committee approved by the council on Dec. 3, 1947, and in the letter of Dec. 4 notifying him of his appointment. In *Hillyer's* case (2) FARWELL, L.J., was of the opinion that it was impossible to contend that the consulting surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anaesthetics, or any of them, were servants in the proper sense of the word. He assumed that nurses and orderlies might be. KENNEDY, L.J., appears to have considered that the hospital was not responsible for the negligence of its professional staff in matters of professional care or skill and to have included nurses in the term professional staff, though he indicated that the hospital authorities were legally responsible to patients for the due performance by their servants within the hospital of their purely ministerial or administrative duties such as attendance of nurses in the wards, the summoning of medical aid in cases of emergency, and the like. It is, I think, of first importance to remember that the court in that case was dealing with something which happened in the operating theatre when the consulting surgeon was in charge. The court did not decide that hospital authorities can never be responsible for the negligence of a doctor.

Hillyer's case (2) has been considered by the courts on many occasions. In *Lindsey County Council v. Marshall* (10) Mrs. Mary Marshall, who contracted puerperal fever in a maternity home, was held entitled to recover damages against the county council on the ground that there was evidence on which the jury might find that the defendants ought to have known that the home was dangerous and had failed to take reasonable steps to prevent damage to the plaintiff from the danger. VISCOUNT HAILSHAM, L.C., said ([1936] 2 All E.R. 1081):

"But it was contended . . . that even if there was negligence in continuing to admit new patients, and in not informing them of the facts, the responsibility rested upon Dr. Campbell and Dr. Stott and the defendants were not liable in law. I am unable to accept that view of the law . . . I can see no difference in principle between the employment of a doctor to advise on medical questions and the employment of any other skilled person to advise upon other questions."

LORD WRIGHT, M.R., said (*ibid.*, 1094):

"In my judgment the facts in this case are to be distinguished from those in *Hillyer's* case (2). It is not necessary to express here any opinion one way or the other about the correctness of that decision. That can be reserved until it comes, if it ever does, before this House: and the same may be said of *Evans v. Liverpool Corpn.* (11) which presents some differences from *Hillyer's* case (2). Nor is it necessary to consider what difficulties may arise in delimiting the respective frontiers of ministerial or administrative duties on the one hand and matters of professional care or skill on the other hand, if it ever becomes necessary to apply the distinction which KENNEDY, L.J., draws."

Later, LORD WRIGHT says (*ibid.*, 1095):

"It is not necessary to add that in all these matters not only the matron and nurses but the medical officers were in my opinion the servants of the appellants, as LAWRENCE, J., ruled. The fact that the appellants necessarily relied on their knowledge and judgment does not the less render them the appellants' agents to carry out the responsibility which rested on the appellants as operating the home."

A In *Gold's* case (1) the Court of Appeal held that a local authority carrying on a public hospital owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants even though the negligence arises while a servant is engaged on work which involves the exercise of professional skill on his part. The plaintiff was injured through the negligence of a competent radiographer, who was a whole-time employee, and the plaintiff recovered damages against the local authority. LORD GREENE, M.R., said ([1942] 2 All E.R. 242):

B " . . . but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf; and this is equally true whether or not the obligation involves the use of skill. It is also true that, if the obligation is undertaken by a corporation, or a body of trustees or governors, they cannot escape liability for its breach, any more than an individual can; and it is no answer to say that the obligation is one which on the face of it they could never perform themselves."

C In the present case was there not an obligation on the hospital to provide Mr. Cassidy with competent, or proper, post-operational treatment? LORD GREENE, M.R., in *Gold's* case (1) said (*ibid.*) that the nature of the work of consulting physicians and surgeons and the relationship in which they stood to the defendants precluded the drawing of an inference that the defendants were responsible for their negligent acts, and he added:

D "The same may be true of the house physicians and surgeons, but their case is not relevant to the present inquiry and I say nothing about it. The position of nurses again, though no doubt analogous, is not strictly relevant; but, if the nature of their employment, both as to its terms and as to the work performed, is what it usually is in such institutions, I cannot myself see any sufficient ground for saying that the respondents do not undertake towards the patient the obligation of nursing him as distinct from the obligation of providing a skilful nurse. Nursing, it appears to me, is just what the patient is entitled to expect from the institution and the relationship of the nurses to the institution supports the inference that they are engaged to nurse the patients . . . It is clear, therefore, that the powers of the respondents include the power of treating patients, and that they are entitled and indeed bound in a proper case to recover the just expense of doing so. If they exercise that power, the obligation which they undertake is an obligation to treat and they are liable if the persons employed by them to perform the obligation on their behalf act without due care."

E MACKINNON, L.J., said (*ibid.*, 244) that Mead, the radiologist, could be treated as a servant of the defendants and (*ibid.*, 246) there was no ground for saying that he ceased to be the servant of the defendants. GODDARD, L.J., speaking of hospital managers, said (*ibid.*, 250):

F "That they are not liable for the doctor's negligence is due simply and solely to the fact that he is not their servant. I desire, however, to say

that for the purpose of this judgment I am not considering the case of doctors on the permanent staff of the hospital. Whether the authority would be liable for their negligence depends, in my opinion, on whether there is a contract of service, and that must depend on the facts of any particular case."

In the case under appeal we are not considering the position of a consulting surgeon. Dr. Fahrni was in no sense a consultant. He was employed by the corporation on the terms of the resolution of Dec. 3, 1947. In regard to post-operational treatment and nursing, I find myself unable to draw a distinction between Dr. Fahrni, on the one hand, and Dr. Ronaldson or a nursing sister, on the other hand. All of them are regarded as skilled persons, and often the nursing sister has more experience than the doctor. It seems to me that, if the plaintiff's injury was caused by negligence on the part of anyone employed by the corporation in relation to the post-operational treatment of the plaintiff, responsibility falls in the first instance on the corporation, the employers. I do not think it is necessary for the plaintiff to pick on any particular employee and to prove that he was negligent in a case in which all those concerned were employees of the corporation. It is difficult, indeed, for the plaintiff in such a case to blame any one individual. Indeed, it may well be that the trouble was caused by lack of co-ordination or failure to have any scheme or system of examination of a surgeon's patients when the surgeon went away for a week-end.

I will now endeavour to trace how the case stands in reference to the submission that, if there was any negligence, it was on the part of Dr. Fahrni, and I begin by saying that, in my judgment, negligence was proved against someone. That was not really disputed by counsel for the defendants, though STREATFIELD, J., had come to the conclusion that there was no negligence. Dr. Fahrni had been brought in as third party. Before the case came to trial he had returned to Canada and his evidence was taken on commission. He was cross-examined by counsel for the defendants and by counsel for the plaintiff. At the trial his evidence was put in by counsel for the defendants. At that stage the case for the defendants was that there was no negligence on the part of anyone at the hospital and it was on that issue that the judge came to a decision that the defendants were entitled to judgment. The case put by counsel for the defendants to this court was that, assuming there was negligence, it was the negligence of Dr. Fahrni for which he submitted the defendants were not responsible, or, alternatively, it was uncertain 'who was the negligent party, and, consequently, the defendants ought not to be held responsible. [His LORDSHIP reviewed the evidence and continued:] The conclusions at which I arrive are: (i) The *prima facie* case made on behalf of the plaintiff has not been displaced. (ii) It is clear that there was negligence in regard to the post-operational treatment. (iii) It is not possible for the plaintiff to say that the negligence was the negligence of any particular individual. It may be that a number of people were at fault, or that lack of system was the cause. Everything was under the control of the hospital authorities and those immediately concerned were in the employ of the corporation. The position might well have been made clearer if Mr. Moroney, the senior consultant surgeon, had been called. (iv) Responsibility lies on the defendants. Even if it was shown that the whole of the trouble was due to negligence on the part of Dr. Fahrni—and that cannot be said to be the position—responsibility would still lie on the Ministry. They are answerable whether the negligence was that of Dr. Fahrni or of Dr. Ronaldson, or of the nursing staff. I am in favour of allowing the appeal of the plaintiff, and I would order that judgment be entered for him, with damages to be assessed.

DENNING, L.J.: If a man goes to a doctor because he is ill, no one doubts that the doctor must exercise reasonable care and skill in his treatment

- of him, and that is so whether the doctor is paid for his services or not. If, however, the doctor is unable to treat the man himself and sends him to hospital, are not the hospital authorities then under a duty of care in their treatment of him? I think they are. Clearly, if he is a paying patient, paying them directly for their treatment of him, they must take reasonable care of him, and why should it make any difference if he does not pay them directly,
- A but only indirectly through the rates which he pays to the local authority or through insurance contributions which he makes in order to get the treatment? I see no difference at all. Even if he is so poor that he can pay nothing, and the hospital treats him out of charity, still the hospital authorities are under a duty to take reasonable care of him just as the doctor is who treats him without asking a fee. In my opinion, authorities who run a hospital, be they
- B local authorities, government boards, or any other corporation, are in law under the self-same duty as the humblest doctor. Whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscope, and no hands to hold the knife. They must do it by the staff which they employ, and, if their staff are
- C negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him. What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they
- D do it for reward or not. It is no answer for them to say that their staff are professional men and women who do not tolerate any interference by their lay masters in the way they do their work. The doctor who treats a patient in the Walton Hospital can say, equally with the ship's captain who sails his ship from Liverpool and with the crane driver who works his crane in the docks: "I take no orders from anybody." That "sturdy answer," as LORD SIMONDS described it in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (12) ([1946] 2 All E.R. 353), only means in each case that he is a skilled man who knows his work and will carry it out in his own way. It does not mean that the authorities who employ him are not liable for his negligence. The reason why the employers are liable in such cases is not because they can control the way in which the work is done—they often have not sufficient
- F knowledge to do so—but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct—the power of dismissal.

- This all seems so clear on principle that one wonders why there should ever have been any doubt about it. Yet for over thirty years—from 1909 to 1942—it was the general opinion of the profession that hospital authorities were not
- G liable for their staff in the course of their professional duties. This opinion was based on a judgment given by KENNEDY, L.J. ([1909] 2 K.B. 828) in *Hillyer's* case (2). I cannot help thinking that this error—for it was, undoubtedly, an error—was due to a desire to relieve the charitable hospitals from liabilities which they could not afford. They were dependent on voluntary contributions and their work would be seriously impeded if they were exposed to heavy
- H claims of this sort. This must have been very present to the mind of KENNEDY, L.J., dealing, as he was, with a claim against that great voluntary hospital, St. Bartholomew's. Indeed, he made a significant reference to the treatment being "gratuitous." When, however, this court in 1942 was brought face to face with the position of a county council hospital, which was not dependent on voluntary contributions, but was supported by the ratepayers—the position of which was in law indistinguishable from that of a voluntary hospital—this court rejected the judgment of KENNEDY, L.J., and held that

the hospital authorities were liable for the negligence of their nurses and radiographers in the course of their professional duties: see *Gold v. Essex County Council* (1). Even the judgment of FARWELL, L.J., in *Hillyer's case* (2) has not passed unscathed. He took the view that, when a patient went into hospital for an operation, which was to be performed (be it noted) by a consulting surgeon whom the patient himself selected and employed, the hospital authorities were not responsible for the negligence of the nurses in the operating theatre. This view was based on the supposition that the nurses, while in the operating theatre, became temporarily the servants of the consulting surgeon. This was a tenable view so long as *Donovan v. Laing, Wharton & Down Construction Syndicate* (13) was an authority, but since then the House of Lords in *Coggins' case* (12) have distinguished *Donovan's case* (13) almost out of existence and there can be no doubt now that the nurses remain the servants of the hospital authorities, even when they are under the direction of the surgeon in the operating theatre. The reason is because the nurses are employed by the hospital authorities, paid by them, and liable to be dismissed by them, and the consulting surgeon has not that "entire and absolute control" over them which is necessary to make them his servants, even temporarily: see *Gold v. Essex County Council* (1), per LORD GREENE, M.R. ([1942] 2 All E.R. 241) and per GODDARD, L.J. (*ibid.*, 249). The result, therefore, is that *Hillyer's case* (2) can now only be supported on the narrow ground on which FARWELL, L.J., explained it in *Smith v. Martin* (3) ([1911] 2 K.B. 784), namely, that the hospital authorities were not liable for the negligence of the consulting surgeon because he was not employed by them and that there no case of negligence had been proved against the nurses and carriers.

Relieved thus of *Hillyer's case* (2), this court is free to consider the question on principle, and this leads inexorably to the result that, when hospital authorities undertake to treat a patient and themselves select and appoint and employ the professional men and women who are to give the treatment, they are responsible for the negligence of those persons in failing to give proper treatment, no matter whether they are doctors, surgeons, nurses, or anyone else. Once hospital authorities are held responsible for the nurses and radiographers, as they have been in *Gold's case* (1), I can see no possible reason why they should not also be responsible for the house surgeons and resident medical officers on their permanent staff. It has been said, however, by no less an authority than GODDARD, L.J., in *Gold's case* (1) ([1942] 2 All E.R. 250) that the liability for doctors on the permanent staff depends "on whether there is a contract of service, and that must depend on the facts of any particular case." I venture to take a different view. I think it depends on this: Who employs the doctor or surgeon? Is it the patient or the hospital authorities? If the patient himself selects and employs the doctor or surgeon, as in *Hillyer's case* (2), the hospital authorities are, of course, not liable for his negligence, because he is not employed by them. Where, however, the doctor or surgeon, be he a consultant or not, is employed and paid, not by the patient, but by the hospital authorities, I am of opinion that the hospital authorities are liable for his negligence in treating the patient. It does not depend on whether the contract under which he was employed was a contract of service or a contract for services. That is a fine distinction which is sometimes of importance, but not in cases such as the present where the hospital authorities are themselves under a duty to use care in treating the patient.

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services. LORD BLACKBURN laid that down on many occasions: see *Tarry v. Ashton* (14) (1 Q.B.D. 319); *Dalton v. Angus* (15) (6 App. Cas. 829) and *Hughes v. Percival* (16) (8 App. Cas. 446); and so have other great judges:

see what PARKE, B., said in *Grote v. Chester & Holyhead Ry. Co.* (17) (2 Exch. 254) and what a strong court, including WILLES, J., and WILLIAMS, J., said in *Pickard v. Smith* (18) (10 C.B.N.S. 480); see also LINDLEY, L.J., in *Hardaker v. Idle District Council* (19) ([1896] 1 Q.B. 340) and this court in *Woodward v. Mayor of Hastings* (20) ([1944] 2 All E.R. 567). All those cases give good illustrations of the principle, but I would add two others. One is the case of a shipowner who is under a duty to navigate his ship with reasonable care. He cannot escape that duty by delegating the handling of the ship to someone else, no matter whether it be a ship's captain under a contract of service or to a pilot under a contract for services, and that is so even though the pilot is in control and the captain acts throughout under his directions: see *The Neptune the Second* (21). Another instance is the case of an employer who is under a duty to use care to provide a proper system of work. Even in the days before the doctrine of common employment was abolished, he could not get rid of his responsibility to his men by delegating it to a foreman or fellow-servant: see *Wilsons & Clyde Coal Co., Ltd., v. English* (22), or even to a competent expert ([1937] 3 All E.R. 641), *per* LORD WRIGHT).

It is unfortunate that the principle which I have enunciated was not drawn to the attention of the court in *Gold's* case (1), but that was my fault because I was counsel in the case. It was plain there that, if the radiographer was employed under a contract of service, the hospital authorities were liable for his negligence, and I contented myself with showing that he was, citing even workmen's compensation cases for the purpose. This was a bad example, because I see that counsel for the defendants did the same in *Collins v. Hertfordshire County Council* (4), which was tried by HILBERY, J. Hence the courts have drifted almost unconsciously into the error of making the liability of hospital authorities depend on whether the negligent person was employed under a contract of service or a contract for services. The judgment of LORD GREENE, M.R., in *Gold's* case (1), however, gives no countenance to this error. He made the liability depend on what was the obligation which rested on the hospital authorities. He showed ([1942] 2 All E.R. 243) that hospital authorities were under an obligation to use reasonable care in treatment, whence it follows, on the authorities I have just cited, that they cannot get rid of that obligation by delegating it to someone else, not even to a doctor or surgeon under a contract for services. If these authorities had been put before HILBERY, J., in *Collins'* case (4), I think he would in all probability have found the hospital authorities liable, not only for the negligence of the resident medical officer, Miss Knight, but also for that of the part-time paid surgeon, Mr. Hunt. HILBERY, J., clearly thought that the hospital authorities ought to be liable for the surgeon, but only decided otherwise because of the test of contract of service, which he felt bound to apply. Once that is out of the way, their liability is clear.

The truth is that, in cases of negligence, the distinction between a contract of service and a contract for services only becomes of importance when it is sought to make the employer liable, not for a breach of his own duty of care, but for some collateral act of negligence by those whom he employs. He cannot escape the consequences of a breach of his own duty, but he can escape responsibility for collateral or casual acts of negligence if he can show that the negligent person was employed, not under a contract of service, but only under a contract for services. Take, first, an instance when an employer is under no duty himself—he is riding passively in a car along a road. He is not under any duty of care himself to road-users, but the driver is. If the driver is a chauffeur employed under a contract of service, the employer is liable for his negligence, but, if the driver is a taximan employed under a contract for services, the employer is not liable. Take, now, an instance where an employer is under a duty himself. Suppose he has a lamp which overhangs

his shop door. He is himself under a duty to his customers to use reasonable care to see that it is safe and he cannot escape that duty by employing an independent contractor to do it. He is liable, therefore, if the independent contractor fails to discover a patent defect which any careful man should have discovered, and, in consequence, the lamp falls on a customer, but he is not liable if the independent contractor drops a hammer on the head of the customer because that is not negligence in the employer's department of duty. It is collateral or casual negligence by one employed under a contract for services. The employer would, however, have been liable if he had got his servant to mend the lamp and his servant had dropped the hammer, because that would be negligence by one employed under a contract of service. These distinctions are, however, of no importance in the present case, because we are not concerned with any collateral or casual acts of negligence by the staff, but negligence in the treatment itself which it was the employer's duty to provide. A

Turning now to the facts in the present case, this is the position. The hospital authorities accepted the plaintiff as a patient for treatment and it was their duty to treat him with reasonable care. They selected, employed, and paid all the surgeons and nurses who looked after him. He had no say in their selection at all. If those surgeons and nurses did not treat him with proper care and skill, then the hospital authorities must answer for it, for it means that they themselves did not perform their duty to him. I decline to enter into the question whether any of the surgeons were employed only under a contract for services, as distinct from a contract of service. The evidence is meagre enough in all conscience on that point, but the liability of the hospital authorities should not, and does not, depend on nice considerations of that sort. The plaintiff knew nothing of the terms on which they employed their staff. All he knew was that he was treated in the hospital by people whom the hospital authorities appointed, and the hospital authorities must be answerable for the way in which he was treated. B C D

This conclusion has an important bearing on the question of evidence. If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it, but he was not put to that impossible task. He says: "I went into the hospital to be cured of two stiff fingers. I have come out with four stiff fingers, and my hand is useless. That should not have happened if due care had been used. Explain it, if you can." I am quite clearly of opinion that that raises a *prima facie* case against the hospital authorities: see *Mahon v. Osborne* (23) ([1939] 1 All E.R. 561, *per* GODDARD, L.J.). They have nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent, but they have called not a single person to say that the injuries were consistent with due care on the part of all the members of their staff. They called some of the people who actually treated the plaintiff, namely, Dr. Fahrni, Dr. Ronaldson, and Sister Hall, each of whom protested that he was careful in his or her part, but they did not call the senior surgeon, Mr. Moroney, or any expert at all, to say that what occurred might happen despite all care. They have not, therefore, displaced the *prima facie* case against them and are liable in damages to the plaintiff. I agree that the appeal should be allowed. E F G

Appeal allowed with costs here and below.

Solicitors: *Helder, Roberts, Giles & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff); *Batesons & Co.*, Liverpool (for the defendants); *Linklaters & Paines*, agents for *Hill, Dickinson & Co.*, Liverpool (for the third party). H

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

LLOYD v. E. LEE, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.), January 23, 24, 1951.]

Street Traffic—"C" licence—Vehicle used to carry goods for hire or reward by person other than licence holder—No identification certificate affixed—Road and Rail Traffic Act, 1933 (c. 53), s. 2 (4), s. 9 (1)—Goods Vehicles (Licences and Prohibitions) Regulations, 1936 (S.R. & O., 1936, No. 269), reg. 12 (2).

The respondents, who held a private carrier's "C" licence in respect of a motor lorry, permitted an associated company to use the vehicle to carry goods for reward, but did not themselves receive any hire or reward in respect of the user. During such user no valid identity certificate was affixed to the vehicle as required by the Goods Vehicles (Licences and Prohibitions) Regulations, 1936, reg. 12 (2). On charges against the respondents that they failed to comply with a condition of the licence that the vehicle should not be used for the carriage of goods for hire or reward, and that the identity certificate was not affixed during the user.

HELD: (i) the words in s. 2 (4) of the Road and Rail Traffic Act, 1933, "no . . . authorised vehicle shall be used for the carriage of goods for hire or reward" created a general prohibition against such user and not merely against a user by the holder of the licence.

(ii) reg. 12 (2) of the regulations of 1936 was infringed when an identity certificate was not kept affixed to the vehicle while the vehicle was used by any person and not only during use by the holder of the "C" licence.

(iii) accordingly, the respondents were guilty of both offences charged.

[FOR THE ROAD AND RAIL TRAFFIC ACT, 1933, s. 2 (4) and s. 9 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 24, pp. 678 and 687, respectively.]

CASE STATED by Southport justices.

On Sept. 11, 1950, before a court of summary jurisdiction sitting at Southport, informations were preferred by the appellant charging that the respondents unlawfully failed to comply with a certain condition of a private carrier's "C" licence, held by them under Part I of the Road and Rail Traffic Act, 1933, namely, the condition that the authorised vehicle should not be used for the carriage of goods for hire or reward contrary to s. 9 of the Act; and, further, that the respondents contravened reg. 12 (2) of the Goods Vehicles (Licences and Prohibitions) Regulations, 1936, by failing during the time the vehicle was used under the said licence to cause a valid identity certificate appropriate to the vehicle to be affixed and carried on the said vehicle.

The following facts were proved before the magistrates. The respondents held a "C" licence in respect of a motor goods lorry. At the material time the vehicle was being used, not by the respondents, but by Enterprise Transport, Ltd., for the carriage of goods for reward. No hire or reward was paid by Enterprise Transport, Ltd., to the respondents for such use. The identity certificate appropriate to the vehicle was not affixed and carried on it in the required manner at the time that the vehicle was used by Enterprise Transport, Ltd.

For the appellant it was contended that the use of the vehicle by Enterprise Transport, Ltd., for the carriage of goods for reward constituted a failure on the part of the respondents to comply with the conditions of a "C" licence. For the respondents it was contended that as the respondents were not using the vehicle under the licence nor being remunerated for its use, there was no failure to comply with the condition of the licence nor any contravention of the regulations. The justices being of opinion that the contentions of the respondent were well founded dismissed the informations. The appellant appealed.

Baucher for the appellant.

Samuel-Gibbon for the respondents.

DEVLIN, J.: This is a Case stated by Southport borough justices and it relates to an information under which the respondents, a limited company, were charged with two breaches of the Road and Rail Traffic Act, 1933, or regulations made thereunder. The first was that

"the respondents unlawfully did fail to comply with a certain condition of a licence held by them under Part I of the Road and Rail Traffic Act, 1933, namely, the condition that the authorised vehicle should not be used for the carriage of goods for hire or reward contrary to s. 9 of that Act."

The vehicle in question, a goods vehicle, was owned by the respondents, and at the material time it was being used by a company associated in business with the respondents called Enterprise Transport, Ltd., for the carriage of goods for reward, and, therefore, in breach of the "C" licence held by the respondents. It would, therefore, seem clear that an offence had been committed.

The points that have been taken on the construction of the section were these. It was said, first, that on the true construction of s. 2 (4) and s. 9 (1) of the Act of 1933 the use of a vehicle, to be a use in contravention of s. 2 (4), must be a use by the holder of the licence, and, as the vehicle in question here was being used by Enterprise Transport, Ltd., and driven by their servant, it was not a use by the respondents, the holders of the licence. When, however, s. 2 (4) is examined no such limitation is found to be in it. It provides:

"A private carrier's licence (in this Part of this Act referred to as 'a C licence') shall entitle the holder thereof to use the authorised vehicle for the carriage of goods for or in connection with any trade or business carried on by him, subject to the condition that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward."

The phrase, "shall be used," is quite wide and means "shall be used by anybody." We are invited to read into it the limitation "shall be used by the holder of the licence." There is no warrant for reading those words into the Act and, indeed, it seems to me that the second part of sub-s. (4) is deliberately put into the passive in contrast with the first part. The first part states what the holder is entitled to do, and it would have been simple to have gone on to say that he is not entitled to do anything else. Plainly the limiting condition is intended to be wider than that, and for that reason it is expressed in the passive and it is said that "no vehicle shall be used."

The next argument—really the same point—is founded on the fact that the charge was brought under s. 9 (1), which reads

"... any person who fails to comply with any condition of a licence held by him, shall be guilty of an offence . . ."

and it is said that, the charge being that the respondents had failed to comply with the condition that the vehicle should not be used for the carriage of goods for hire or reward, only they, as holders of the licence and when actually users of the vehicle, can fail to comply with the condition. I think there is no substance in that. The condition is in the licence, and if it is not complied with the licence holder is responsible for the fact that it is not complied with.

Finally on this point, it was said that, as it was found as a fact by the justices that no hire or reward, although earned by Enterprise Transport, Ltd., was paid to the respondents, therefore, the respondents had committed no offence. The argument we heard on that point involves the broad proposition that it would be lawful for any person who had a goods vehicle, but did not propose to licence it, to carry the goods of his friends all round the country, provided he did not do so for hire or reward and provided he carried no goods of his own, without obtaining a licence or paying duty at all. Whether that proposition

be one which is acceptable as a matter of common sense or not, the matter comes back again to the exact wording of s. 2 (4) which provides

“ . . . that no vehicle which is for the time being an authorised vehicle shall be used for the carriage of goods for hire or reward.”

A This vehicle was being used for the carriage of goods for hire or reward, and it is impossible to read into those words the limitation that, for the holder of a licence to be guilty of an offence under s. 9 (1), he must himself receive hire or reward for the use of the vehicle. In my view, it is plain that an offence has been committed under this sub-section.

The second information with which the respondents are charged is a breach of the Goods Vehicles (Licences and Prohibitions) Regulations, 1936 (S.R. & O., 1936, No. 269), the relevant one (reg. 12 (2)) being as follows:

B “ The holder of a licence shall during such time as any vehicle is used under the licence cause the appropriate identity certificate to be affixed to that vehicle . . . ”

C The Case finds that the identity certificate appropriate to the vehicle was not affixed and carried on it in the required manner, but it also finds that the vehicle was not being used by the respondents on the said occasion. Here, again, it seems to me that the regulation is perfectly plain as a matter of construction. Again it is cast, if I may so put it, in the passive: “ The holder of a licence shall during such time as any vehicle *is used* under the licence.” It does not say “ is used by the holder.” It is argued that the holder is the only person who can “ use ” the vehicle under the licence within the meaning of the regulation, and, therefore, we ought to construe the regulation so narrowly as to produce the result that, if a vehicle is being used under the licence but in breach of the licence, the regulation does not apply. I do not think that that is the common-sense or sensible construction to put on the regulation. The second point taken on the second information is that the justices have not followed in their finding, nor, for that matter, did the information strictly follow, the wording of the regulation. They have added to the word “ affixed,” the words “ and carried ” and their finding is that the identity certificate was not affixed and carried on it in the required manner. The words “ and carried on it ” are, in my view, quite superfluous, and the finding that it was not affixed is sufficient to show that the offence was proved.

F For these reasons it seems plain that the justices were wrong in accepting the submission of the defence at the end of the case for the prosecution that there was no case for the defence to answer. The case will go back to the justices with a direction to convict.

HUMPHREYS, J.: I agree.

G LORD GODDARD, C.J.: I agree with the judgment which DEVLIN, J., has delivered, but I want to add that when this case goes back to the justices they are not to consider that these are otherwise than perfectly deliberate breaches of the law. These are not technical offences in any shape or form. They are offences deliberately committed. If people think that because they are associated in business together and one uses the vehicles of the other when convenient they can avoid committing offences, the sooner it is understood that that is not so the better. I want to emphasise that the justices would not be right in considering that these offences are technical offences.

Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. E. Perrins*, town clerk, Southport (for the appellant); *Vizard, Oldham, Crowder & Cash*, agents for *Henry Backhouse & Son*, Blackburn (for the respondents).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re A SOLICITOR.

[CHANCERY DIVISION (Harman, J.), January 23, 24, February 7, 1951.]

Costs—Taxation—Withdrawal and re-delivery of bill—Discretion of court to permit—Counsel's fees not paid before delivery of bill—Unpaid fees not set out under separate heading—Fees paid by solicitor before taxation—Disallowance—R.S.C., Ord. 65, r. 27 (29A).

On Dec. 23, 1949, having conducted for his clients certain proceedings which were ultimately compromised, a solicitor delivered to the clients a bill showing costs amounting to £729 and disbursements £1,250, and giving credit for cash paid on account amounting to £745. In a letter sent with the bill the solicitor drew attention to the fact that certain counsel's fees had been marked "not yet paid," and asked for a remittance so that counsel's fees might be discharged. Counsel's fees marked "not yet paid" amounted to £399. On Feb. 15, 1950, the solicitor applied for a charging order on certain property, forming part of an estate in the course of administration recovered or preserved for the clients through his efforts, but on the administrators' undertaking to retain sufficient of the clients' share to discharge the bill and the clients' undertaking to have the bill taxed the hearing was adjourned. On Feb. 22, 1950, an order for taxation was made. On Mar. 17, 1950, the solicitor paid the counsel's fees, which on his representations had been reduced to £280. On Mar. 27, 1950, on the taxation, the master pointed out that the bill was defective in that counsel's fees which were unpaid when it was delivered were not shown under a separate heading, and stated that he must disallow them. The solicitor now applied for leave to amend the bill or to withdraw and re-deliver it.

HELD: the bill was defective under R.S.C., Ord. 65, r. 27 (29A), but the court had discretion to permit its withdrawal and re-delivery and it was proper to exercise it in favour of the solicitor.

Re A Solicitor ([1943] 1 All E.R. 157), followed.

Re A Solicitor ([1936] 1 All E.R. 491), distinguished.

[AS TO ALLOWANCE OF COUNSEL'S FEES ON TAXATION, see HALSBURY, Hailsham Edn., Vol. 2, pp. 548-554, paras. 753-763; and FOR CASES, see DIGEST, Practice, pp. 932-940, Nos. 4722-4807.]

Cases referred to:

- (1) *Re Thompson*, (1885), 30 Ch.D. 441; 55 L.J.Ch. 138; 53 L.T. 479; 42 Digest 159, 1594.
- (2) *Re Heather*, (1870), 5 Ch. App. 694; 39 L.J.Ch. 781; 42 Digest 158, 1588.
- (3) *Davis v. Dysart (Earl)*, (1855), 21 Beav. 124; 25 L.J.Ch. 122; 26 L.T.O.S. 84; 52 E.R. 805; 42 Digest 158, 1581.
- (4) *Sadd v. Griffin*, [1908] 2 K.B. 510; 77 L.J.K.B. 775; 99 L.T. 502; 42 Digest 156, 1558.
- (5) *Holmes v. Penney*, (1854), 9 Exch. 584; 23 L.J.Ex. 132; 22 L.T.O.S. 276; 156 E.R. 249; 42 Digest 258, 2914.
- (6) *Re A Solicitor*, (1883), 27 Sol. Jo. 683; 42 Digest 399, 4503.
- (7) *Re Hildesheim*, [1914] 3 K.B. 841; 84 L.J.K.B. 1; 111 L.T. 749; 42 Digest 156, 1559.
- (8) *Re A Solicitor*, [1936] 1 All E.R. 491; [1936] 1 K.B. 523; 105 L.J.K.B. 376; 154 L.T. 621; Digest Supp.
- (9) *Re Carven*, (1845), 8 Beav. 436; 14 L.J.Ch. 372; 50 E.R. 171; 42 Digest 157, 1576.
- (10) *Re A Solicitor*, [1943] 1 All E.R. 157; [1943] Ch. 48; 112 L.J.Ch. 73; 168 L.T. 127; 2nd Digest Supp.
- (11) *Thomas v. Smith*, unreported (May 2, 1932).

SUMMONS for leave to amend, or, alternatively, to withdraw and re-deliver, a bill of costs. The facts appear in the judgment.

J. A. Brightman for the plaintiff.

Millner for the defendants.

Cur. adv. vult.

Feb. 7. **HARMAN, J.**, read the following judgment. This is an application **A** by a solicitor whose name is Levy, but who practices under the name of Christian, for leave to amend, or, alternatively, to withdraw and re-deliver, a bill of costs delivered by him to the defendants.

It appears that the defendants, one Wolf Tiger and Pessel Tiger, his wife, were interested in the estate of one West, and that in 1946 there were proceedings in the Probate Division as to the validity of a will made by Mr. West. These **B** proceedings were compromised, but in 1947 further proceedings in the same Division were instituted by Mr. and Mrs. Tiger with the object of upsetting the compromise and again seeking to establish the validity of the will. In these proceedings they, apparently, instructed first one and then another firm of solicitors, but in March, 1948, having dispensed with the services of the second of those firms, they consulted Mr. Levy, and I shall hereafter describe them **C** as "the clients." The defendants in the action were a Dr. Tiger and one Klara Haider, a son and daughter of the clients, and a certain Mrs. Handley and Barclays Bank, Ltd. The son and daughter of the clients, though defendants, were friendly to their parents, and each of them seems from time to time to have attended on Mr. Levy for the purpose of instructing him.

The action was, apparently, a heavy one, and it first came before the court **D** in the early part of November, 1948, on a preliminary issue, *i.e.*, the validity of the earlier compromise, which justified the employment of leading counsel and the hearing of which lasted three days, *viz.*, Nov. 1, 2, 3, 1948. In the result, the clients were successful on the preliminary issue, and the defendant, Mrs. Handley, was ordered to pay their costs as between party and party. **E** The hearing of the main action came on before the court on seven days in November and December, 1948, and was then adjourned with a view to a further compromise. Throughout this period Mr. Levy had been pressing the clients from time to time for moneys on account of his disbursements, and, in particular, for the payment of counsel's fees, but he had experienced great difficulty in obtaining money, and by Dec. 13, 1948, relations had become strained by reason of the fact that Mr. Levy conceived that he had been **F** authorised to put forward terms of settlement which his clients repudiated, and he wrote a letter to them setting out that view and offering to retire from the matter on payment of a sum sufficient to indemnify him against disbursements which he had made for counsel's fees and otherwise. In the result, the clients did not discharge Mr. Levy, but negotiations continued through most of 1949 and were conducted, I gather, largely by the clients themselves. **G** Towards the end of 1949 the action was restored to the list, but never came on again for hearing, because after the day had been fixed a compromise was reached on Nov. 11, 1949. The details of this compromise do not matter, but I understand that as a result of it the clients have become entitled to between £20,000 and £25,000.

By this time the clients had paid to Mr. Levy sums amounting to between **H** £700 and £800, but his disbursements amounted to considerably more than that sum, and he had received nothing in respect of his profit costs. Relations were evidently strained between the solicitor and the clients owing to this fact. In the result, on Dec. 23, 1949, Mr. Levy delivered to the clients the bill which is the subject of this application. That bill showed costs amounting to about £729 and disbursements of £1,250, and it gave credit for cash paid on account of £745. The amount shown as due on the bill, therefore, is approximately £1,234, £500 of which represents disbursements. At the same time Mr. Levy

had prepared a bill of costs in respect of the separate issue tried in November, 1948, and payable by Mrs. Handley. This bill has been taxed at a sum of £588, and that sum is due from Mrs. Handley to the clients and will, of course, go in relief of their liability under the main bill. Mr. Levy's bill was accompanied by a letter in the following terms:

"Dear Sir and Madam, We enclose our bill in this matter. We have prepared another bill for taxation in respect of the costs which are payable by Mrs. Handley under the judgment of Nov. 3, 1948, and whatever sum we recover from Mrs. Handley credit will be given against the amount charged in our bill. You will appreciate, however, that the bill as prepared for taxation will not, of course, be the amount we recover after taxation. We have included all the costs we can in the taxed bill, but in many cases there will have to be an apportionment and correspondingly a reduction, as the costs payable by Mrs. Handley only relate to the issue. You will observe that we have marked against certain counsel's fees not yet paid, and we should be glad if you could let us have a remittance on account when you receive payment from the estate so that we can discharge counsel's fees."

In the bill delivered there are shown disbursements in respect of counsel's fees with the note "not yet paid" against them. These amounted in the bill as delivered in the aggregate to approximately £399. No answer to this letter was received by Mr. Levy who, not surprisingly, became anxious about his position, and on Jan. 20, 1950, wrote a letter in these terms:

"We wrote to you recently with regard to outstanding counsel's fees and would suggest that you authorise Messrs. Thornton, Lynne and Lawson to pay out of the proceeds of sale of the property a sum of say £1,000 in order to enable us to discharge counsel's fees. We enclose a form of authority and shall be glad if you agree, if you will kindly sign and return to us."

This letter has been criticised on the footing that unpaid counsel's fees at this time only amounted, according to the claim made, to about £400, whereas £1,000 was suggested as the payment. On the same day Mr. Levy wrote to Dr. Tiger, the client's son, in these terms:

"We are very surprised not to have heard from you in regard to the bills which we forwarded to you for perusal. We ought to lodge the bill against Mrs. Handley or at least send a copy to Messrs. Theodore Goddard & Co., and see whether it is possible to agree the same. Will you please, therefore, let us hear from you. You will remember, further, that in October last your sister gave us a cheque for £50, which was to be met on Nov. 1. At your request we delayed presenting this cheque, and you will also remember that we are out of pocket in the matter and do feel that this cheque should now be met. As there is still a very considerable liability to counsel, we think that your parents ought to sign an authority authorising Messrs. Thornton, Lynne & Lawson to pay out of their share a sum sufficient to cover counsel's fees, and we have forwarded to them such an authority."

Thornton, Lynne & Lawson, were solicitors for the trustees of the will under which Mr. and Mrs. Tiger took a share. The answer came from Mrs. Tiger in these terms:

"We acknowledge receipt of your letter of 20th instant and will write to you as soon as we have gone through your bill, which we have not been able to do yet. We simply cannot understand why you are now in such a hurry, especially when we think of the delay which we consider you solely to have been responsible for, and which has cost us not only one year as to time but also a considerable amount of additional costs. Will you, there-

fore, wait until you receive our comments on your bill and in the meantime please refrain from acting on our behalf."

In these circumstances, in February, 1950, Mr. Levy applied in the probate action for a charging order on the share in Mr. West's estate recovered or preserved through his efforts. That application was heard on Feb. 15, 1950, and was adjourned under an arrangement whereby the administrators (the son and daughter of the clients) undertook to retain sufficient of the clients' share to discharge the bill, while the clients undertook to have the bill taxed under the Solicitors Act, 1932. Accordingly, the common order for taxation was made on Feb. 22, 1950, and on Feb. 24, 1950, Mr. Levy's retainer was withdrawn and fresh solicitors were instructed by the clients. Mr. Levy appears to have been aware that he could not ask the taxing master to tax as disbursements unpaid counsel's fees unless they were paid before the taxation began, and, accordingly, he took steps to pay them. Before doing so, however, he checked the items with counsel's clerks and as a result of a strict enforcement of the five-hour rule succeeded in reducing the outstanding fees to £280, which he paid on Mar. 17, 1950. The taxation came on before the taxing master on Mar. 27, when the master pointed out that the bill was defective in that the counsel's fees unpaid when it was delivered were not shown in a separate schedule and that he would, therefore, have no option but to disallow them. Thereupon, in April, 1950, Mr. Levy wrote to the clients or their new solicitors asking for their consent to his withdrawing the bill and re-delivering it in a proper form. The clients declined to consent to this, and this application is the consequence.

There is no doubt about the general law as to a bill delivered in these circumstances. In *Re Thompson* (1), COTTON, L.J., says (30 Ch.D. 448):

"Now, it has been well established that, when a solicitor sends in his bill, he gives the client to whom he sends it in a right to have that bill taxed. That rule was laid down to prevent any attempt being made by solicitors to impose on clients, who did not know what the proper charges were, by sending in a bill which would not stand taxation, and then, when taxation was insisted on or threatened, sending in another bill which they knew could stand taxation. The rule has been carried so far that even where objections have been made to particular items of a bill delivered, and the solicitors have, with the assent of the client, taken back the bill for the purpose of re-consideration and have struck out certain items, the court has held that the bill to be taxed must be the bill as it was originally sent in and not the bill as amended. That was so decided in *Re Heather* (2)."

This seems to show that even the consent of the client will not authorise the alteration of the bill once delivered, though that observation seems to be inconsistent with the observations of SIR JOHN ROMILLY, M.R., in *Davis v. Dysart (Earl)* (3), where the Master of the Rolls says (21 Beav. 132):

"The bill of costs, as between party and party, is always susceptible of being added to or varied after it has been brought into the office. In this respect, it is quite different from a bill of costs taxed under the statute, where an alteration cannot be made as against the client, except with his consent, after the bill has been brought in for taxation."

The position of this matter in 1908 is illustrated by *Sadd v. Griffin* (4), where the headnote is as follows:

"For the purpose of taxation of a solicitor's bill under the Solicitors Act, 1843, 'disbursements' means actual payments before delivery of the bill, and any sums claimed in the bill as disbursements, e.g., fees to counsel, which have not been paid before its delivery, must be disallowed."

FARWELL, L.J., after citing the passage which I have just read from *Davis v. Dysart (Earl)* (3), goes on ([1908] 2 K.B. 512):

"The Act of 1843 imposes on a solicitor the duty of sending to his client a signed bill of his fees, charges, and disbursements. Until he has done this, and a month has elapsed, he can bring no action to recover them. If and when he does sue, he sues on the bill so delivered and no other. If the client pays without taxation, he pays the bill so delivered, and if he wishes for taxation before payment, it is the bill so delivered that is sent to taxation. There is but one bill, and its delivery is a condition precedent to payment. The Act requires the bill to include 'disbursements,' that is (I quote the OXFORD ENGLISH DICTIONARY, edited by MURRAY, vol. 3, p. 409), 'That which has been disbursed: money paid out: expenditure.' It is clear that the money must have been paid in order to support an action on the bill: see *Holmes v. Penney* (5), where PARKE, B., says (9 Exch. 588): 'We never entertained any doubt that an attorney cannot charge for counsel's fees which have not been paid. In point of law they are gratuities; and as he has not paid them, with respect to them he is not a farthing out of pocket.' It is equally clear that a solicitor cannot properly accept payment of the bill unless he has paid the alleged disbursements, and, if he did so, he would run considerable risk of being struck off the rolls: see *Re A Solicitor* (6), and it is settled beyond controversy that the solicitor is, for the purposes of taxation, bound by the bill that he has delivered and cannot alter it without the leave of the court or the consent of the party . . . We hold, therefore, that for the purpose of taxation under the Solicitors Act 'disbursements' means actual payments before the delivery of the bill, and that any sums claimed in the bill as disbursements and not paid before its delivery must be disallowed."

This, therefore, is a decision of the Court of Appeal that money due to counsel is not a disbursement and if not paid before the delivery of the bill will be taxed off. It seems to have been thought that this might create a hardship, and in 1909 the Rules Committee of the Supreme Court added a regulation, No. 29A to r. 27 of Ord. 65, in these terms:

"In taxations under or pursuant to the Solicitors Act, 1932, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill of costs, unless the bill shall expressly state that they have not then been made, and shall set out such unpaid items of disbursements under a separate heading in the bill, in which case they may be allowed by the taxing master if they are actually made before the commencement of the proceedings in which the taxation takes place, and are made in discharge of an antecedent liability of the solicitor (including counsel's fees) properly incurred on behalf of the client."

This rule came before the Court of Appeal in 1914 in *Re Hildesheim* (7), where it was not suggested that it was not effective for its purpose provided that it was strictly followed, though the court there held that its provisions had not been complied with. The headnote is as follows:

"A solicitor delivered to his client a bill of costs containing among the other items generally many items of disbursements which had not then been paid; and he sent with it a letter stating that, of the payments therein, £27 for counsel's fees and £36 for printer's charges had not been paid. The client obtained an order for taxation and a day was appointed to proceed with the taxation; on that day the taxing master, before dealing with any item in the bill by way of taxation, granted an adjournment to enable the solicitor to pay the unpaid items; they were all paid before the adjourned appointment, and the master allowed them on taxation. *Held*, that the payment of the items in question had been made by the solicitor 'before the commencement of the taxation,' within the

meaning of r. 27 (29A) of Ord. 65, but that the bill, even if read with the letter, did not 'set out such unpaid items of disbursements under a separate heading in the bill' as required by the rule, and that therefore those items could not be allowed on taxation."

BUCKLEY, L.J., expressed great regret that he had to hold that the appeal must be allowed. He says ([1914] 3 K.B. 845):

A "The bill of costs contains charges for disbursements purporting to
have been made for counsel's fees and printer's charges. In fact at the
date of the delivery of the bill of costs those fees and charges had not
been paid. The letter which accompanied the bill stated that that was so.
B That being so, if matters now stood as they did in 1908, disbursements
which had not been so made must have been disallowed on taxation. That
was decided in *Sadd v. Griffin* (4). The operation of the law there laid
down has been modified by the provisions of R.S.C., Ord. 65, r. 27 (29A).
C The effect of that rule is that non-payment before the delivery of the
bill of costs of items of disbursements is not now necessarily fatal to their
allowance upon taxation. By that rule the taxing master has power to
allow disbursements if actually made 'before the commencement of the
proceedings in which the taxation takes place,' or, in cases within the
proviso to the rule, 'before the commencement of the taxation.' This
D case comes within the proviso. I propose to deal with that part of the
rule first. What happened was this. The order for taxation was made on
Feb. 11 last, on the application of the client. On Mar. 18 a notice was
sent by the taxing master appointing Mar. 24 for proceeding with the
taxation. The taxing master, in his answer to the objection, states what
then happened. (The lord justice read the answer). I hold that then,
on Mar. 24, the commencement of the taxation had not taken place. The
taxation commences when the taxing master takes the bill of costs and
deals with items by way of taxation. He had not done so in that case
E on Mar. 24, and I hold that he had not then commenced the taxation of
the bill of costs. So far, then, the solicitor succeeds. I come then to the
next point. The bill of costs contains these items of disbursements for
counsel's fees and printer's charges scattered through the bill. This letter
was sent to the client with the bill. (The lord justice read the letter).
F It is admitted that the aggregate figures stated in the letter are correct
when the items in the bill are added up. Turning to the words of the rule,
it provides that disbursements not actually made before the delivery of
the bill may be allowed on taxation if certain conditions are observed.
First, the bill must 'expressly state that they have not then been made';
and, secondly, the bill must 'set out such unpaid items of disbursements
under a separate heading in the bill.' Have those conditions been satis-
G fied? The bill does not expressly state that these disbursements had not
then been made, unless it is sufficient that the letter so states. Possibly
we might be able to get over that difficulty. But the rule goes further
and says that such items must be set out under a separate heading in the
bill. The provisions of that rule are binding upon us, and this provision has
not been complied with . . . It is purely a question of technicality and
H the client has no merits, but the appeal must be allowed and the matter
must go back to the taxing master with a direction to disallow the items in
question."

In 1932 there was a new Solicitors Act, and in 1936 in *Re A Solicitor* (8) it was held that it made no alteration of the law in this respect. In that case, however, it was suggested that reg. 29A was *ultra vires* in so far as it treated the fees of counsel as a disbursement, and on that subject SCOTT, L.J., expresses himself as follows ([1936] 1 All E.R. 494):

"What, then, is the true position in regard to the argument that reg. 29A is *ultra vires*? Clearly its first four lines are just as consistent with the new Act as with the old; that part is not *ultra vires*. In regard to lines 4 to 11 of the regulation we need not consider the question of *ultra vires* for nothing in this appeal turns upon that part, but we must not be understood to express any affirmative view that that part of the regulation can have the effect of authorising the inclusion in the bill of costs of any disbursement which is not 'due' as a legally enforceable debt from the client to the solicitor. In the case of counsel's fees there cannot be any debt until after actual payment by the solicitor to counsel. To enter unpaid counsel's fees in the bill of costs under the permissive words of the regulation would be a direct violation of the prohibition of the statute. The wording of the regulation should be considered by the rule committee. On this first point the appeal must be dismissed."

He, therefore, in flat contradiction to the opinion of the court in *Re Hildesheim* (7), held that one could not include unpaid counsel's fees under the disbursements by virtue of the new rule.

Since those observations were made the regulation has not been altered, and, so far as I am aware, it has continued to be acted on in the taxing office. However that may be, it is clear on looking at this bill that it does not come within reg. 29A in the respect that the unpaid items are not set out under a separate heading in the bill. In other respects the bill complies with the rule, and when the case opened the primary application made to me was that I should allow an amendment merely to the extent of collecting the unpaid items under a separate heading at the end of the bill. In other words, no alteration in substance was asked for, but merely an alteration in form.

The first objection taken was that there was no jurisdiction to allow an amendment, but, having regard to the observations in *Re Thompson* (1) and *Sadd v. Griffin* (4), already cited, and also the observation in an earlier case, *Re Carven* (9), in these terms (8 Beav. 438):

"Cases may arise, where, from accident or mistake, a bill of costs contains overcharges, and in such case, a proper application of the solicitor to redress the error will deserve and receive consideration . . ."

this objection was not insisted on. It was, however, urged before me that I ought not to allow such an amendment because it would be ineffective having regard to the observations of SCOTT, L.J., already cited, in which the rest of the court concurred, in *Sadd v. Griffin* (4), and I feel the force of this contention, because, if unpaid counsel's fees be not disbursements, there is no power to allow them under the rule unless the rule-making body had the power to treat them as disbursements when they were not truly so, which the lord justice held it not competent to do. The application, however, asks alternatively for leave to withdraw the bill and deliver a new one, and this, if done, would cure the defect, for the fees, having now been paid, would be disbursements in any sense of the word and disbursements made before the taxation of the re-delivered bill began. As against this it was urged before me that, even though there was jurisdiction to allow an amendment of a bill, there was none to allow its withdrawal and the delivery of a new one. On this point, however, I have the authority of UTHWATT, J., in *Re A Solicitor* (10), where he held

"that the court had jurisdiction to allow the bill to be withdrawn and a fresh bill delivered, and would exercise that jurisdiction as otherwise the client would obtain the benefit of the payments which the solicitor had made and had failed to note properly in the bill."

There the solicitor had made several mistakes in delivering his bill, and UTHWATT, J., said ([1943] 1 All E.R. 158):

"The exact circumstances in which this bill came to be drawn do not

appear to me to be really very material except . . . that they indicate no desire or intention on the part of the applicant to trick his client or to take advantage of him . . . although they certainly show stupidity and negligence on the part of the solicitor. As regards Greenhalgh, it might be suggested that his opposition to this application shows cupidity. He has undoubtedly got the benefit of certain payments made by the solicitor, and he is relying on the technical rule to prevent the latter from recovering those sums from him. However that may be, it is undoubted that there is a discretion in the court . . . to allow a solicitor to withdraw a bill and to deliver a fresh bill. There are . . . old authorities to that effect, but there is a recent authority in . . . *Thomas v. Smith* (11), where the Court of Appeal . . . exercised that power . . . in circumstances which as far as one could gather from the only available material . . . were exceedingly like the present case . . . The question whether that discretion ought to be exercised in any particular case depends upon all the circumstances of the case."

It was urged against the validity of this decision that the case in 1936 of *Re A Solicitor* (8) was not cited, but that case decided nothing on this point. In my judgment, I should be quite wrong not to follow that decision, even if I disagreed with it, which I do not. I hold, therefore, that I have jurisdiction to allow the withdrawal and re-delivery of the bill.

It was next urged that the discretion, if I had it, should not be exercised in the circumstances existing here, and criticisms were levelled at the solicitor which, it was said, disentitled him to the indulgence which he now asked.

[HIS LORDSHIP considered the circumstances in which the matter had arisen and criticisms made of Mr. Levy's conduct, but found nothing to disentitle Mr. Levy to the relief asked. HIS LORDSHIP continued:] Lastly, however, this point was taken, namely, that by allowing the bill to be withdrawn and re-delivered I should be putting the solicitor in a better position than he would have been if the bill as originally delivered had contained the unpaid items in a

separate schedule, for in that event the invalidity of reg. 29A in this respect could have been urged before the taxing master or on a review of taxation, and that at the most I ought to allow an amendment, leaving this point to be taken hereafter. On the whole I think this is only tantamount to duplicating litigation, and I think the answer that counsel for Mr. Levy gave is the right one, namely, that, if this point had been taken on a bill delivered in accordance

with reg. 29A and it had been held good, Mr. Levy would have been allowed to withdraw and re-deliver his bill, because otherwise it would have been a gross hardship that he should suffer by reason of compliance with the rule which has stood for a number of years and has never been amended notwithstanding the criticism of it made by SCOTT, L.J., in 1936. I agree with counsel for the respondents that a solicitor must show a strong case to justify the

amendment or withdrawal of a bill, and that the applicant ought to have been alive to the rule as to showing unpaid disbursements separately. I agree also that it would need a very strong case to allow a solicitor to alter his bill so as to increase his charges. The mistake here was, however, merely one of form. No attempt to deceive the clients was made, nor is any increased charge sought to be introduced. The clients have largely benefited by the efforts of their

solicitor and counsel, and it would, in my opinion, be an altogether disproportionate punishment of a mere slip if I were to saddle the solicitor personally with these not inconsiderable fees which he has paid. For all these reasons I propose to exercise my discretion and to allow the bill to be withdrawn and re-delivered. This I propose to do on the same terms as were proposed by UTHWATT, J., in the case in 1943, *Re A Solicitor* (10), and I shall direct the bill when re-delivered to be taxed. The terms, therefore, are: tax the clients' costs of this application and of the application for taxation as between solicitor

and client, and order the solicitor to pay them. Subject to their payment within fourteen days of taxation, the solicitor may withdraw his bill and deliver a fresh bill not distinguished from it in any particular save that proper entries may be made in respect of disbursements, and that bill, if and when delivered, should be taxed.

Order accordingly.

Solicitors: *F. Shirley Turner & Harrison* (for the plaintiff); *Preston, Lane-Claypon & O'Kelly* (for the defendants). A

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

Re A DEBTOR (No. 21 of 1950). *Ex parte* THE PETITIONING CREDITORS v. THE DEBTOR.

[CHANCERY DIVISION (Harman and Danckwerts, JJ.), January 22, February 12, 1951.] C

Costs—Set-off—Separate proceedings—Bankruptcy petition by judgment creditors dismissed with costs—Judgment debt unpaid—Jurisdiction to order stay of execution of order for costs.

A balance of £409 of a judgment debt not having been paid, the judgment creditors obtained a receiving order against the debtor, but, on an appeal by the debtor to the Divisional Court in Bankruptcy, the order was set aside for technical reasons and the creditors were ordered to pay to the debtor the costs of the appeal and of the proceedings in the county court, which amounted to about £72. The debtor having threatened to levy execution against the creditors in respect of this sum, the creditors applied to the court for a stay of execution of the order for costs. The application was resisted by the debtor on the ground that to grant a stay would be equivalent to allowing a set-off to be made, and that (a) a set-off would interfere with the lien of the debtor's solicitor and (b) the judgment creditors would be obtaining payment in full in priority to other possible creditors. D

HELD: the court had a discretion to allow a set-off when just, notwithstanding a solicitor's lien: *Reid v. Cupper* ([1915] 2 K.B. 147), *applied*; there being at the time no bankruptcy, no question of undue preference arose, and, in any event, money set-off under an order of the court could not constitute an undue preference; and, on the facts of the case, it was just that the creditors should have a stay. E

[As to SET-OFF, WHERE SOLICITOR'S LIEN AFFECTED, see HALSBURY, Hailsham Edn., Vol. 31, p. 248, para. 272; and FOR CASES, see DIGEST, Vol. 42, pp. 284-287, Nos. 3192-3219.] F

Cases referred to:

- (1) *Ex p. Cleland, Re Davies*, (1867), 2 Ch. App. 808; 36 L.J. Bey. 45; 17 L.T. 187; 42 Digest 286, 3212.
- (2) *Ex p. Griffin, Re Adams*, (1880), 14 Ch.D. 37; 49 L.J. Bey. 28; 42 L.T. 704; 4 Digest 524, 4789. H
- (3) *Hall v. Ody*, (1799), 2 Bos. & P. 28; 126 E.R. 1136.
- (4) *Re Bassett, Ex p. Lewis*, [1896] 1 Q.B. 219; 65 L.J.Q.B. 144; 73 L.T. 736; 4 Digest 524, 4790.
- (5) *Re A Debtor, Ex p. Petitioning Creditors*, [1907] 2 K.B. 896; 97 L.T. 644; *sub nom. Re S., Ex p. Peak Hill Goldfield, Ltd.*, 76 L.J.K.B. 1144; 4 Digest 524, 4786.

- (6) *Re Drummond, Ex p. Ashmore*, [1909] 2 K.B. 622; 78 L.J.K.B. 935; 4 Digest 524, 4787.
- (7) *Blakey v. Latham*, (1889), 41 Ch.D. 518; 60 L.T. 624; 42 Digest 284, 3193.
- (8) *David v. Rees*, [1904] 2 K.B. 435; 73 L.J.K.B. 729; 91 L.T. 244; 21 Digest 647, 2260.
- A (9) *Reid v. Cupper*, [1915] 2 K.B. 147; 84 L.J.K.B. 573; 112 L.T. 573; 42 Digest 284, 3194.
- (10) *Puddephatt v. Leith* (No. 2), [1916] 2 Ch. 168; 85 L.J.Ch. 543; 114 L.T. 1159; 42 Digest 284, 3195.
- (11) *Young v. Mead*, [1917] 2 I.R. 258; 42 Digest 284, 3192 *ii*.
- (12) *Knight v. Knight*, [1925] Ch. 835; 95 L.J.Ch. 33; 133 L.T. 259; 42 Digest 304, 3382.
- B (13) *Pringle v. Gloag*, (1879), 10 Ch.D. 676; 48 L.J.Ch. 380; 40 L.T. 512; 42 Digest 284, 3191.
- (14) *Re A Debtor* (No. 21 of 1950), *Ex p. The Debtor v. Bowmaker, Ltd.*, [1950] 2 All E.R. 1129.
- (15) *Mercer v. Graves*, (1872), L.R. 7 Q.B. 499; 41 L.J.Q.B. 212; 26 L.T. 551; 42 Digest 286, 3213.
- C

APPLICATION by the creditors for an order for a stay of execution of an order made by the Divisional Court in Bankruptcy on Nov. 13, 1950 (reported *sub nom. Re A Debtor* (No. 21 of 1950), *Ex parte The Debtor v. Bowmaker, Ltd.* ([1950] 2 All E.R. 1129)), whereby the creditors were ordered to pay to the debtor the costs of an appeal to the Divisional Court from a receiving order made against him in the Windsor County Court and the costs of the proceedings in the county court.

- D On Sept. 30, 1948, the creditors obtained judgment in the King's Bench Division against the debtor for the sum of £509 1s. 4d. (being the sum then owing to them plus certain costs). The debtor paid £100 of this sum, and, the balance of £409 1s. 4d. remaining unpaid, on May 19, 1950, the creditors issued
- E a bankruptcy notice to the debtor out of the Windsor County Court, but, owing to an oversight, the copy of the notice served on the debtor was wrongly entitled "In the Redhill County Court." On Sept. 27, 1950, a receiving order was made against the debtor by the registrar of the Windsor County Court, but the order was set aside by the Divisional Court on the ground that the notice served on the debtor was bad, and, therefore, the petition founded on
- F it failed *in limine*. The creditors' application for a stay was resisted by the debtor on the ground that it would amount to a set-off, which (a) would interfere with the lien of the debtor's solicitors and (b) would enable the creditors to obtain payment in full in priority to other possible creditors.

Jupp for the creditors.

- G *C. H. Duveen* for the debtor.

Cur. adv. vult.

Feb. 12. The following judgments were read.

- DANCKWERTS, J.: In this case the applicants, Bowmaker, Ltd., presented a petition in the Windsor County Court against the debtor, and a receiving order was made. On Nov. 13, 1950, an appeal to this court by the
- H debtor was allowed and the receiving order was set aside on account of defects in the bankruptcy proceedings, and the applicants were ordered to pay to the debtor the costs of the appeal and of the proceedings in the Windsor County Court. Those costs amount to some £72. The applicants, however, are judgment creditors of the debtor for a balance of £409 1s. 4d. remaining out of a larger sum for which they originally obtained judgment. The debtor's solicitors have notified the creditors of an intention to issue execution against them to recover the sum owing in respect of the order for costs. In these circumstances

the creditors have applied to this court for a stay of execution of the order for payment of the costs and have intimated that they are proposing to present a fresh bankruptcy petition against the debtor. At the moment there is no bankruptcy.

It seems somewhat remarkable if a debtor, who owes a creditor a sum of £409, is entitled to issue execution against that creditor to recover the much smaller sum of £72 for costs directed to be paid by the creditor. It is urged, however, on behalf of the debtor that (a) to grant a stay would be equivalent to allowing a set-off to be made, and (b) the practice of the Bankruptcy Court prohibits a set-off being admissible in the case of a sum owing for bankruptcy costs except in the case of sums owing for other costs in bankruptcy. The reasons adduced for this suggested practice are (i) that to allow a set-off would be to enable the creditor to obtain payment in full of part of his debt instead of a dividend in equality with other creditors, and (ii) that the effect of allowing a set-off would be to deprive the debtor's solicitor of his lien and his sole hope of recovering his charges as solicitor in acting for the debtor.

There appears to have been a disposition at one time to treat the solicitor's lien on costs recovered as so strong a right that no set-off could be allowed to a creditor of the client, and the client was spoken of as merely a trustee for his solicitor: see *Ex p. Cleland, Re Davies* (1), per LORD CAIRNS, L.J. (2 Ch. App. 813). In *Ex p. Griffin, Re Adams* (2), in the course of the arguments, JAMES, L.J., said (14 Ch.D. 38): "The equitable owner of costs is the solicitor who has conducted the litigation." In his judgment (*ibid.*, 40), JAMES, L.J., quoted a passage from *Hall v. Ody* (3), where LORD ELDON (then Chief Justice of the Common Pleas) said (2 Bos. & P. 29) that in the Court of Chancery he

" . . . never knew the idea entertained of arranging the funds till the respective attorneys were paid their costs."

Treating the bankruptcy rule as the same as the practice in the Court of Chancery, the Court of Appeal in *Ex p. Griffin, Re Adams* (2) refused to allow costs in another court to be set-off against costs in the Court of Bankruptcy. In *Re Bassett, Ex p. Lewis* (4) VAUGHAN WILLIAMS, J., felt compelled to hold that costs of an appeal from a county court to the High Court in proceedings in the winding-up of a company could not be set-off against costs of an appeal from a county court to the High Court in bankruptcy proceedings, although the two appeals were between the same parties. In *Re a Debtor, Ex p. Petitioning Creditors* (5), BIGHAM, J., felt bound, on a statement of the taxing master as to the practice, to hold that there could be no set-off of costs in bankruptcy proceedings between a creditor and his debtor where the creditor made costs payable to him part of the debt on which he based his bankruptcy petition against the debtor (the petition having been dismissed on technical grounds). In *Re Drummond, Ex p. Ashmore* (6), PHILLIMORE, J., was faced with a judgment summons under the Debtors Act, 1869, to compel payment by a creditor, whose bankruptcy petition had been dismissed, of the taxed costs of opposing the petition awarded to the debtor, who owed the creditor more than the amount of the costs. Though he struggled against it, the learned judge felt compelled to make an order for payment by instalments. Apparently, it was admitted that, if the debtor had sued for the amount of the costs, the creditor could have counterclaimed for his debt, and there would have been a set-off, but it was urged in argument that, if set-off were allowed in bankruptcy proceedings, no debtor could get a solicitor to act for him because his lien for costs might be defeated by the set-off. In these cases the court appears to have reached the conclusion that no set-off was admissible, but with reluctance—no doubt, because it appears contrary to reason that a debtor, who owes a larger sum to a creditor, should be entitled to enforce his claim against that creditor. However, later the tide seems to have turned against the debtor and the consideration rendered to the solicitor's lien seems to have been reduced.

In *Blakey v. Latham* (7) KAY, J. (41 Ch.D. 522) described the supposed equity of the other party's solicitor as the most extraordinary equity he ever heard of.

The provisions of R.S.C., Ord. 65, r. 14, permit a set-off to be made of costs between parties notwithstanding a solicitor's lien, but in *David v. Rees* (8) this rule was held to be confined to cases in which the judgments for costs sought to be set-off against each other are in the same action or proceeding and not to extend to cases in which the judgments for costs are in distinct and independent litigations. In *Reid v. Cupper* (9), however, the Court of Appeal, though treating the decision in *David v. Rees* (8) as binding, stated grounds for questioning the correctness of that decision. The court reached the conclusion that the allowance of a set-off was really discretionary. The lords justices considered that the court had a discretionary power to allow a set-off and a discretion as to the terms on which they would allow it. The decision of the Court of Appeal in *Reid v. Cupper* (9) was applied by YOUNGER, J., in *Puddephatt v. Leith* (No. 2) (10), in which a set-off of costs ordered to be paid by a defendant to a successful plaintiff in the Chancery Division was allowed against the sum recovered by the defendant (when he was plaintiff) in another action between the parties in the King's Bench Division. After considering *Reid v. Cupper* (9), YOUNGER, J., remarked ([1916] 2 Ch. 179):

" . . . LORD ELDON's views [in *Hall v. Ody* (3)] have now been displaced by those of KAY, J., [in *Blakey v. Latham* (7)] as to what is the best and most salutary rule of practice in this matter."

YOUNGER, J., decided that in the Chancery Division he had a discretion as to the allowance of the set-off and proceeded to consider how he ought to exercise that discretion. He reached the conclusion that the existence of a solicitor's lien was not sufficient to justify refusal of a set-off, remarking (*ibid.*, 180) that "the old views as to the sanctity of a solicitor's lien no longer obtain."

It has been said in some of the cases that the bankruptcy practice has always followed the Chancery practice in these matters. The decision of YOUNGER, J., has been applied in bankruptcy by an Irish court in *Young v. Mead* (11). In *Knight v. Knight* (12) in the Court of Appeal *Puddephatt v. Leith* (No. 2) (10) was cited without dissent from it, and ATKIN, L.J. ([1925] Ch. 840) seemed to have regarded it as clear that the court had a discretion to allow a set-off so as to defeat a solicitor's lien, though in that particular case the court refused to allow a set-off. In the result, therefore, I conclude that we are not fettered in the manner that was so distasteful to VAUGHAN WILLIAMS, J., in *Re Bassett, Ex p. Lewis* (4) and to PHILLIMORE, J., in *Re Drummond, Ex p. Ashmore* (6), and we have a discretion to allow a set-off, and, therefore, clearly power, if we think fit, to order a stay of the order of Nov. 13, 1950, for the payment of costs by the creditors to the debtor.

In the circumstances of this case should a stay be directed so as to prevent the debtor issuing execution against the creditors? *Prima facie*, it seems to me that it is most unfair that the creditors should have to pay the debtor. In *Pringle v. Gloag* (13) SIR GEORGE JESSEL, M.R., said (10 Ch.D. 680):

"If a solicitor says, Unless I have a lien I cannot get paid, the answer is, he should see before he undertakes a particular business for a client, that that client is able to pay him for it: a solicitor is not compelled to work for an insolvent client."

On the other hand, it is said that, unless the debtor recovers these costs, his solicitor will have no chance of being paid, and that this will discourage solicitors from giving persons who are in danger of being made bankrupt the legal assistance which they need against proceedings wrongfully instituted against them. It is said also that a set-off would enable the creditor to that extent to be paid in full. On the other hand, if the debtor recovers the costs, his solicitor obtains payment in full. It is unfortunate that in successive editions of WILLIAMS

ON BANKRUPTCY the statement has been repeated that in bankruptcy a set-off is only admissible as regards several orders for costs in bankruptcy, because this statement may have misled those who have to deal with bankruptcy matters. It is, however, difficult to see why an unpaid creditor should be required to provide for the costs of his debtor's solicitor, and be subject to the risk of an execution to recover the amount of such costs. Accordingly, it seems to me that a stay of execution should be granted in this case.

HARMAN, J.: The creditors being unable to recover from the debtor a balance due for goods sold and delivered, obtained judgment against him, and, in 1950, the judgment remaining unsatisfied, served a bankruptcy notice and obtained a receiving order against him. In November, 1950, this court felt constrained for technical reasons, having nothing to do with the merits of the debtor, to set that order aside (see *Re A Debtor (No. 21 of 1950), Ex p. The Debtor v. Bowmaker, Ltd.* (14)), with the result that a sum of costs amounting to about £70 has become due from the creditors to the debtor who now threatens to levy execution in respect of that sum and resists this application for a stay on the ground that costs in bankruptcy ought not to be set-off against a petitioning creditor's debt. On the face of it and apart from authority, I should have thought that justice demanded that this set-off should be allowed. Two reasons are urged against it: (i) that it will interfere with the lien of the debtor's solicitors, and (ii) that, if the creditors are allowed to set off the costs, they will be obtaining payment in full in priority to other possible creditors. As to the first of these reasons, there was a time, no doubt, when a solicitor's lien for his costs was sacrosanct, and in 1832 and 1853 rules were made forbidding a set-off which interfered with such a lien. In *Ex p. Griffin, Re Adams* (2) JAMES, L.J., during the argument, went so far as to say (14 Ch.D. 38): "The equitable owner of costs is the solicitor who has conducted the litigation." The modern rule, however, does not take that view. The rules of 1832 and 1853 have been superseded by R.S.C., Ord. 65, r. 14, which provides:

"A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

David v. Rees (8) decided that this rule was limited in its effect to costs incurred in one and the same litigation, but in *Reid v. Cupper* (9) the Court of Appeal came to the conclusion that, the rules of 1832 and 1853 being out of the way, the old discretion of the court revived in cases which were not touched by the modern rule, and that a discretion existed to allow a set-off when just. Now it seems to me, as it seemed to KAY, J., in *Blakey v. Latham* (7), that, as between the parties, there can be no equity to refuse a set-off, and that to suggest that there is some equity obliging one party to pay the costs of the solicitor to the other is absurd. The observations of KAY, J., are as follows (41 Ch.D. 521):

"If this case were absolutely free from authority I confess it seems to me difficult to see why the solicitor's lien should intercept the right. Take the simplest case one can imagine. A. brings an action against B., and it is dismissed with costs. B. brings another action against A., and that is dismissed with costs. The order in each case is, A. to pay B. his costs in the one action, B. to pay A. his costs in the other action. Well, when those costs are taxed and the master's *allocatur* is issued, there is a judgment in each action for a definite amount, and there is no doubt whatever that those judgments could be set-off one against the other. That being so, just suppose the case (which is the only case in which the matter becomes the least material), that one of those parties, A., was insolvent and unable to pay anything; why B. should pay costs to A., for the sake of A.'s solicitor is what I cannot understand. I cannot see how there can be any equity for that."

Having quoted certain words of COCKBURN, C.J., in *Mercer v. Graves* (15), KAY, J., added (*ibid.*, 522):

" . . . how can A.'s solicitor possibly have an equity against B. to make B. pay the costs which B. is ordered to pay to A., when B. cannot recover from A. the costs which A. is ordered to pay to B.—how can A.'s solicitor have an equity to make B. pay instead of setting them off? If this matter were free from authority, I should say that is the most extraordinary equity I ever heard of."

I am, therefore, of opinion that there is nothing in the point about the solicitor's lien. As to the other reason, I cannot see that any question of undue preference arises. There is no bankruptcy here, and, in any event, money set-off under an order cannot constitute an undue preference.

- B It remains the fact, however, that in WILLIAMS ON BANKRUPTCY, 16th ed. (1949), p. 199, it is categorically stated that costs given in bankruptcy can only be set-off against other bankruptcy costs, and this statement has appeared at least since the eleventh edition of that work (the last one edited by Mr. E. W. HANSELL) in 1915: see p. 166. These statements are based on the four cases cited by DANCKWERTS, J.—*Ex p. Griffin*, *Re Adams* (2), *Re Bassett*, *Ex p. Lewis* (4), *Re A Debtor*, *Ex p. Petitioning Creditors* (5), and *Re Drummond*, *Ex p. Ashmore* (6). All these cases, however, and also WILLIAMS ON BANKRUPTCY, 11th ed., preceded the decision of the Court of Appeal in *Reid v. Cupper* (9), and it seems to me that the statement in WILLIAMS ON BANKRUPTCY, 16th ed., overlooks that decision and also the decision of YOUNGER, J., in *Puddephatt v. Leith* (No. 2) (10). The old decisions about the practice in bankruptcy were based, apparently, on the view that the practice in Chancery was being followed. Now, whatever the practice in Chancery was at one time, it has, at any rate since 1916, allowed a set-off in all proper cases, notwithstanding the solicitor's lien, and I see no reason why bankruptcy practice should not follow the same rule. I agree, therefore, with DANCKWERTS, J., in thinking that we have a discretion to allow this set-off, or a stay, which amounts to much the same thing, if it be just. In my opinion, it would be right to allow it.
- E I cannot see that as between the parties themselves there can be any justice in allowing the debtor to levy execution against the goods of his creditors, nor do I think that this ought to be allowed for the sake of the debtor's solicitor. I cannot see any reason why the creditors should pay the costs of the debtor's solicitor if the debtor is unable to do so, nor do I believe that a solicitor accepting the retainer of a person against whom bankruptcy proceedings are pending does so in reliance on the view that the petitioner's solicitor may blunder and thus give him the advantage of an order for costs against the petitioner. Therefore, we propose to grant the stay which is asked for.
- F

Order accordingly. No order as to costs, the stay not having been asked for when the debtor's appeal was heard and the receiving order was set aside.

- G Solicitors: Peacock & Goddard, agents for W. P. Curtis, Bournemouth (for the creditors); Isadore Goldman & Son (for the debtor).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

REYNOLDS v. G. H. AUSTIN & SONS, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Humphreys and Devlin, JJ.),
February 1, 16, 1951.]

*Street Traffic—Express carriage—Special occasion—Conveyance of private party—
Journey advertised by organisers—Coach-owners' ignorance of advertisement—
Road Traffic Act, 1934 (c. 50), s. 25 (1) (b).*

In May, 1950, a women's guild arranged with the respondents, motor coach proprietors, for the conveyance of a number of their members on a coach trip to the seaside. Six seats in the coach remaining vacant, the guild, by advertisement, invited applications for tickets. The respondents did not know that the advertisement had been issued, and it was found that, had they been aware of the fact, they would have cancelled the booking. The journey took place, there being no road service licence in force in respect of the vehicle, as required by s. 72 (1) of the Road Traffic Act, 1930, because the respondents treated the trip on which the vehicle was to be used as a "special occasion for the conveyance of a private party" for which, under s. 61 (2) of the Act, no licence was required. On an information against the respondents for using the omnibus without a licence, it being alleged that, owing to the advertisement, the condition contained in s. 25 (1) (b) of the Road Traffic Act, 1934, which must be fulfilled before the vehicle could be deemed to be used on a "special occasion," had not been complied with,

HELD: although it was important that there should be no relaxation of the rule of law that where there was an absolute prohibition against the doing of an act *scienter* formed no part of the offence, that rule did not extend to the case of a person charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some person who was not his servant or agent; accordingly, to render the respondents guilty in the present case the prosecution must prove that they knew that the conditions which would have made the trip a "special occasion" had not been fulfilled; and the prosecution had failed to do so.

Sherras v. De Rutzen ([1895] 1 Q.B. 918) and *Evans v. Dell* ([1937] 1 All E.R. 349), applied.

[AS TO VEHICLES CARRYING PASSENGERS FOR HIRE AT SEPARATE FARES ON A SPECIAL OCCASION, see HALSBURY, Hailsham Edn., Vol. 31, p. 731, para. 1126; and FOR CASES, see DIGEST Supps.]

AS TO MENS REA IN STATUTORY OFFENCES, see HALSBURY, Hailsham Edn., Vol. 9, pp. 10-12, paras. 3 and 4; and FOR CASES, see DIGEST, Vol. 14, pp. 31-38, Nos. 31-82 and Digest Supps.]

Cases referred to:

- (1) *Evans v. Dell*, [1937] 1 All E.R. 349; 156 L.T. 240; 101 J.P. 149; Digest Supp.
- (2) *Sherras v. De Rutzen*, [1895] 1 Q.B. 918; 64 L.J.M.C. 218; 72 L.T. 839; 59 J.P. 440; 14 Digest 38, 80.
- (3) *Somerset v. Hart*, (1884), 12 Q.B.D. 360; 53 L.J.M.C. 77; 48 J.P. 327; 14 Digest 43, 122.
- (4) *Cundy v. Le Cocq*, (1884), 13 Q.B.D. 207; 53 L.J.M.C. 125; 51 L.T. 265; 48 J.P. 599; 30 Digest 86, 667.
- (5) *Hobbs v. Winchester Corpn.*, [1910] 2 K.B. 471; 79 L.J.K.B. 1123; 102 L.T. 841; 74 J.P. 413; 14 Digest 36, 64.
- (6) *Harding v. Price*, [1948] 1 All E.R. 283; [1948] 1 K.B. 695; [1948] L.J.R. 1624; 112 J.P. 189; 2nd Digest Supp.
- (7) *Brend v. Wood*, (1946), 175 L.T. 306; 110 J.P. 317; 2nd Digest Supp.

- (8) *Griffiths v. Studebakers, Ltd.*, [1924] 1 K.B. 102; 93 L.J.K.B. 50; 130 L.T. 215; 87 J.P. 199; 34 Digest 153, 1202.
- (9) *Brooks v. Mason*, [1902] 2 K.B. 743; 72 L.J.K.B. 19; 88 L.T. 24; 67 J.P. 47; 14 Digest 38, 81.
- (10) *Bank of New South Wales v. Piper*, [1897] A.C. 383; 66 L.J.P.C. 73; 76 L.T. 572; 61 J.P. 660; 14 Digest 33, 38.

A CASE STATED by Staffordshire justices.

On Sept. 13, 1950, at a court of summary jurisdiction sitting at Stone, an information was preferred by the appellant, a clerk to the licensing authority for public service vehicles, charging that the respondents did unlawfully use a motor omnibus as an express carriage otherwise than under and in accordance with the terms of a road service licence, contrary to s. 72 of the Road Traffic Act, 1930. The information was dismissed and the appellant appealed.

B

J. P. Ashworth for the appellant.

Karmel, K.C., and *A. W. M. Davies* for the respondents.

Cur. adv. vult.

Feb. 16. The following judgments were read.

C

HUMPHREYS, J.: This Case stated by justices of Staffordshire, sitting at Stone, raises once more the question, often argued, to what extent, if any, does ignorance of the fact or facts constituting an offence avail a person summoned for doing an act expressly forbidden by statute where the doing of the act is proved or admitted.

D

The respondents, a limited company, were summoned for having, on June 14, 1950, unlawfully used an omnibus as an express carriage otherwise than under and in accordance with the terms of a road service licence, contrary to s. 72 of the Road Traffic Act, 1930. An express carriage is defined by s. 61 of that Act as including a motor vehicle carrying passengers for hire or reward at separate fares, but by a proviso to that section a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion. By s. 25 of the Road Traffic Act, 1934, it is further enacted that a vehicle shall be deemed to be used on a special occasion for the conveyance of a private party where it is used on a journey in relation to which certain conditions are satisfied and not otherwise. There follow seven conditions lettered (a) to (g), of which condition (b) is as follows:

F

" . . . the journey must be made without previous advertisement to the public of the arrangements therefor."

As a result of that somewhat complicated legislation it would seem that a trip otherwise lawful becomes unlawful and renders the user of the vehicle liable to prosecution under s. 72 of the Act of 1930 if any one of the conditions specified in s. 25 of the Act of 1934 is not satisfied.

G

H

The material facts are that in May, 1950, Mrs. Turner, a member of the Stone Women's Guild, all the members of which are also members of the local co-operative society, arranged with the respondents, who operate motor coaches, for a trip to Skegness on June 14 at the rate of 14s. 6d. per head, with a minimum of twenty-eight passengers. At the end of May there were six unbooked seats. The committee of the guild then placed a notice of the trip in the window of the co-operative society's branch shop at Stone in view of the public. The notice was as follows: "Women's Guild Coach Trip to Skegness, Wednesday, June 14, 1950. Few tickets left. Apply within." The trip duly took place. The respondents were not in possession of a road service licence covering this journey. The justices held, and, in my opinion, rightly, that the notice in question constituted a previous advertisement to the public rendering the use

of the vehicle on June 14 unlawful. There was, accordingly, in my opinion, a *prima facie* case against the respondents. The justices, however, dismissed the information on grounds which they state as follows:

"We were of opinion that the advertisement was made without the knowledge or connivance of the respondents in any way and as the respondents' place of business was ten miles away they had no reasonable means of knowing that it had been made . . ."

I agree that it is important that the rule should not be relaxed which declares that when there is an absolute prohibition against the doing of an act *scienter* forms no part of the offence and absence of it affords no defence to the accused person, but, in my opinion, that rule does not extend to the case of a defendant charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some other person not his servant or agent. I am not entirely satisfied that the offence alleged in this case is one to which the doctrine applies at all, but, as the point was not argued before us, I prefer not to base my judgment on that ground. On the question which was argued, whether the respondents ought to have inquired whether the party had been publicly advertised, it is to be noted that this condition in s. 25 comes directly after condition (a) which, in effect, forbids the person providing the vehicle from taking part in making the arrangements for the party.

Nor do I find any indication in the section itself that it should be so strictly construed as is contended by the appellant. If that result is to follow it must be on clear and unambiguous language. The words in the Road Traffic Act, 1930, s. 72 (10), which creates the offence,

"If any person uses a vehicle or causes or permits it to be used . . ."

do not suggest to my mind that the legislature intended that different considerations should apply to those three cases, and it is plain that in the case of permitting at least lack of knowledge may be a complete defence: see *Evans v. Dell* (1). The language of the judgment in that case seems to me to be entirely appropriate to the present case. GODDARD, J., observed as follows ([1937] 1 All E.R. 354):

"With the complexity of modern litigation, one knows that there are times when the court is constrained to find that, by reason of the clear terms of an Act of Parliament, *mens rea*, or the absence of *mens rea*, becomes material, that if a certain act is done, an offence is committed whether the person knew or did not know. When one gets complete vindication of the respondent, as in this case, so far as any knowledge of being guilty of using the coach wrongly, I gather there is nothing in this Act that constrains me to hold that, knowledge or no knowledge, he is guilty of the offence."

I would only add that, whereas in the present case the justices have acquitted the respondents, the appellant to this court must satisfy the court that their decision was wrong in law—not that they might have convicted, but that they were bound to convict. In my opinion, the appeal should be dismissed.

LORD GODDARD, C.J.: The justices, having absolved the respondents from any knowledge that the journey for which they had let the vehicle had been advertised—and on the evidence clearly they could have come to no other finding—dismissed the summons. None would, I imagine, deny that in so doing they acted in accordance with what would appear to be elementary principles of justice. As every lawyer knows, when dealing with positive law surprising results may follow and a statute may, perhaps unintentionally, oblige a court to hold that which in ordinary circumstances would be contrary to every idea of justice or even common fairness.

- The argument of the appellant on behalf of the Ministry of Transport may thus be stated. If this class of vehicle is used without the special class of road licence, the user (in this case the owner) must show that it was being used on a special occasion, and, if he cannot show compliance with all the conditions which must exist to create a special occasion under s. 25 of the Road Traffic Act, 1934, he commits an offence although the material condition was broken,
- A not by him, but by some other person and that without his knowledge or connivance. This is an intelligible proposition, however unjust the result might be, and must be faced, but observe how far it would go. Were a coach proprietor to require his customer to make a statutory declaration that the trip had not been advertised, the owner would still be guilty if the declaration proved to be false, and that even if the declarant did not know of the falsity, as might
- B be the case if one of the party, unknown to the promoter of the trip, had advertised it somewhere. Unless compelled by the words of the statute so to hold no court should give effect to a proposition which is so repugnant to all the principles of criminal law in this kingdom. This is not to throw any doubt on the well-established principle that, if there is an absolute prohibition and the prohibited act is done, a penalty is incurred, but hitherto that doctrine
- C has never been applied, as far as I know, to a case where the prohibited act is not that of the defendant, but that of some person over whom he had no control and for whom he had no responsibility.

- I am not now considering the cases of delegated management or of a shop-keeper's liability under such Acts as the Food and Drugs Act, 1938, for sales by his servants. The impossibility of any defence if such a construction were
- D given is what underlies, in my opinion, the decision in the well-known case of *Sherras v. De Rutzen* (2). The charge there was serving a police constable on duty with intoxicating liquor, an act against which there was what appears to be an absolute prohibition. The licensee had been deceived into believing that the constable was off duty. In holding this was a defence, DAY, J., based his judgment on the ground that the absence of "knowingly" in the statute
- E only shifted the onus of proof so that it was for the defence to prove lack of knowledge and not for the prosecution to prove that there was. This affirms the principle that except in cases where the statute creates an offence of knowingly doing an act the prosecution can establish a *prima facie* case merely by proving the act was done. Lack of knowledge must be proved by the defendant, as the burden of proving knowledge or the lack of it with respect to the act to be
- F proved depends on the opportunities of knowledge which may be possessed by the respective parties: see STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 12th ed., art. 104, p. 128. WRIGHT, J., after an illuminating analysis of the circumstances when knowledge or no knowledge is material for considering whether the provisions of a statute have been broken, said that if guilty knowledge is not necessary no care on the part of the publican could save him from conviction.
- G I need not emphasise the weight that attaches to any pronouncement of that learned judge, more especially on matters concerned with the construction of statutes. That case is sometimes thought to be in conflict with other decisions where the prohibition appears to be absolute, but, in my opinion, when properly understood, it is not. The fact is that the court refused to regard the prohibition as absolute and held that lack of knowledge was a defence as
- H otherwise a man could never defend himself. This means, not that a defendant can set up ignorance of the law, but that he may plead ignorance of some fact which is necessary to constitute the offence. The licensee was not saying that he did not know the law forbade him to serve a constable on duty. What he did say was that he did not know the constable was on duty, and, in fact, believed he was not. The court evidently accepted the submission on behalf of the appellant that an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent act is a good defence.

In the present case, it is said that there is an absolute prohibition against this class of vehicle being used without the appropriate licence and, moreover, that the respondents knew, as, of course, they did, that it had none, but is it to be regarded as a prohibition that is absolute? The vehicle can be used without a licence on a special occasion, and so far as the respondents knew or intended the occasion in question was special. Whatever the form of the summons no one pretended that the vehicle was being used as an ordinary express carriage as defined in s. 61 (1) (b) of the Road Traffic Act, 1930. What was suggested and proved was that one of the conditions which would have entitled the journey to be regarded as a special occasion had been broken, not by the respondents, but by someone for whom they had no responsibility. To make them guilty of an offence the breach must, in my opinion, have been committed by them or to their knowledge. I need not consider whether they might be made civilly liable for any sum of money which may have to be paid for a road service licence, but, in my opinion, on the principle of *Sherras v. De Rutzen* (2) they are not guilty of the criminal offence. A consideration of the conditions, specified in s. 25 (1) of the Road Traffic Act, 1934, which have to be satisfied to make the journey a special occasion show that some impose a prohibition or some duty on the user, who for this purpose is equivalent to the owner. Such are those in paras. (a), (d), (f) and (g) of the sub-section. Clearly no question of knowledge arises in regard to them.

It seems to me that quite different considerations apply to conditions (b), (c) and (e). The owner must be no party to a breach of them, but they appear to me to apply not only to acts of the owner but to those of others whom he could not control. Take, for instance, condition (c). No doubt the owner must not agree to carry some of the passengers only for part of the journey, but, if one of them felt ill or for any reason insisted on getting out after a short distance, could it possibly be said the owner committed an offence? And how is a coach owner who contracts to carry a party from a town some miles from his garage to a destination, perhaps in the opposite direction, to be certain that one member of the party of whom he has never heard is not a person who frequently or as a matter of routine travels at or about the time of day at which the journey is made to that destination from a place from or through which the journey is made? Such considerations reinforce the opinion I have formed that knowledge is a material ingredient. Then it will be observed that s. 72 (10) of the Act of 1930 imposes a penalty on a person who uses or causes or permits a vehicle to be used in contravention of the section. I adhere to what I said in *Evans v. Dell* (1), where the charge was preferred against the owner in circumstances very similar to the present of permitting the use. It is said that that case is distinguishable from this because here the charge is using and there is ample authority that a man cannot be guilty of permitting that of which he does not know, e.g., *Somerset v. Hart* (3). But I will certainly be no party to holding a man guilty or not guilty of this offence according to whether the informant charges him with using or with permitting the use. This would be reducing the law to an absurdity. I agree the appeal should be dismissed, and I should like to express my appreciation of the way in which the justices dealt with this matter and the clarity with which they have stated the Case.

DEVLIN, J.: It has always been a principle of the common law that *mens rea* is an essential element in the commission of any criminal offence against the common law. In the case of statutory offences it depends on the effect of the statute. In *Sherras v. De Rutzen* (2) **WRIGHT, J.**, in his judgment, laid it down that there was a presumption that *mens rea* was an essential ingredient in a statutory offence, but that that presumption was liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it dealt. It is worth noting that at the Bar **Mr. R. S. Wright** had conceded the existence of the principle in his successful

argument in *Cundy v. Le Cocq* (4). KENNEDY, L.J., in *Hobbs v. Winchester Corpn.* (5), thought that in construing a modern statute this presumption as to *mens rea* did not exist. In this respect, as he said, he differed from CHANNELL, J., in the court below, but the view of WRIGHT, J., in *Sherras v. De Rutzen* (2) has consistently been followed. I need refer only to the *dictum* of LORD GODDARD, C.J., in *Harding v. Price* (6) ([1948] 1 All E.R. 284):

- A "The general rule applicable to criminal cases is *actus non facit reum nisi mens sit rea*, and I venture to repeat what I said in *Brend v. Wood* (7) (175 L.T. 307): 'It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.'
- B In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."
- C The statutory provision we have to consider, the Road Traffic Act, 1930, s. 72, makes it an offence to use a vehicle or to cause or permit it to be used as an express carriage except under a road service licence. The respondents are charged with using, and the vehicle was actually being used on their business by one of their servants. Counsel for the respondents has argued that "use," when contrasted with "causing or permitting the use," should be given a narrow meaning and that the respondents should be said to have caused or permitted the use rather than to have used it themselves. *Mens rea* is admittedly necessary for the offence of permitting the use: *Evans v. Dell* (1). I think that it would also be necessary for the offence of causing the use. The point, which does not appear to have been taken before the justices, is of importance only if *mens rea* is not essential to the offence of using. As, in my view, it is, I do not express any opinion on the narrower point of construction.
- D Applying the principle I have stated, *prima facie* the respondents commit no offence unless *mens rea* is present. The first question, therefore, is whether on the true construction of this statute the presumption can be rebutted. There are certainly no express words to rebut the presumption. In considering whether there is an implication of rebuttal, it is necessary to have regard to the language of the statute as a whole and to the subject-matter with which it deals.
- E There is, in my view, nothing in the language of this statute to rebut the presumption, and something, which I shall consider later, to suggest the contrary. The main weight of the case for the appellant rests on the contention that this statute belongs to a class in which *mens rea* should be dispensed with. There is no doubt that some of the provisions of the Road Traffic Acts do fall within that class: see, for example, *Griffiths v. Studebakers, Ltd.* (8). It may seem on the face of it hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know he was committing, but there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in the following words of DEAN ROSCOE POUND in his book, *THE SPIRIT OF THE COMMON LAW*: see L.Q.R., vol. 64, p. 176:
- F "Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals."

Thus, a man may be made responsible for the acts of his servants or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organisations up to the mark. Although in one sense the citizen is being punished for the sins

of others, it can be said that, if he had been more alert to see that the law was observed the sin might not have been committed. If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty.

That these considerations are of capital importance is shown in the judgment of WRIGHT, J., in *Sherras v. De Rutzen* (2), where he said ([1895] 1 Q.B. 922):

“It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction . . .”

In the present case there is nothing which the owners of the vehicle could be reasonably expected to have done to see that the offence was not committed. It is said that they could have recited to Mrs. Turner [the organiser of the trip] the conditions laid down in the Road Traffic Act, 1934, s. 25, and, indeed, could even have obtained from her an undertaking that they would be complied with. Suppose that they did. If she broke the undertaking, he would still, on the construction of the section which has been urged on us, be liable. It is permissible also to examine the other conditions, for we have to construe this section in its application generally and not merely as restricted to the facts of this particular case. If the owner of a vehicle had taken every conceivable precaution to ensure that the conditions were observed, but after the journey began a passenger refused to complete it, the condition (c) would have been broken. Is the owner to be punished for that? Is he to be punished if, in breach of condition (a), the organiser of the party surreptitiously takes a little remuneration? He must not, at the risk of committing a breach of condition (a), take any part in the arrangements for bringing the passengers together for the journey, but, if those passengers include one who is travelling at his normal time on his normal route, condition (e) is broken. No amount of forethought and no degree of efficiency can protect the accused. The people whose acts may create the criminal offence are not merely people outside his sphere of influence. They are people whom the Act insists should be kept outside it. To punish the owner of the vehicle in such circumstances achieves no object except to make him an underwriter of the good behaviour of the community at large. I think it a safe general principle to follow (I state it negatively, since that is sufficient for the purposes of this case), that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended.

There is another way in which the matter may be tested. In the case of statutes which apparently dispense with *mens rea*, it is sometimes said that it is the doing of an act which is absolutely prohibited that itself supplies the *mens rea*. In many such cases it is impossible to do the prohibited act without being conscious of it, and though in such cases there may be no moral guilt if the accused does not know that he is doing wrong, this is an excuse the law cannot permit. In other cases it is possible, by taking heed, to avoid the doing of the prohibited act. In *Cundy v. Le Cocq* (4), in which the decision turned partly on the wording of the Act, it was also said that the object of the Act was to put on the publican the responsibility of determining for himself whether a person supplied with drink was sober or not and so conceivably to punish him for an error of judgment. In the present case, as I have pointed out, not only is there no means of knowledge open to the accused, but there is also no data available to him on which he could arrive at any determination whether the law was likely to be broken or not. Even after the event it would need a

- judicial inquiry, covering the past activities of the organiser and each of the passengers, before it could be determined whether it had been broken. An express carriage is not a type of vehicle which can be identified by observation. No driver on one of these expeditions could answer the question whether or not he was driving an express carriage. In truth, an express carriage is an abstract conception. A vehicle may begin as an ordinary vehicle and become
- A an express carriage in the course of its journey if a passenger insists on dismounting. It is a creature of statute, and a creature which, in its habits of appearing and disappearing (and, I suspect, of leaving a grin behind it at the legal complications which its behaviour may cause) has many of the attributes of the Cheshire cat. In these circumstances, it would be going further than any decided case has yet gone, and further than I am willing to go without the
- B clearest authority, to construe the statute as imposing an absolute prohibition.

- The words of the section, so far as they help, suggest the contrary. In s. 72 (10) of the Road Traffic Act, 1930, the legislature deals, as it were in the same breath, with using the vehicle and causing or permitting it to be used, and treats all as being subject to the same penalty. Inasmuch as there must be guilty knowledge in the last two cases, the lack of differentiation suggests that there
- C must be guilty knowledge in all three and that it is assumed that the user will know of the facts which constitute the offence. The same sub-section makes it an offence if the holder of a road service licence wilfully or negligently fails to comply with any of its conditions. The object of the section is that a vehicle should not be used for purposes for which it is not licensed. It is just as much so used if it is used in breach of a condition as if it is used without
- D any licence at all. I see no reason for requiring proof of a wilful or negligent act before a man can be convicted in the former case, and not requiring it in the latter. It would be strange if Parliament required proof of wilfulness or negligence in relation to the breach of a condition in the licence, which would ordinarily cover matters within the owner's control, and did not require it in the case of such conditions as those set out in s. 25 (1) of the Road Traffic Act,
- E 1934.

- Counsel for the appellant presented an attractive argument which, I think, can be expressed as follows. The section prohibits the use of the vehicle as an express carriage. *Prima facie* this vehicle was going to be used as an express carriage and the respondents knew it, for they knew that it was going to be used for the carriage of persons who were making separate payments. *Prima*
- F *facie*, therefore, there is a prohibited use, but the Act relieves the user if there is a special occasion. If he wants to take advantage of that relief, he must prove that there was a special occasion, and if, by reason of some accident, albeit one for which he is not responsible, he cannot give that proof, it is his misfortune. It is, no doubt, true as a general proposition that, if a statute creates an offence subject to an exception, it is for the accused to bring himself
- G within that exception if he wishes to take advantage of it. Thus, in *Brooks v. Mason* (9) the Intoxicating Liquors (Sale to Children) Act, 1901, s. 2, provided that every holder of a licence who knowingly sold any intoxicating liquor to a child, "excepting such liquors as are sold . . . in corked and sealed vessels," committed an offence. It was held that, once it had been proved that the defendant knowingly delivered intoxicating liquor to a child, he was guilty
- H of an offence although he honestly believed (contrary to the fact) that the liquor was in a corked and sealed vessel.

I cannot find any warranty either in the language of these sections, nor in their scope as a whole, for construing the proviso relating to the special occasion as if it were an exception to a *prima facie* liability. The relevant provisions are not too easy to follow, but I think may be summarised in four propositions. First, an express carriage is a vehicle which carries passengers for hire or reward at separate fares: see the Act of 1930, s. 61 (1) (b). Secondly, a vehicle which

carries passengers in consideration of separate payments made by them to any person, whether the owner of the vehicle or not, is *deemed* to be carrying passengers for hire or reward at separate fares, *i.e.*, an express carriage: *ibid.*, s. 61 (2). Thirdly, a vehicle used on a special occasion for the conveyance of a private party shall not be *deemed* to be an express carriage merely because the members of the party have made separate payments; proviso to s. 61 (2). Fourthly, a vehicle shall be *deemed* to be used on a special occasion only when certain conditions are satisfied: see the Act of 1934, s. 25. A

I have stressed the word "*deemed*" because I think that it shows that everything that is said is part of the definition. This chain of provisions seems to me to be designed to be read as a whole so that the reader may eventually arrive at an understanding of the concept of an express carriage. I do not think that there is any point in the process at which it can be said, as it were, that the definition has stopped growing, and that what follows is an exception grafted on it. It certainly cannot be said that the language clearly and unambiguously creates an exception, and, if there be any ambiguity, I should lean strongly against a construction which convicts the respondents in circumstances such as these. Moreover, if there be an exception, it would naturally follow that the burden of proof is on the accused to bring himself within it, and the task of showing affirmatively that all the conditions had been complied with would be monumental. I think that the proper question of fact in this case is: Did the respondents know that the vehicle was being used, and used as an express carriage? As was said in the advice of the Privy Council in *Bank of New South Wales v. Piper* (10) ([1897] A.C. 389): B

" . . . the absence of *mens rea* really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." C

That is what in effect the justices have found in this case, and so I think that they were right in law in refusing to convict. I agree that the appeal should be dismissed. D

Appeal dismissed with costs. E

Solicitors: *Treasury Solicitor* (for the appellant); *Beale & Co.* (for the respondents).

[Reported by F. GUTTMAN, ESQ., *Barrister-at-Law.*] F

PICKETT v. PICKETT (otherwise MOSS).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Barnard, J.), February 21, 1951.] G

Nullity—Pleading—Petition by husband on ground of wife's impotence—Cross-charge of desertion—Need to file cross-petition—Inclusion in same document as answer.

The husband filed a petition for nullity on the ground of non-consummation of the marriage through his wife's impotence, or, alternatively, her wilful refusal to consummate it. In her answer the wife denied that the marriage had not been consummated, denied that she was impotent, and denied that she was guilty of wilful refusal to consummate. In para. 5 and para. 6 of the answer she alleged that her husband had deserted her without cause for a period of not less than three years before the presentation of the answer, and she prayed the court to reject the prayer of the petition and to dissolve the marriage. H

ADDENDUM: Read after the quotation of s. 180 of the Act of 1925.

This section only deals with divorce proceedings, and is, therefore, inapplicable to the present proceedings. I must, therefore, apply s. 32 of the same Act, which is in the following terms:

“ The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained.”

HELD: it was the established practice of the court not to allow the respondent in a nullity suit to cross-charge a matrimonial offence and seek relief in respect of it; such a charge must be made by way of a separate petition; *Anon.* (1857) (Dea. & Sw. 295) and *Humphrey v. Williams* (*falsely calling herself Humphrey*) (1860) (29 L.J.P.M. and A. 62), *applied*; but the cross-petition could be contained in the same document as the answer after the words "and by way of cross-petition."

- A** [As to CROSS-PETITIONS AND CROSS-PRAYERS, see HALSBURY, Hailsham Edn., Vol. 10, p. 713, paras. 1079-1082; and FOR CASES, see DIGEST, Vol. 27, pp. 404, 405, Nos. 4030-4044.]

Cases referred to:

- (1) *Anon.*, (1857), Dea. & Sw. 295; 164 E.R. 581; 27 Digest 370, 3565.
B (2) *Humphrey v. Williams* (*falsely calling herself Humphrey*), (1860), 29 L.J.P.M. and A. 62; 27 Digest 405, 4043.

SUMMONS ADJOURNED INTO COURT.

The wife appealed against the decision of the district registrar of Reading District Registry striking out part of her answer to her husband's petition for nullity. The facts appear in the judgment.

- C** *Bulger* for the wife.
Cusack for the husband.

Cur. adv. vult.

- Feb. 21. BARNARD, J.**, read the following judgment. This summons raises an interesting question of practice. On June 27, 1950, the husband, Harold Joseph Pickett, filed a petition in the Reading District Registry of the High Court of Justice alleging that his marriage to Kathleen Joyce Pickett, otherwise Moss, had not been consummated by reason of her impotence, or, in the alternative, by reason of her wilful refusal to consummate the same, and praying that the marriage be declared null and void. On Sept. 28, 1950, the wife filed an answer to the petition in which she denied that the marriage had not been consummated. She further denied that she was either impotent or had wilfully refused to consummate the marriage, and, in para. 5 and para. 6 of her answer, she alleged that the husband had deserted her without cause for a period of not less than three years immediately preceding the presentation of the answer, and she prayed the court to reject the prayer of the petition and to dissolve the marriage. On Dec. 19, 1950, on the application of the husband, the district registrar at Reading struck out para. 5 and para. 6 of the answer, and the matter now comes before me by way of appeal from this order.

The question of practice which I now have to decide is whether or not it is possible in answer to a petition for nullity to cross-charge a matrimonial offence and seek relief in respect of it. I have been referred to s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads as follows:

- G** "If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief."

- H** The practice in the ecclesiastical courts was undoubtedly not to allow a respondent to plead a matrimonial offence in answer to a suit for nullity. In a case referred to as *Anon.* (1) which came before the Consistory Court of London on May 16, 1857, Dr. LUSHINGTON admitted a libel of the husband in a suit brought by him for the purpose of having his marriage declared null and void by reason of the wife's incurable malformation, but rejected that part of the wife's responsive allegation which alleged that the husband had been guilty of cruelty towards her and had committed adultery which entitled her to a

decree of separation. It must be borne in mind that the taking of evidence and the cross-examination of the witnesses were entirely on deposition, and it was not until after publication of the evidence on both sides that the cause was set down for hearing. Dr. LUSHINGTON, in his judgment, after reviewing the authorities, summarised them as follows (Dea. & Sw. 304):

"The results of these cases were twofold: first, if the marriage be denied, that question must be disposed of before evidence can be taken as to adultery or cruelty; second, that without fresh citation the court may, in any matrimonial suit where the validity of the marriage has been disposed of, receive an allegation pleading adultery or cruelty, and separate the parties if it be proved. Therefore, I am of opinion, both upon principle and authority, that I ought not now, at this stage of the cause, to admit the article pleading adultery to proof; but I am equally clear, for the same reason, that the court might possibly come to a decision in this case which would justify the court in receiving this, or an allegation to the same effect."

After the passing of the Matrimonial Causes Act, 1857, which compelled the attendance of witnesses before the court to be sworn and orally examined, this question was again raised before SIR CRESSWELL CRESSWELL in *Humphrey v. Williams (falsely calling herself Humphrey)* (2). This was a suit of nullity of marriage brought by the husband against his wife by reason of impotence. The wife in her answer asserted the validity of the marriage, and alleged cruelty against the husband, concluding with a prayer for judicial separation. The Judge Ordinary, in granting the motion to strike out the answer, said that the answer tendered was in reality no answer to the petition, that it had no connection with the substance of the petition, either as a plea in bar or by way of mitigation, and that it must, therefore, be struck out. It has been the established practice of this court, ever since, for a respondent to a nullity suit to put forward such a charge by way of a separate petition.

In the case before me the charge of desertion is no answer to the husband's plea of nullity, and the district registrar was, therefore, right in ordering that charge to be struck out in so far as it is only an answer. After careful consideration, and in order to save expense, I see no reason why an answer and a cross-petition should not be contained in one and the same document, and I am, therefore, prepared to restore para. 5 and para. 6, subject to the following amendment. Between para. 4 and para. 5 of the answer insert: "and by way of cross-petition," and also insert a new paragraph, para. 4 (a): "4 (a) She repeats para. 1 of her answer" [in which she alleged that the marriage between her and her husband was a valid and subsisting marriage] and thereafter follow the restored paragraphs alleging desertion and the prayer for cross-relief. The nullity suit will have to be tried first, and in some cases where, for example, there is a cross-charge of adultery, it may not only be proper to try the nullity issue first, but, in order to save the expense of bringing witnesses to court to deal with such a charge, also to try it as a separate issue. With regard to costs, I think the proper order to make is that the wife's costs before the registrar and before me should be costs in the cause; and, as this was a summons, I think I should also grant a certificate for counsel.

Appeal allowed.

Solicitors: *Stafford Clark & Co.*, agents for *Soanes & Welch*, Witney (for the wife); *Andrew Walsh, Lightfoot & Co.*, Oxford (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

READING v. ATTORNEY-GENERAL.

[HOUSE OF LORDS (Viscount Jowitt, L.C., Lord Porter, Lord Normand, Lord Oaksey and Lord Radcliffe), January 15, 16, March 1, 1951.]

Master and Servant—Profits obtained by a servant dishonestly by virtue of employment—Right of master to profits—Soldier—Bribes by civilian—Right of Crown thereto.

A The appellant, a sergeant in the army stationed at Cairo, on several occasions, while in uniform, boarded a private lorry and escorted it through Cairo, thus enabling it to pass the civilian police without being inspected. The lorry was loaded with cases, the contents of which were unknown. On each occasion the sergeant received from a civilian a large sum of money of which the military authorities later took possession.

B HELD: any position which enabled a servant to earn money by its use gave the master a right to receive the money so earned even though it was earned by a criminal act; this right was derived from an implied promise by the servant, made at the time that the contract of employment was entered into, that he would account to his master for any moneys he might receive by reason of his employment, and it was not open to the servant to set up his own wrong as a defence to the master's claim; the appellant was using his position as a sergeant in His Majesty's army, and the uniform to which his rank entitled him, to obtain the money which he received, and, therefore, the Crown, his master, was entitled to that money.

Decision of the COURT OF APPEAL ([1949] 2 All E.R. 68), affirmed.

D [AS TO RECEIPT OF BRIBES BY AGENT OR SERVANT, see HALSBURY, Hailsham Edn., Vol. 1, p. 252, para. 426; and FOR CASES, see DIGEST, Vol. 1, pp. 480-483, Nos. 1601-1627.]

Cases referred to:

(1) *Boston Deep Sea Fishing & Ice Co. v. Ansell*, (1888), 39 Ch.D. 339; 59 L.T. 345; 1 Digest 484, 1632.

(2) *A.-G. v. Goddard*, (1929), 98 L.J.K.B. 743; Digest Supp.

E APPEAL from a decision of the Court of Appeal dated May 19, 1949 (*sub nom. Re Reading's Petition of Right*) ([1949] 2 All E.R. 68), affirming a decision of DENNING, J., dated May 10, 1948 ([1948] 2 All E.R. 27), who dismissed a petition of right filed by the appellant for the restitution of money alleged to have been had and received by the Crown to his use, or for the payment to the appellant of money taken possession of on behalf of the Crown.

F The appellant was at all material times in the service of the Crown as a soldier in the regular army. In 1944 he was serving in Cairo as a sergeant in the Royal Army Medical Corps. The Crown contended that the appellant was a servant of the Crown and that the moneys in question represented bribes which he had received for accompanying loaded lorries in and about Cairo while wearing His Majesty's uniform, thus enabling the lorries to escape police inspection. DENNING, J., held that the using by the appellant of the uniform of the Crown and his position as a servant of the Crown was the sole cause of his obtaining the money, which he did dishonestly, and, although the Crown had suffered no loss, the money belonged to the Crown as his master. The Court of Appeal, in dismissing the appeal, held that a fiduciary relationship existed between the Crown and the appellant regarding the use of the uniform, which was entrusted to him to be used solely in the course of his employment for the benefit of the Crown; that the appellant's use of the uniform was in breach of the duty he owed to the Crown; and that he had obtained the money by reason of that breach.

Salmon, K.C., Pearson, K.C., and Cassel for the appellant.

The Attorney-General (Sir Hartley Shawcross, K.C.), J. P. Ashworth and H. A. P. Fisher for the Crown.

The House took time for consideration.

Mar. 1. The following opinions were read.

LORD PORTER: My Lords, the **LORD CHANCELLOR** is unable to be present today and asks me to say that he concurs with the opinion which I am about to deliver.

My Lords, this is an appeal from an order of the Court of Appeal dated May 19, 1949, affirming the judgment of DENNING, J., and ordering that the appellant's appeal from the said judgment be dismissed with costs to be paid by the appellant to the Crown or its solicitor, such costs to be taxed by a taxing master. In 1944 and 1945 certain sums, all in Egyptian currency, amounting in all to £E18,842.105, equivalent to £19,325 4s. 8d. in sterling, and held by or on behalf of the appellant, were seized and taken into possession on behalf of His Majesty. By petition of right presented on Nov. 1, 1946, the appellant sought to recover these sums or their sterling equivalent (allowance being made for sums released to him), as money had and received by His Majesty to his use. The Crown admitted that these sums had been seized and taken into possession on behalf of His Majesty, but alleged that they represented part of the proceeds of bribery and that the appellant was accountable therefor to His Majesty and received and held them in trust for His Majesty. Alternatively, the Crown claimed that it was entitled to set them off against the appellant's claim.

The facts proved or agreed in the action are not in dispute and may succinctly be stated substantially in the form adopted by the appellant in his Case and are as follows. (A) In 1943 and 1944 the appellant was a sergeant in the Royal Army Medical Corps and receiving pay at the rate appropriate to his rank. He was employed as a sergeant in charge of medical stores at No. 63 General Hospital, Cairo. (B) On Mar. 14, 1944, he dictated and signed a statement to Lieutenant Brooks of the Special Investigation Branch, Middle East, that he had received in all some £20,000 from a man named Manole in the following circumstances. Some time about the beginning of 1943, when having coffee at Alexandria while on leave, he was asked by a man, who, apparently, knew him, but whom he did not know, whether he would assist by selling cases of whisky and brandy to agents in Cairo for which he would get a few pounds. The appellant expressed his willingness and was told that someone would get into contact with him outside the hospital gates at Helmeih and tell him what he had to do. About a month later Manole met him there and told him a lorry was coming at a specified time to a place which was pointed out to him. When it arrived he was to board it and take it to another spot which again he was shown. At the specified time and place a lorry duly arrived, the appellant then boarded it and conducted it through Cairo to the appointed spot, where the contents were transferred to another lorry, but he was unable to see of what they consisted. He then went home, but by arrangement met Manole later on the same day at a restaurant in Cairo and received from him an envelope which on examination was found to contain £2,000. This process was repeated on a number of occasions on which, as in the first, a lorry arrived with cases the contents of which were undisclosed, and after each journey the appellant was given sums varying from £1,000 to £4,000. (C) On Mar. 20, 1944, his statement was shown to the appellant by Sergeant-Major Jones of the Special Investigation Branch, and the appellant acknowledged that it was his statement and that it was true. He also told Sergeant-Major Jones that he had been dressed on each occasion in uniform, and on a later occasion he showed Corporal Read of the Special Investigation Branch a number of different places in Cairo as points at which he had met or left the lorries which he had accompanied from time to time. The appellant's case also alleges that at all material times it was obligatory for all service personnel in Cairo to wear uniform, except when engaged in sport or other specially excepted activity. I can find no evidence to this effect, but regard the allegation as immaterial to the decision which your Lordships are asked to reach.

In these circumstances DENNING, J., held that the Crown was entitled to the money in question. It was, in his view, immaterial to consider whether the method of seizure was justified or not. Even if it was not, the Crown had a valid counterclaim, and, avoiding a circuity of action, could thus defeat the appellant's claim. He says ([1948] 2 All E.R. 28):

A "The real cause of action is a claim for restitution of moneys which, in justice, ought to be paid over."

It was suggested in argument that the learned judge founded his decision solely on the doctrine of unjust enrichment and that that doctrine was not recognised by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland, and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated. But, indeed, this doctrine is not of the essence of DENNING, J.'s judgment. His reasoning is to be found in the passage which succeeds that quoted. He says (*ibid.*):

C "In my judgment, it is a principle of law that, if a servant takes advantage of his service and violates his duty of honesty and good faith to make a profit for himself, in the sense that the assets of which he has control, the facilities which he enjoys, or the position which he occupies, are the real cause of his obtaining the money as distinct from merely affording the opportunity for getting it, that is to say, if they play the predominant part in his obtaining the money, then he is accountable for it to the master. It matters not that the master has not lost any profit nor suffered any damage, nor does it matter that the master could not have done the act himself. If the servant has unjustly enriched himself by virtue of his service without his master's sanction, the law says that he ought not to be allowed to keep the money, but it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master."

E Again (*ibid.*, 29):

"The uniform of the Crown and the position of the suppliant as a servant of the Crown were the only reasons why he was able to get this money, and that is sufficient to make him liable to hand it over to the Crown."

F The learned judge, however, also says (*ibid.*):

"There was not, in this case, a fiduciary relationship. The suppliant was not acting in the course of his employment."

If this means, as I think it does, that the appellant was neither a trustee nor in possession of some profit-earning chattel and that it was contrary to his duty to escort unwarranted traffic or, possibly, any traffic through the streets of Cairo, it is true, but, in my view, irrelevant. He, nevertheless, was using his position as a sergeant in His Majesty's army, and the uniform to which his rank entitled him, to obtain the money which he received. In my opinion, any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act. "You have earned," H the master can say, "money by the use of your position as my servant. It is not for you, who have gained this advantage, to set up your own wrong as a defence to my claim."

In the Court of Appeal ASQUITH, L.J., points out ([1949] 2 All E.R. 70) that there is a well-established class of cases in which a master can recover whether or not he has suffered any detriment in fact, *e.g.*, those in which a servant or agent has realised a secret profit, commission or bribe in the course of his employment, and that the amount recoverable is a sum equal to such

profit. It is, perhaps, sufficient to refer in this connection to *Boston Deep Sea Fishing & Ice Co. v. Ansell* (1), and to quote the words of BOWEN, L.J. (39 Ch.D. 367):

"It is true, as KEKEWICH, J., says, that the money which is sought to be recovered must be money had and received by the agent for the principal's use; but the use which arises in such a case . . . does not depend on any privity between the principal and the opposite party with whom the agent is employed to conduct business—it is not that the money ought to have gone into the principal's hands in the first instance; the use arises from the relation between the principal and the agent himself. It is because it is contrary to equity that the agent or the servant should retain money so received without the knowledge of his master. Then the law implies a use, that is to say, there is an implied contract, if you put it as a legal proposition—there is an equitable right, if you treat it as a matter of equity—as between the principal and agent that the agent should pay it over, which renders the agent liable to be sued for money had and received, and there is an equitable right in the master to receive it, and to take it out of the hands of the agent, which gives the principal a right to relief in equity."

It is said, however, that this right to recover is subject to two qualifications; (i) the sum obtained must have been obtained in the course of the servant's employment, and (ii) there must exist in the matter in question a fiduciary relationship between employer and employee. It is often convenient to speak of money obtained as received in the course of the servant's employment, but, strictly speaking, I do not think that expression accurately describes the position where a servant receives money by reason of his employment, but in dereliction of his duty. In *A.-G. v. Goddard* (2) the bribes given to Police-Sergeant Goddard were received by reason of his employment, but not in the course of it, except in the sense that his employment afforded the opportunity by which the gain was made. Just as in the often-quoted instance of a servant letting out his own services and the use of his master's horses for private gain, he is not acting in the course of his employment. He is taking advantage of the position which his employment gives him and for reward so gained he is answerable to his master none the less, as *A.-G. v. Goddard* (2) shows, though the obtaining of the money is a criminal act. It is true that the right of the master to demand payment of the money is often imputed to a promise implied from his relationship to the servant. I doubt whether it is necessary to raise such an implication in order to show that the money has been received to the master's use, but, even if it were, it may well be contended that there is no illegality in a servant promising to hand over to his master any sums he gains by use of his position. Nor would the master be affirming any criminal act committed by the servant in earning the sum claimed. He would only be saying that, as between himself and the servant, the servant could not set up his own wrong as a defence. Any third party's claim to the money would not be affected. In this aspect the making of the promise need not, and should not, in my view, be referred to a point of time after the receipt of the bribe. It may well be ascribed to the time when the contract of employment was entered into.

As to the assertion that there must be a fiduciary relationship, the existence of such a connection is, in my opinion, not an additional necessity in order to substantiate the claim, but another ground for succeeding where a claim for money had and received would fail. In any case, I agree with ASQUITH, L.J., in thinking that the words "fiduciary relationship" in this setting are used in a wide and loose sense and include, *inter alios*, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives.

My Lords, the fact that the Crown in this case, or that any master, has lost no profits or suffered no damage is, of course, immaterial and the principle is so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master. In general I find myself in complete agreement with the views of the Court of Appeal as delivered by ASQUITH, L.J. I differ only as to the time to which the making of the implied contract is to be imputed.

A I should, indeed, have thought it unnecessary to add any observations of my own, had it not been for the interesting and closely argued contentions of counsel for the appellant. As it is, I would nevertheless dismiss the appeal.

LORD NORMAND: My Lords, I agree with the Court of Appeal with the single reservation that I have not found it necessary to consider whether

B the respondent would have been entitled to succeed in an action at law for money had and received. On that question I would have desired to hear further argument had it been necessary to decide it. Though the relation of a member of His Majesty's forces to the Crown is not accurately described as that of a servant under a contract of service or as that of an agent under a contract of agency, the Court of Appeal has held that he owes to the Crown a duty as fully

C fiduciary as the duty of a servant to his master or of an agent to his principal, and, in consequence, that all profits and advantages gained by the use or abuse of his military status are to be for the benefit of the Crown. I respectfully think that these are unassailable propositions, and, further, that the appellant cannot be allowed to propound as a defence to the Crown's claim his own criminal conduct either in accepting a bribe in breach of military discipline or in partici-

D pating in an offence against the municipal law of Egypt.

LORD OAKSEY: My Lords, I agree with the judgment of the Court of Appeal except on one point. I do not think there is any difficulty in imputing to a servant an implied promise that he will account to his master for any moneys he may receive in the course of his master's business, or by the use of his master's property, or by the use of his position as his master's servant. There is nothing

E illegal in such a promise. On the contrary, in substance it is the basis for the equitable principle that an agent is accountable for profits made in the course of his agency without the knowledge and consent of his principal and no less accountable if the profits arise out of corrupt transactions. An agent is bound to know the law, and, therefore, when he enters into a contract of agency he impliedly undertakes to be accountable for any such profits. It was further

F argued on behalf of the appellant that the Crown would not be entitled to property stolen in what is called a "smash and grab" raid in which a servant of the Crown had shared some of the stolen property, and this is, no doubt, true, but the reason is that the Crown could not assert a right to receive stolen property knowing it to have been stolen. It was also argued that, because a master is not liable for damages caused by a servant's use of the master's property

G when not engaged on the master's business, it follows that the master cannot claim the profits. This argument appears to confuse the obligations of a servant or agent to his master with the principal or master's obligations to third parties. It may be that there are cases in which a servant may use his master's property in the servant's hours of leisure and earn profits for which he is not accountable to the master. It would depend on the facts and on the degree of user of the

H master's property, and the rule *de minimis* might apply in many cases. The appellant, however, who was a soldier on active service in time of war, was not an ordinary servant, and his use of his uniform and his rank and position was, as DENNING, J., and the Court of Appeal pointed out, the real cause of his obtaining the money in question. The question: When is a soldier on active service and in uniform not on duty? is one which will depend on the facts of the case. Whether he is in uniform or not he is always bound to act so as not to prejudice order and good discipline, and, in my opinion, he is never

entitled to appear in public in uniform in order to earn money without the knowledge and consent of the Crown.

LORD RADCLIFFE (read by **LORD OAKSEY**): My Lords, I agree that this appeal should be dismissed, for I see no answer to what has been said in the judgment of the Court of Appeal.

Appeal dismissed. No order as to costs.

Solicitors: *Lewis & Lewis & Gisborne & Co.* (for the appellant); *Treasury Solicitor* (for the Crown).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

Re LANDER (deceased). LANDER AND OTHERS v. LANDER.

[CHANCERY DIVISION (Roxburgh, J.), February 21, 22, 1951.]

Estate Duty—Incidence—Real property—Option to purchase given by will—Proportion of duty to be borne by purchaser—Law of Property Act, 1925 (c. 20), s. 16 (1), (5)—Administration of Estates Act, 1925 (c. 23), s. 36 (1), (9).

By his will, dated June 22, 1943, a testator, who died on Dec. 22, 1948, gave all his real and personal estate not thereby otherwise disposed of to his trustees on trust to sell and out of the proceeds to pay his funeral and testamentary expenses and debts and to pay the income of the residue to his wife during her life. After the death of his wife the testator directed his trustees to pay a legacy free of all duties, and, subject thereto, he gave the whole of his residuary estate to his daughter absolutely. The testator further directed that his nephew, W., should be entitled to purchase his freeholds at T. for £14,000 on giving notice in writing to his trustees within two months from the date of his death, such property to be conveyed to W. by the trustees notwithstanding that W. was himself a trustee of the testator's will. The will provided that the purchase should be completed within six months from the expiration of the said two months. W. served a notice exercising his option to purchase, and on June 10, 1949, the freeholds were conveyed to him for £14,000. For the purposes of estate duty the freeholds were agreed to be of the value of £21,645, and the question arose how the estate duty payable in respect thereof ought to be borne as between W. and the residuary legatees.

HELD: W. was entitled under the will to a beneficial interest in land of the value of £7,645; as estate duty in respect of an interest in land was, despite s. 16 (1) of the Law of Property Act, 1925, and having regard to s. 16 (5) thereof, a charge on the interest itself, W. was *prima facie* liable for the duty; and, there being nothing in the will nor in the fact that W. was a purchaser to alter the ordinary incidence of the duty, W. was liable to pay 7,645/21,645ths of the duty paid in respect of the freeholds at T.

London & South Western Ry. Co. v. Gomm (1882) (20 Ch.D. 562), *applied*.

Re Jolley (1901) (17 T.L.R. 244), *not followed*.

[AS TO INCIDENCE OF ESTATE DUTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 287-296, paras. 302-309; and FOR CASES, see DIGEST, Vol. 21, pp. 27-33, 38-40, Nos. 148-209, 244-254.]

Cases referred to:

- (1) *Berry v. Gaukroger*, [1903] 2 Ch. 116; 72 L.J.Ch. 435; 88 L.T. 521; 21 Digest 27, 155.

- (2) *Re Orford*, [1896] 1 Ch. 257; 65 L.J.Ch. 253; 73 L.T. 681; 21 Digest 41, 257.
- (3) *London & South Western Ry. Co. v. Gomm*, (1882), 20 Ch.D. 562; 51 L.J.Ch. 530; 46 L.T. 449; 40 Digest 305, 2617.
- (4) *Re Jolley*, (1901), 17 T.L.R. 244; 21 Digest 33, 199.
- (5) *Re Cockerill*, [1929] 2 Ch. 131; 98 L.J.Ch. 281; 141 L.T. 198; Digest Supp.

A ADJOURNED SUMMONS to determine how the estate duty payable in respect of certain freehold property, valued for duty purposes at £21,645, ought to be borne as between those interested in the testator's residuary estate (of which the freeholds or the proceeds of sale thereof formed part) and the person to whom the testator by his will gave an option to purchase the freeholds for £14,000.

B *Pennycuik, K.C.*, and *J. F. Bowyer* for the plaintiffs, persons interested as executors or residuary legatees.

Richmount for the defendant, the grantee of the option, who was also one of the executors.

C ROXBURGH, J.: Vernon Lander made his will on June 22, 1943, and died on Dec. 22, 1948. He appointed his wife, the plaintiff Sarah Lander, his son-in-law, the plaintiff William Foster-Greenwood, and his nephew, the defendant William Heath Sharrod Lander, to be his executors and trustees. He devised and bequeathed all his real and personal estate not thereby otherwise disposed of unto his trustees on trust to sell and out of the proceeds of sale to pay his funeral and testamentary expenses and debts and on trust to invest the residue thereof in their own names and to pay the income thereof to his wife during her life and after her death on trust to pay £2,000 free of all duties to his sister-in-law, Mary Alice Mountford, and subject thereto he gave the whole of his residuary estate both capital and income unto his daughter, the plaintiff, Sarah Esther Foster-Greenwood, absolutely. He directed that his nephew, the defendant, William Heath Sharrod Lander, should be entitled to purchase his freeholds at or near Tibberton and Charrington in the county of Shropshire for £14,000 on giving notice in writing to his trustees within two calendar months from the date of his death, such property to be conveyed to him by his trustees notwithstanding that the said defendant, William Heath Sharrod Lander, was himself a trustee, and that the said purchase should be completed within six months from the expiry of the before-mentioned two months' notice. The defendant duly served notice of the exercise of the option, and on June 10, 1949, the said freeholds at or near Tibberton and Charrington in the county of Shropshire were conveyed to the defendant for £14,000 paid by him to the executors and trustees of the will. In due course the value of the said freehold properties was for the purpose of estate duty ascertained to have been at the date of the death of the testator £21,645.

E This summons asks whether the incidence of the estate duty payable in respect of the said freehold properties is apportionable between the testator's residuary estate and the said defendant in the proportion which the sum of £14,000 bears to the value for estate duty purposes of the said freeholds, or in some other and in what proportions, or whether the whole of the said estate duty ought to be borne by the testator's residuary estate, or how otherwise the same ought to be borne.

H In *Berry v. Gaukroger* (1), VAUGHAN WILLIAMS, L.J., said ([1903] 2 Ch. 131):

" . . . it seems to me the whole scheme of the Finance Act [1894] so far as it relates to property passing on the death of the deceased in respect of which his executor is not responsible for estate duty, is to tax the property itself so passing, and to make the estate duty a first charge. The decision of NORTH, J., in *Re Orford* (2) seems to me to be a distinct authority on the construction of the Finance Act, 1894, that in all cases where the

duty becomes payable for which the executor is not made accountable by s. 6 (1), the duty must be paid ultimately by the persons beneficially entitled in proportion to their shares, and it follows that the duty cannot be thrown wholly on the residue."

Of course, freehold land is not within the Finance Act, 1894, s. 6 (1), and, so far as that Act was concerned, the executors were not accountable for estate duty on freehold land. COZENS-HARDY, L.J., says (*ibid.*, 134):

"It is true that the Crown, having the right to demand the duty from other persons—namely, the trustees—has not proceeded against the legatees; but that, I think, can make no difference. It is an old and well-established principle of equity that, when several persons are liable in respect of one and the same obligation, the rights of the parties *inter se* are not affected by the circumstance that one of those persons has been called upon to discharge and has discharged the obligation. This right of contribution must, I think, prevail here . . ."

So, the position under the Finance Act, 1894, was that the executors were not responsible for the estate duty, that the duty had to be paid ultimately by the persons beneficially entitled in proportion to their shares, and that, if the executors did pay the duty, the rights of the parties *inter se* would not be affected by that circumstance by reason of rights of contribution.

The Law of Property Act, 1925, s. 16, made an important change. Section 16 provides:

"(1) A personal representative shall be accountable for all death duties which may become leviable or payable on the death of the deceased in respect of land (including settled land) which devolves upon him by virtue of any statute or otherwise . . . (5) Notwithstanding that any duties are by this section made payable by the personal representative or other person aforesaid, nothing in this Part of this Act shall affect the liability of the persons beneficially interested or their respective interests in respect of any duty and they shall accordingly account for or repay the same and any interest and costs attributable thereto to the said commissioners or to the personal representative or other person accountable as aforesaid, as the case may require."

Accordingly, the important change was that from thenceforth personal representatives became accountable for the duty, but the Act made no change in the incidence of the duty or in the rights of contribution between the parties liable for the duty.

I must now endeavour to apply these general principles to the case before me, which, strangely enough, is free from satisfactory direct authority. What the defendant had under the will of the testator was an option. It was a valuable option because it enabled him to acquire for £14,000 something worth £21,645. What is the equitable nature of such an option? *London & South Western Ry. Co. v. Gomm* (3) supplies the answer. In that case SIR GEORGE JESSEL, M.R., in the Court of Appeal, said (20 Ch.D. 581):

"The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for re-purchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

What, then, was the position under this will at the moment of the testator's death? The whole of these freehold properties passed on his death and beneficial

interests therein were created by the will which were in possession as from the death of the testator. First, there was the beneficial interest of the option holder. This was the right to acquire a freehold estate in property, afterwards ascertained to have been at the date of the testator's death worth £21,645, for £14,000. That was a beneficial interest in land worth £7,645. The beneficial interest of those entitled to residue was the freehold interest in the properties subject to that burden. It was not certain at the date of the testator's death what the value of that interest was. The option holder might not have exercised his option, in which case it would have been worth £21,645. But, of course, there was every probability that the option would be exercised, as, in fact, it was, and the value of the beneficial interest in residue was in due course ascertained to be £14,000. Therefore, unless there are other considerations which ought to be taken into account, the duty ought to be apportioned between the option holder and residue so that the option holder bears $7,645/21,645$ ths of the duty, and residue bears $14,000/21,645$ ths of the duty.

Are there any other considerations which ought to be taken into account? First, is there any context in the will? It is true that one or two legacies are given free of all duties, but with that exception there is no reference in the will to the incidence of duties and no reference to estate duty *eo nomine* at all. It is true that the testator directs that the defendant shall be entitled to purchase his freeholds, and, of course, it is not usual to think of a purchaser as having to bear estate duty, but I do not think that that, which is the only context, is enough to alter the incidence of the estate duty on these properties. I cannot be sure that the question of estate duty ever entered the testator's mind in this connection, and, after all, the defendant was not an ordinary purchaser. He was a purchaser favoured by and to the extent of the benefit conferred by the will. I cannot agree, as counsel for the defendant suggested, that the exercise of the option destroyed his beneficial interest, though, no doubt, he had some contractual rights as well. The essence of his situation still was, as it had been ever since the testator's death, that he had the right to acquire property worth £21,645 for £14,000. He certainly differs from the purchaser to whom the property might have been sold under the trust for sale at a much higher price if he had not exercised his option. But counsel submits that, even if the defendant would otherwise have to bear a rateable proportion of the estate duty, he is absolved therefrom by the circumstance that no reservation was made in the conveyance to him of these properties. Accordingly, the defendant relies on the Administration of Estates Act, 1925, s. 36, which provides:

"(1) A personal representative may assent to the vesting, in any person who . . . may be entitled thereto . . . of any estate or interest in real estate to which the testator . . . was entitled . . . (2) The assent shall operate to vest in that person the estate or interest to which the assent relates . . . (9) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duties, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance."

Section 36 (11) defines " purchaser " as a purchaser for money or money's worth. It well may be that that section does exonerate these properties from any charge in respect of the duty in question, but that cannot, in my judgment, avail the defendant, and on two grounds: first, it seems to me that the right of contribution which residue has against the defendant, as appears from *Berry v. Gaukroger* (1), is carefully preserved by the Law of Property Act, 1925, s. 16 (5), and is a right quite distinct from any charge that there might otherwise have

been on the properties, and, secondly, as, in my judgment, the will did not exonerate the defendant from a rateable proportion of the estate duty, he cannot rely on the terms of the will as a justification for being, as a trustee, party to a conveyance to himself which has the effect of exonerating the property from estate duty. If, therefore, that is the effect of the conveyance, as it may well be, he ought not to have been a party to it in that form, and, therefore, he cannot put it forward as a justification for himself. On those two grounds, I think this most ingenious point fails. A

There are, therefore, in my judgment, no considerations which ought to deter me from reaching the conclusion at which I have already tentatively arrived, namely, that the duty ought to be borne in the proportions which I have already stated. I must add a few observations about two cases. First in *Re Jolley* (4), JOYCE, J., treated the option holders as devisees and reached the conclusion that they ought to bear the whole of the duty. Counsel for the plaintiffs has expressly disclaimed any reliance on that authority, and, accordingly, I need say no more about it except that it is undoubtedly difficult to reconcile with other cases which have since been decided. It will have been observed that I have nowhere suggested, and I do not suggest, that the defendant was a devisee. *Re Cockerill* (5) comes tantalisingly near the present: B

"A testator, by his will, devised land to P. subject to the payment of certain annuities, of road-making charges for which the testator was liable, and of estate and other death duties, and subject also to the proviso that if within twenty years of the testator's death P. should desire to sell the land, he was to give the governors of the N. Grammar School the option of purchasing the land at the price of £300 an acre, such offer to be subject to the payment by the governors of the said annuities and road charges, and acceptance to be notified within three months. The land, of about twenty-two acres in area, was in fact worth £670 an acre at the date of the testator's death. In accordance with the condition P. offered it to the school governors at £300 an acre, and the offer was duly accepted and the land sold and conveyed to the governors . . . *Held* (1), that the governors having acquired the land, not under any disposition by the testator, but by the voluntary act of P. in selling instead of retaining the property, took no benefit under the testator's will . . ." C

EVE, J., said ([1929] 2 Ch. 134): D

"In the first place, they [the governors] take nothing under the testator's will. They have not acquired the land at the price they paid for it by reason of any option given to them by the testator, but by the voluntary act of the devisee in electing to dispose of the land instead of retaining it, and I see no ground for charging them as beneficiaries under the will with a proportion of the duties." E

It would be wrong to say that EVE, J., has decided that in the circumstances with which I am concerned the option holder would be properly chargeable as a beneficiary under the will with a proportion of the duty. He certainly did not so decide, but it is true that he nowhere suggests that, if counsel for the plaintiff had been arguing the present case before him, his argument would have been heard with disfavour. Accordingly, in my judgment, the summons should be answered by declaring that the defendant ought to bear 7,645/21,645ths of the duty, and the residue the remainder. F

Order accordingly. Costs of all parties to be taxed as between solicitor and client and paid out of the residue. G

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Lee-Barber, Goodrich & Co.*, Torquay (for the plaintiffs); *Sole, Sawbridge & Co.*, agents for *Cooper, Woolley & Co.*, Bridgnorth, Salop (for the defendant). H

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

NOTE.

R. v. DEPUTY RECORDER OF WOLVERHAMPTON.

Ex parte DIRECTOR OF PUBLIC PROSECUTIONS.

[KING'S BENCH DIVISION (Lord Goddard, C.J., and Barry, J.), February 23, 1951.]

A *Criminal Law—Company—Trial—Committal order—Stamp of court.*

APPLICATION for an order of *mandamus*.

A limited company was charged on indictment at Wolverhampton Quarter Sessions with having carried out certain works of construction contrary to the Defence (General) Regulations, 1939, reg. 56A. The chairman of the examining magistrates had signed a written order of committal for trial, but no seal of the court was affixed, and, in view of the decision in *R. v. H. Sherman, Ltd.* (1), the deputy recorder held that the committal was irregular, and, therefore, quarter sessions had no power to try the indictment. The Director of Public Prosecutions now applied for an order of *mandamus* directing the deputy recorder to try the indictment.

C [AS TO CRIMINAL PROCEEDINGS AGAINST A CORPORATION, see HALSBURY, Hailsham Edn., Vol. 9, p. 114, para. 147; and FOR CASES, see DIGEST, Vol. 13, pp. 408-411, Nos. 1286-1308 and Digest Supp.]

Case referred to:

(1) *R. v. Sherman (H.), Ltd.*, [1949] 2 All E.R. 207; [1949] 2 K.B. 674; 113 J.P. 412; 2nd Digest Supp.

D *Bourke* for the applicant.

R. J. Parker for the deputy recorder of Wolverhampton.

C. Lawson for the company.

LORD GODDARD, C.J.: In *R. v. H. Sherman, Ltd.* (1) I said, and for this I must take responsibility ([1949] 2 All E.R. 210):

E “Where a statute makes an order of a particular character a necessary condition precedent to the doing of some other act, we think that we must construe that statute as meaning that the order must be in writing drawn up under the hand of the presiding magistrate and with the seal of the court. The order must be authenticated, and if any question arises whether or not an order has been made, the right way of proving that order is by producing it. That can be done only if it is in writing . . . There was no order drawn up and authenticated at the time.”

F It was a slip on my part when I said “with the seal of the court” because it is well known that no court of summary jurisdiction has a seal. Most of them—as I expect the court of summary jurisdiction has in this case—have a rubber stamp which the clerk of the court uses. That shows that the document stamped is authenticated. It would have been more accurate if I had said “under the hand of the presiding magistrate and bearing the stamp of the court if there is one.” The deputy recorder thought that we had laid down that there must be a seal. As I have said, no court of summary jurisdiction has a seal in the strict sense, but they do have a stamp, and it was to that I referred. Consequently, the committal for trial in this case was in order and there was authority in the court of quarter sessions to entertain the proceedings. Therefore, the order for *mandamus* must go. I think that technically the order must go to the recorder and not to the deputy recorder.

Order for mandamus.

Solicitors: *Director of Public Prosecutions* (for the applicant); *Treasury Solicitor* (for the deputy recorder of Wolverhampton); *Forsythe, Kerman & Phillips* (for the company).

Re BLECKLY (deceased). BLECKLY AND OTHERS *v.* BLECKLY.

[CHANCERY DIVISION (HARMAN, J.), February 15, 1951.]

Will—Class gift—Closing of class—Gift to children on attaining specified age—Gift in futuro subject to life interest—No member of class existing at cesser of life interest—Class not closed on attainment of specified age by one member of class.

By a codicil to his will a testator gave £10,000 to his executors on trust to invest and pay the income thereof to his daughter-in-law, then the wife of his son H., "during so much of her life as she shall remain the wife or widow of [H.] . . . [and] subject to the interest of my daughter-in-law therein my executors shall hold the said sum of £10,000 . . . upon trust for all or any the children or child of [H.] who shall attain the age of twenty-one years if more than one in equal shares." In 1927 H.'s marriage, of which there was no issue, was dissolved. In the same year, H. re-married, and in March, 1929, a daughter was born. In 1950, the daughter having attained the age of twenty-one years, and there being then in existence no other child of H., the daughter claimed the whole fund. H. was still living.

HELD: the application of the rule in *Andrews v. Partington* (1791) (3 Bro. C.C. 401) would, by excluding children born after the daughter's attainment of her majority, defeat the testator's intention as expressed in the codicil; in the absence of authority binding the court to apply the rule, it ought not to be invoked in such circumstances; and, therefore, the class was not closed, and the fund not distributable.

[AS TO THE RULE IN *ANDREWS V. PARTINGTON*, see HALSBURY, Hailsham Edn., Vol. 34, pp. 271-276, paras. 322-325; and FOR CASES, see DIGEST, Vol. 44, pp. 768-781, Nos. 6266-6379.]

Cases referred to:

- (1) *Andrews v. Partington*, (1791), 3 Bro. C.C. 401; 29 E.R. 610; 44 Digest 768, 6266.
- (2) *Re Chartres*, [1927] 1 Ch. 466; 96 L.J.Ch. 241; 137 L.T. 52; 44 Digest 785, 6422.
- (3) *Wyndham v. Wyndham*, (1789), 3 Bro. C.C. 58; 29 E.R. 407; 44 Digest 293, 1250.
- (4) *Ellison v. Airey*, (1748), 1 Ves. Sen. 111; 27 E.R. 924; 44 Digest 1166, 10100.
- (5) *Hutcheson v. Jones*, (1817), 2 Madd. 124; 56 E.R. 281; 44 Digest 804, 6580.
- (6) *Re Emmet's Estate*, (1880), 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 44 Digest 769, 6282.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of Herbert Sanderson Bleckly, a legacy, subject to a life interest during wifehood or widowhood, to "all or any the children or child of my son Herbert who shall attain the age of twenty-one years if more than one in equal shares" was payable to the first child of Herbert to attain twenty-one (there being no other child of Herbert then living) where no child was living at the date of the cesser of the life interest.

Shebbeare for the plaintiffs.

Wigan for the defendant, the daughter of Herbert Bleckly, the younger.

HARMAN, J.: The testator, Herbert Sanderson Bleckly, died in February, 1925, leaving a will and a codicil. By his will, so far as material, he gave the whole of his estate to his son Herbert absolutely. By his codicil he gave to his executors the sum of £10,000 "upon trust to invest . . . and to pay the income thereof" to his daughter-in-law, then the wife of his son Herbert "during so much of her life as she shall remain the wife or widow of my said son." Then

"subject to the interest of my daughter-in-law therein my executors shall hold the said sum of £10,000 . . . upon trust for all or any the children or child of my son Herbert who shall attain the age of twenty-one years if more than one in equal shares."

A Reading that, one can only suppose that the testator meant what he said, viz., that all or any of the children of Herbert who attained twenty-one should take, but it is said I am prevented from taking that view because of a rule which the courts have adopted for what has been called convenience.

B In 1927 the marriage of Herbert to the wife mentioned in the codicil was dissolved and she ceased, therefore, to be his wife and could not ever become his widow. Therefore, her interest in the £10,000 legacy ceased, and there was no one then in existence to take the legacy. In 1927, however, Herbert married C his present wife and of that marriage there have been issue two children, one of whom died in a few days, and the other of whom is the defendant. She was born in March, 1929, and, therefore, has now attained the age of twenty-one years. The defendant, as soon as she was born became contingently entitled to a share in the legacy of £10,000, but she says that, having attained twenty-one, and, therefore, a vested interest in the legacy, and there being no other D child at present of her father, she is entitled to take the whole of the legacy according to the rule in *Andrews v. Partington* (1). That rule has been followed with reluctance by one judge after another. It is better, I suppose, that the law should be certain rather than that it should be just in all circumstances, and, therefore, I should be prepared to follow it in appropriate circumstances. The rule is stated by Mr. VAUGHAN HAWKINS in his work on WILLS, 1st ed., D at p. 75:

"Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded."

E It is said that, this being a gift to children as a class, the defendant has become entitled to her share, and, therefore, children coming into existence after that period are excluded and the defendant may give a good receipt for the fund.

There are exceptions to the rule. The next relevant statement in HAWKINS, on p. 77, is:

F "If the gift be in remainder after a life interest, as a bequest to A. for life and after his decease to the children of B., payable at twenty-one, the period of distribution is the later of the two events to which payment is postponed: thus, if a child attains twenty-one in the lifetime of A., children born afterwards in A.'s lifetime are admissible; if at the death of A. no child has attained twenty-one, children born after A.'s death G before the first child attains twenty-one are admissible."

That is to say, supposing in the present case when the first Mrs. Bleckly's interest failed there had been a daughter or son of that marriage, then the class would have closed when that son or daughter attained twenty-one and the children born in the interim would come in. There is, however, another exception to the rule. If, when the prior gift fails, there is no object of the gift in existence, H then, in the case of an immediate gift, every object afterwards born into the class would come in. Thus, in this case, if, at the failing of the interest of the first Mrs. Bleckly there had been, as there was here, no child of Herbert, and if also the gift had been to children of Herbert without the condition of attaining twenty-one, then every after-born child of Herbert whenever born would come in. That is stated in JARMAN ON WILLS, 7th ed., vol. 3, p. 1667. The editor adds under the heading "Personal estate" that the rule applicable to bequests of personal estate is that

" 'a bequest to A. for life, and after his death to the children of B., is not defeated by the non-existence of an object at the death of A., but will take effect in favour of all the subsequently born children as they arise.' The correctness of the rule thus stated is clearly established."

But Mr. JARMAN, on p. 1665, expresses doubt about such circumstances as those of the present case in these terms:

"Where the gift is to the children of A. on attaining twenty-one, and no child of A. is in existence at the testator's death, it is doubtful whether all the children of A. who attain twenty-one will be entitled, or only those who are in existence when the eldest attains that age."

Mr. JARMAN is there referring to the case of an immediate gift not preceded by some prior interest, but, nevertheless, it appears to be a doubtful point.

Without going into the older cases, I propose to confine myself to the case decided by ASTBURY, J., of *Re Chartres* (2), where his Lordship made what he called a "not exhaustive" attempt to define the rule. He thinks, as I think, that when the testator says "all or any of the children of A." the testator may be taken to mean all or any of the children of A., and, in the cases in which other children are born after the attainment of the age of twenty-one by one of the class, the so-called rule would defeat the express intention of the testator. It is said, however, that the convenience of having a rule of this kind by which the trustees are able to pay the appropriate share of the fund to the first member of the class who attains the given age overweighs the possible hardship to those who may come later. The learned judge says ([1927] 1 Ch. 471):

"The principle of this rule is that the class to take is to be ascertained as soon as possible in order that the beneficiaries may know what their shares are and that the fund may be distributed. The rule is, of course, obviously convenient to those who take under it to the exclusion of others intended to benefit, but the irony of the rule is no doubt more apparent to those who are by its application excluded from taking what the testator intended them to take. The rule is so well established and its ambit so clearly laid down that if the present case did not raise a point of equity, which I do not think has ever been directly decided, there would be little more to say. Having regard, however, to this point of equity I will endeavour to state very shortly what this rule is in general though not in exhaustive terms."

He deals first with an immediate gift and states the exception to that, and then with a gift *in futuro* and states an exception. He then deals with the third head (*ibid.*, 472):

"... a gift to A. for life and after his death to B.'s children who attain twenty-one, then if at A.'s death there are children of B. who have attained twenty-one or the representatives of such children, the rule applies and the class closes. If at A.'s death there are only infant children of B. who subsequently attain twenty-one then again the class closes when the first child so attains that age . . ."

He has left out of the classification the case, which is the present case, where there is no taker at all when the prior interest ceases.

The question is whether to apply what is called the exception, which he states only under the first head in these terms (*ibid.*, 471):

"... if there are no children of A. in existence at the testator's death then the rule of convenience ceases to operate, and all subsequently born children take in accordance with the testator's intention."

Counsel for the defendant urged me to say that exceptions to the rule should only be made where necessary, and that in the case of a gift to persons attaining twenty-one it was not necessary to make an exception because

there was no taker at the time when the prior interest ceased, while the exception to the rule in immediate cases was an exception of necessity. I prefer to take the view that the rule in *Andrews v. Partington* (1) is one that is fairly fixed in this court, but not one that I am bound to apply in any circumstances in which it has not been applied by my predecessors. So far as anyone's researches have gone, it has not been applied to the present circumstances, and I do not see why, therefore, I should say that I am bound to decide in a way which, in my view, will defeat the testator's obvious intention. I think the testator intended that any child the son Herbert might have should have a chance, if he attained twenty-one, of taking a share in this £10,000 fund, and I do not think that there is any authority binding me to decide contrary to what I conceive is the express intention of the testator. I, therefore, hold that the class is not closed and the fund is not distributable.

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B
Order accordingly. *Costs of all parties as between solicitor and client to be paid out of the fund.*

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for all parties).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

C

D CURTIS v. CHEMICAL CLEANING AND DYEING CO., LTD.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.JJ.), February 15, 1951.]

Negligence—Bailee—Clause in document excepting liability “for any damage howsoever arising” to bailed article—Innocent misrepresentation as to extent of exception clause—Exclusion of exception—Cleaner and dyer—Damage to garment.

- E
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G
The plaintiff took to the defendants, a firm of dyers and cleaners, a white satin wedding dress for cleaning. She was asked to sign a document which contained a clause that the dress “is accepted on condition that the company is not liable for any damage howsoever arising.” Before signing the document the plaintiff asked why she had to sign it, and she was told by one of the defendants’ servants that the defendants would not accept any liability for damage done to beads or sequins on the dress. The plaintiff then signed the document without having read all of it. When the dress was returned, there was a stain on it. The county court judge found that there was no stain on the dress when the plaintiff left it with the defendants for cleaning, that the burden of proof was on the defendants to show that the stain had not been caused by their negligence, and that the defendants had failed to discharge that burden. The defendants did not challenge that finding, but sought to rely on the exception clause in the document which the plaintiff had signed.

- H
HELD: since the plaintiff had been induced to sign the document by an innocent misrepresentation as to the extent of the exception clause, the exception never became part of the contract between the parties, and, therefore, the defendants were liable to the plaintiff.

Per DENNING, L.J.: Any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent

misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. A representation might be literally true but practically false, not because of what it says, but because of what it leaves unsaid. In short, because of what it implies. When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or, at any rate, not so wide an exemption as that which is in fact contained in the document. A

[AS TO CONDITIONS LIMITING LIABILITY, see HALSBURY, Hailsham Edn., Vol. 23, p. 670, para. 952; and FOR CASES, see DIGEST, Vol. 3, pp. 73-75, Nos. 134-144.]

Cases referred to:

- (1) *L'Estrange v. Graucob (F.), Ltd.*, [1934] 2 K.B. 394; 103 L.J.K.B. 730; 152 L.T. 164; Digest Supp. B
- (2) *Olley v. Marlborough Court, Ltd.*, [1949] 1 All E.R. 127; [1949] 1 K.B. 532; [1949] L.J.R. 360; 2nd Digest Supp.
- (3) *R. v. Kylsant (Lord)*, [1932] 1 K.B. 442; 101 L.J.K.B. 97; 146 L.T. 21; Digest Supp.
- (4) *Low v. Bouverie*, [1891] 3 Ch. 82; 60 L.J.Ch. 594; 65 L.T. 533; 8 Digest 464, 354. C
- (5) *Chapelton v. Barry Urban District Council*, [1940] 1 All E.R. 356; [1940] 1 K.B. 532; 109 L.J.K.B. 213; 162 L.T. 169; 104 J.P. 165; 2nd Digest Supp.

APPEAL by the defendants from a decision of His Honour JUDGE BLAGDEN, given at Westminster County Court on Dec. 12, 1950, whereby he awarded the plaintiff £32 10s. damages for injury to a wedding dress which she had deposited with the defendants for the purpose of cleaning. The facts are fully stated in the judgment of SOMERVELL, L.J. D

Lawrence, K.C., and *A. M. Wallace* for the defendants.

Turner-Samuels, K.C., and *D. J. Turner-Samuels* for the plaintiff. E

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE BLAGDEN who awarded the plaintiff damages. The defendants are cleaners and dyers. The plaintiff took to them for cleaning a white satin wedding dress. When the dress was returned to her it was found that there was on it a stain which the learned judge found was not there when the dress was left with the defendants for cleaning. That fact, in his view, put the onus on the defendants to show that the stain had not been caused by their negligence, and he came to the conclusion that the defendants had failed to discharge the onus, and, therefore, the damage must be held to be due to their negligence. That finding is not challenged, but the defendants sought to rely on an exception as to liability contained in a document headed "receipt," which the plaintiff had been asked to sign. It sets out her name and address and the description of the dress to be cleaned and pressed, and the material words, which are in the bottom right-hand corner under the amount which is to be charged, are: F

"This or these articles is accepted on condition that the company is not liable for any damage howsoever arising, or delay." G

On the basis that that document would exempt the defendants from liability for negligence the plaintiff alleges that she was induced to sign it by misrepresentation. H

This appeal refers to a very short point which depends, to my mind, on the meaning to be given to the learned judge's findings in regard to the evidence. He said:

"I was satisfied that in fact the assistant who received the plaintiff's

garment, when asked by the plaintiff why her signature was required, said (whatever her actual words) something to the effect that the defendants would not accept liability for certain specified risks, including the risk of damage by or to beads and sequins. She did not tell the plaintiff that the defendants sought to exclude any liability for damage, however caused, and this, it seemed to me, was a misrepresentation, though a perfectly innocent one, of the document's effect."

A Then the learned judge referred to the statement of SCRUTTON, L.J., in *L'Estrange v. Graucob (F.), Ltd.* (1), which reads as follows ([1934] 2 K.B. 403):

"When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."

B Some evidence was admitted by the learned judge as to the instructions given to the assistant with regard to requiring customers to sign a "receipt" of this kind. I am not sure that it is material, but from the note I would gather that the intention of those who gave the instructions was that in cases of certain articles, where damage was not anticipated, the assistant was told not to trouble about requiring the customer to sign. In cases, however, where the article was such that, in the experience of the defendants, damage might occur without negligence, then customers should be asked to sign. Beads and sequins which this dress had on it are adornments which are apt to get damaged in cleaning. It may well be that those instructions might not be fully understood by those who had to carry them out. Counsel for the defendants submitted that the judge's findings should be read as meaning that the assistant conveyed the impression that the defendants were not liable for damage, and beads and sequins were given as examples of that non-liability. I cannot so read the findings of the learned judge. We were referred, quite rightly, to the notes of the evidence which seem to me to support amply the construction which I put on the passage, indeed, in my opinion, it is the only construction which it can bear.

E What was conveyed to the plaintiff was, in my view, that there were certain risks, in the present case beads and sequins, which the defendants were not prepared to accept. The plaintiff was asked to sign this document and she thought that its purpose was to exempt the defendants from liability for beads and sequins, and that alone. That, I think, was plainly a misrepresentation. The words on the document purported to exempt the defendants from all liability howsoever arising. In those circumstances, I think that owing to that misrepresentation the exception never became part of the contract between the parties. Counsel commented on the fact that there was no finding in terms that the plaintiff was induced to sign by the misrepresentation, but on her evidence, which the learned county court judge clearly accepted, she asked why she had to sign the document. Obviously, the answer she received was what induced her to sign it. For these reasons I think this appeal fails and must be dismissed.

SINGLETON, L.J.: I agree.

H DENNING, L.J.: The present case is of importance because of the many instances nowadays when people sign printed forms without reading them, only to find afterwards that they contain stringent clauses exempting the other side from their common law liabilities. In every such case it must be remembered that, if a person wishes to exempt himself from a liability which the common law imposes on him, he can do it only by an express stipulation brought home to the party affected and assented to by him as part of the contract: see *Olley v. Marlborough Court, Ltd.* (2). If the party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent

to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation: see *L'Estrange v. Graucob* (1). What is a sufficient misrepresentation for this purpose? That is the point which counsel for the defendants has raised in the present appeal.

In my opinion, any behaviour by words or conduct is sufficient to be a misrepresentation if it is such as to mislead the other party about the existence or extent of the exemption. If it conveys a false impression, that is enough. If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation. But either is sufficient to disentitle the creator of it to the benefit of the exemption. It was held in *R. v. Kylsant* (Lord) (3) that a representation might be literally true but practically false, not because of what it said, but because of what it left unsaid. In short, because of what it implied. This is as true of an innocent misrepresentation as it is of a fraudulent misrepresentation. When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the impression that there is no exemption at all, or, at any rate, not so wide an exemption as that which is in fact contained in the document. The present case is a good illustration. The customer said in evidence:

"When I was asked to sign the document I asked why. The assistant said I was to accept any responsibility for damage to beads and sequins. I did not read it all before I signed it."

In those circumstances, by failing to draw attention to the width of the exemption clause, the assistant created the false impression that the exemption related to the beads and sequins only, and that it did not extend to the material of which the dress was made. It was done perfectly innocently, but, nevertheless, a false impression was created. It was probably not sufficiently precise and unambiguous, to create an estoppel: see *Low v. Bouverie* (4); but, nevertheless, it was a sufficient misrepresentation to disentitle the cleaners from relying on the exemption, except in regard to the beads and sequins. In the present case the misrepresentation was as to the extent of the exemption. In other cases it may be as to its existence. For instance, if nothing was said by the assistant, this document might reasonably be understood to be, like a boot repairer's receipt, only a voucher for the customer to produce when collecting the goods, and not to contain conditions exempting the cleaners from their common law liability for negligence, in which case it would not protect the cleaners: see *Chapelton v. Barry Urban District Council* (5). I say this because I do not wish it to be supposed that the cleaners would have been better off if the assistant had simply handed over the document to the customer without asking her to sign it, or if the customer was not so inquiring as the plaintiff, but was an unsuspecting person who signed whatever she was asked without question. In those circumstances the conduct of the cleaners might well be such that it conveyed the impression that the document contained no conditions, or, at any rate, no condition exempting them from their common law liability, in which case they could not rely on it.

The second point made by counsel for the defendants was that, even if there was an innocent misrepresentation, the plaintiff cannot, in point of law, avoid the terms of the contract. He said that an innocent misrepresentation gives no right to damages but only to rescission, that rescission was not possible because the contract was executed, and that in any case rescission was of no use to the plaintiff, because, once rescission has taken place, there would be no contract to sue upon. That is an attractive argument, but I do not think it is right. One answer to it is that an executed contract can in a proper case be rescinded for innocent misrepresentation; and if the present contract were rescinded, the plaintiff could sue in tort for negligence, because any task undertaken must be done carefully. I do not pursue this point, however, because

I prefer to put it more simply. In my opinion, when a condition, purporting to exempt a person from his common law liabilities, is obtained by an innocent misrepresentation, the party who has made that misrepresentation is disentitled to rely on the exemption. Whether one calls that a rule of law or one of equity does not matter in these days. We have got too far beyond 1873 to trouble about distinctions of that kind. SCRUTTON, L.J., and MAUGHAM, L.J., in *L'Estrange v. Graucob* (1), treated it as plain. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *E. F. Iwi*, agent for *Hanchett Copley & Hails*, Edgware (for the defendants); *Pearce & Sons* (for the plaintiff).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

WOOLFE v. WEXLER.

[COURT OF APPEAL (Cohen, Asquith and Birkett, L.JJ.), February 2, 6, 7, 21, 1951.]

Building Control—Licence—Work ordered by tenant—Licence in name of sub-tenant—Right of builder to recover cost of work from tenant—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended by S.R. & O., 1945, No. 502), reg. 56A (2) (6).

In 1946, under an agreement with the defendant, the plaintiff, a builder, carried out work on certain premises of which the defendant was tenant. The defendant had agreed to let the basement and first floor of the premises to a sub-tenant, and part of the work to be done by the plaintiff was for the benefit of the sub-tenant who had agreed to pay part of the cost of the work. The plaintiff was informed of this fact, but he had no contractual relationship with the sub-tenant. The defendant obtained a licence for the work from the Minister of Works, as required by the Defence (General) Regulations, 1939, reg. 56A (2) (as amended by S.R. & O., 1945, No. 502), but he applied for the licence, and obtained it, in the name of the sub-tenant and not in his own name. After receiving an assurance from the defendant that he had a licence, the plaintiff carried out the work in respect of which the licence was given. In an action by the plaintiff against the defendant claiming the balance of moneys due for the work done, the defendant contended, *inter alia*, that it was implicit in reg. 56A (2) that the licence should be in the name of the person at whose expense the work was to be carried out as that was the person who might be liable to a penalty under reg. 56A (6) for a breach of reg. 56A (2), and, therefore, the work forming the subject-matter of the claim was not covered by the licence, and was illegal, and the plaintiff was debarred from recovering.

HELD: (i) in determining whether there was a breach of reg. 56A (2), the court was not entitled to look at the application for the licence.

R. v. Barnet, etc., Rent Tribunal. Ex p. Reeds Investments, Ltd. ([1950] 2 All E.R. 848), *applied*.

(ii) the policy of reg. 56A was to prohibit work of a kind, or at a cost, or for a purpose, not covered by the licence, and this policy did not require that the person paying for the work should necessarily be the recipient of the licence; reg. 56A (2) contained no express provision prohibiting the doing of the work unless the name of the person at whose expense

it was being done was named in the licence, and an implication to that effect should not be read into the penal provisions of the paragraph; and, accordingly, there had been no breach of reg. 56A (2), and the plaintiff was entitled to recover.

[AS TO CONSTRUCTION OF PENAL ENACTMENTS, see HALSBURY, Hailsham Edn., Vol. 31, p. 536, para. 704; and FOR CASES, see DIGEST, Vol. 42, pp. 726-730, Nos. 1456-1527.]

FOR THE DEFENCE (GENERAL) REGULATIONS, 1939, reg. 56A, see HALSBURY'S STATUTES, Vol. 40, p. 1392.]

Cases referred to:

- (1) *Bostel Bros., Ltd. v. Hurlock*, [1948] 2 All E.R. 312; [1949] 1 K.B. 74; [1948] L.J.R. 1846; 2nd Digest Supp.
- (2) *Re Mahmoud & Ispahani*, [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; 12 Digest 271, 2220.
- (3) *Dennis & Co., Ltd. v. Munn*, [1949] 1 All E.R. 616; [1949] 2 K.B. 327; [1949] L.J.R. 857; 2nd Digest Supp.
- (4) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (5) *Tuck & Sons v. Priester*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 42 Digest 729, 1516.
- (6) *Dyke v. Elliott, The Gauntlet*, (1872), L.R. 4 P.C. 184; 41 L.J.Ad. 65; 26 L.T. 45; 17 E.R. 373; 42 Digest 730, 1526.
- (7) *R. v. Barnet, etc., Rent Tribunal. Ex p. Reeds Investments, Ltd.*, [1950] 2 All E.R. 848; 114 J.P. 505.

APPEAL by the defendant from an order of His Honour W. G. EARENGEY, K.C., sitting as deputy official referee on Aug. 18, 1950, whereby he gave judgment for the plaintiff in an action claiming the balance of moneys alleged to be due from the defendant for work done and materials supplied in respect of premises of which the defendant was tenant. A licence in respect of the work had been granted by the Minister of Works, but was in the name of the defendant's sub-tenant, who was to be liable, as between the defendant and himself, for part of the cost of the work, but with whom the plaintiff had no direct contractual relationship. The defendant contended, *inter alia*, that, as the licence was not in his name, the work was not covered by a licence and was, therefore, illegal, so that the plaintiff was not entitled to recover.

Lester for the defendant.

A. R. Campbell for the plaintiff.

Cur. adv. vult.

Feb. 21. COHEN, L.J., read the following judgment of the court. This is an appeal from a decision of His Honour W. G. EARENGEY, K.C., sitting as deputy official referee, given on Aug. 18, 1950, whereby he awarded to the plaintiff a sum of £1,042 16s. with interest at the rate of four per cent. per annum from Mar. 5, 1947. The plaintiff's claim was for the balance of moneys alleged by him to be due by the defendant for work done and materials supplied to certain premises known as Cleveland House, Richmond Road, London, E.18. The learned judge found as facts that the work in question had been done and the materials supplied to the order of the defendant. At the trial there was some dispute as to quantum, but the only question now in issue is whether the plaintiff is debarred from recovering because, as the defendant alleges, the doing of the work was not covered by a licence and was, therefore, illegal under the provisions of the Defence (General) Regulations, 1939, reg. 56A.

That regulation deals with the control of building operations, and before going into the facts it will be convenient to refer to the relevant provisions thereof. Paragraphs (1) and (2) prohibit the execution or carrying out of certain

operations and works without the authority of the appropriate government department. The relevant paragraph for the purpose of this appeal is para. (2), which, so far as material, reads:

A "Subject to the provisions of this regulation, the carrying out in the United Kingdom, except for a purpose specified in the first column of the table set out in Part I of sched. VI to these regulations, of any work specified in Part III of that schedule or of any maintenance work on a building or on any such works as are mentioned in Part II of that schedule, shall be unlawful except in so far as there is in force in respect thereof a licence granted by the Minister . . ."

Paragraph (6) provides, so far as material:

B "If any operation is executed or work is carried out in contravention of any of the first three paragraphs of this regulation the person at whose expense the operation is executed or the work is carried out, and (where he is not the same person) the person undertaking the execution of the operation or the carrying out of the work, and (in either case) any architect, engineer or other person employed in an advisory or supervisory capacity
C in connection with the execution of the operation or the carrying out of the work shall each be guilty of an offence against this regulation . . ."

The proviso does not affect the matter. We pause here to observe that there is now no para. (3), para. (2) having been substituted [by S.R. & O., 1945, No. 502] for para. (2) and para. (3) of the original regulation. Paragraph (7) enables the licensing authority to impose conditions or limitations on any
D licence it grants. Paragraph (8) provides:

E "If any condition attached to an authorisation or licence granted for the purposes of this regulation is contravened or not complied with, then, whether or not the authorisation or licence is revoked, the person at whose expense the operation is executed or the work is carried out in respect of which the authorisation or licence was granted and (where he is not the same person) the person undertaking the execution of the operation, or the carrying out of the work, and any architect, engineer or other person employed in an advisory or supervisory capacity in connection with the execution of the operation or the carrying out of the work shall each be guilty of an offence against this regulation."

F We need not refer to any other paragraph of the regulation.

With these provisions in mind we turn to the facts. In or about May, 1946, the defendant was a tenant of Cleveland House. His tenancy had only a short time to run, but he was in negotiation with the freeholder, a railway company, for the purchase of the freehold. He evidently expected those negotiations to reach a happy ending, since he began to discuss with a Mr. Lament, a clothing
G manufacturer, the terms on which he would be prepared to take a lease of the basement and first floor of the premises. Mr. Lament required certain alterations to be made if he was to take a lease. The defendant then got into touch with the plaintiff, a builder, who had done work for various companies controlled by the defendant, and asked him for a rough idea of the cost involved in carrying out the necessary work. The plaintiff gave a figure of £800, but
H it is clear that at that stage there was no binding contract between the plaintiff and the defendant. We should add that the defendant told the plaintiff that Mr. Lament would have to bear part of the cost of the work, but the plaintiff said that he did not know Mr. Lament from Adam and would deal only with the defendant. The defendant seems by then to have come to terms with Mr. Lament, though no written agreement was signed until Aug. 6. The terms included a provision that Mr. Lament should pay half of the cost of erecting four new lavatories and half of the cost of certain other work. The plaintiff

was, as the deputy official referee put it, "no scholar," which term, counsel seemed to agree, meant that he was practically illiterate. At any rate, all the typing and preparing of accounts and estimates in connection with work done by the plaintiff for the defendant or his companies had been done in the defendant's office by the defendant's staff, a Mr. Booth, the defendant's manager, having played a prominent part. The defendant introduced Mr. Lament to his (the defendant's) architect, a Mr. Moore. Mr. Moore had been consulted on the alterations of Cleveland House in February, 1946. On June 3, 1946, on the defendant's instructions Mr. Moore put in an application for a licence inserting the name of Mr. Lament as applicant on the express instructions of the defendant, who said that he made the suggestion as Mr. Lament was to occupy the first floor. Question No. 1 on the application form is: "Full name and address of applicant, *i.e.*, person paying the cost of the proposed work." In answer to that is inserted: "J. Lament, c/o Durnford & Moore." Then the address at which the work is to be carried out is inserted: "Building, Railway Bridge, Richmond Road, Hackney." That is Cleveland House. The premises are described as factory and work rooms. Under question No. 3 the name of the business was described as "dress manufacturing," and I should mention there that Mr. Lament was a dress manufacturer. Then a specification was attached to indicate the nature of the work. In answer to "Reasons why the work is regarded as necessary at the present time," there is "To replace premises now required to be surrendered." That, I think, must be surrendered by Mr. Lament. The name and address of the builder was given as "J. Woolfe," the plaintiff. The "estimated cost of proposed work" was £1,675, and the form was signed by Durnford & Moore, chartered architects, purporting, no doubt, to sign on behalf of Mr. Lament. The only respects in which it is suggested that the statements in this form are inaccurate is that Mr. Lament never came into direct contractual relationship with the plaintiff and was, therefore, not directly liable to him for any sum, and that, in any event, under the terms of Mr. Lament's agreement with the defendant Mr. Lament was to pay only part of the cost of the work.

On June 27, 1946, the Minister of Works granted the licence to carry out the desired work at a cost of £1,675. The licence was addressed to J. Lament, c/o Mr. Moore's firm. Certain conditions were imposed, including a condition that the licence was not transferable. The only other matters in the licence to which counsel referred were condition 8 and note B. Condition 8 reads:

"Immediately the work has been completed the licensee must inform the licensing officer and state the cost of the work which has been carried out."

Note B reads:

"This licence does not remove any obligations to comply with the provisions in force under public, general and local Acts and bye-laws, or the Restriction of Ribbon Development Act, 1935, or Town and Country Planning Acts or orders. It is desirable that the holder of this licence should consult the local authority on these matters."

We do not think that these latter provisions affect our decision. The licence having been obtained, on July 6, 1946, the plaintiff (or we should say someone on his behalf, since the letter is signed *per pro*) addressed a letter to the defendant and Mr. Lament containing an estimate for the work specified in the schedule attached to the application form. This work included the work half of the cost of which Mr. Lament was to bear under his arrangements with the defendant. The letter concluded with this paragraph: "Upon your confirmation and the necessary licence this work will be put in hand." Mr. Booth, the defendant's technical manager, testified that he prepared this letter for typing. On receiving an assurance from the defendant, or from Mr. Booth in the defendant's pre-

sence, that the defendant had a licence which was in a drawer in the defendant's office, the plaintiff commenced, and in due course carried out work in respect of which the licence was granted. By Aug. 15, 1946, he wanted some money on account and had an interview with Mr. Lament and the defendant at which Mr. Booth was present. What happened, in the plaintiff's own language, as recorded by the learned judge, is as follows:

- A "Aug. 15 defendant rang me up to come to his office quickly. I found Lament, defendant and Booth in the office. Defendant said to me: 'You want some more money.' (He had previously asked me if £500 would be all right: I said it would do lovely). I said 'Yes.' He said 'Step outside a minute and we will go into the details.' That left defendant, Lament and Booth in the office. After a little time I was called in. Defendant handed me two cheques—one made out by Lament and signed by defendant—£250 each. He slapped me on the back and said: 'Now you've no worries.' B Lament went and the defendant in Booth's presence said to me: 'You'd better let me have back my cheque; I am financially embarrassed.' I said I could wait for a little while. I handed the cheque to defendant and he tore it up into pieces. I don't remember whether it was drawn on his C own account or on one of his company's."

- This evidence is corroborated by Mr. Lament and Mr. Booth. Mr. Lament afterwards paid two further sums of £150 and £100 respectively, but the evidence establishes that, though the plaintiff discussed the work with Mr. Lament, he always refused to take instructions from anyone but the defendant. Mr. Lament's cheques for £150 and £100 appear to have been given to the plaintiff D by the defendant. The work was completed about the end of November, 1946, and from then onwards the plaintiff pressed the defendant for payment of the balance of his account, but the defendant persistently refused to pay. The facts which we have stated are taken either from the judgment or from the deputy official referee's notes of the evidence of the plaintiff's witnesses, the deputy official referee having stated that the defendant was a most unsatisfactory witness and that wherever his evidence differed from that of the plaintiff E and his witnesses he preferred the latter. The plaintiff's witnesses included Mr. Moore, Mr. Lament and Mr. Booth.

- The defendant having refused to pay, the writ was issued on Sept. 19, 1949. The only defence set up in the original pleading was that the defendant never gave instructions for the work. That defence was rejected by the judge at F the trial and very wisely counsel for the defendant did not seek to disturb that finding of fact. When the case came before the deputy official referee on July 20, 1950, the licence was produced. The defendant must have been aware of its provisions, but his legal advisers, apparently, were not, and counsel for the defendant at once applied to amend his defence by alleging that the claim was illegal in that the work forming the subject-matter of the claim could be G done lawfully only if it were covered by an appropriate licence, whereas, in fact, no such licence existed. The deputy official referee very properly gave the defendant leave to amend. Indeed, it would have been the court's duty to take notice of the illegality, if such there were, even if it had not been pleaded. The plaintiff then by leave amended his statement of claim, alleging a collateral warranty by the defendant that he had a proper licence and claiming damages H for breach of that warranty. We doubt whether this alternative claim could succeed, but, in view of the conclusions which we have formed on the main issue, we need not pursue this matter further.

The defendant, on whom the onus rests of establishing the illegality, put his case in this way. He said that the plaintiff was on the horns of a dilemma. Either the licence which was granted to Mr. Lament had been transferred to the defendant, in which case there was a breach of a condition of the licence attracting a penalty under para. (8) of the regulation, and the contract (said

counsel for the defendant) was, therefore, illegal. Alternatively, the licence was still vested in Mr. Lament, in which event there was no licence within the meaning of para. (2) of the regulation. We can deal shortly with the first of these two contentions. We see no evidence whatever to support the view that there had been a transfer of the licence. Had there been such a transfer, we should still have entertained some doubt whether the defendant could succeed. This question was considered in *Bostel Brothers, Ltd. v. Hurlock* (1). In that case the question at issue was work done in excess of the licensed cost. Counsel for the plaintiffs in that case advanced the argument that, if the limit of cost is a condition or limitation attachable to a licence under para. (7) of the regulation so that work done at an excess cost is a breach of condition within para. (8), the only result is that the builders are liable to prosecution, but the legality of the work is unaffected. He relied in particular on the words in para. (8), "whether or not the authorisation or licence is revoked," as showing that para. (8) was not intended to affect the validity of the licence. This court decided against the builders on the ground that work done in excess of cost is work done without a licence, and, therefore, *prima facie* contravenes para. (2) of the regulation, and is not merely a breach of condition bringing para. (8) into operation. The headnote ([1949] 1 K.B. 74) records the court as saying that a breach of condition merely gives rise to liability to a penalty under para. (8). We are unable to find anything in the judgment supporting this statement in the headnote. None the less, the opinion that a breach of condition, which does not involve a breach of para. (1) and para. (2), only attracts a penalty under para. (8), and does not *per se* invalidate the licence, is attractive for the reasons advanced by counsel for the plaintiffs in *Bostel Brothers, Ltd. v. Hurlock* (1), and for the further reason that, if counsel for the defendant in the case now before us were to succeed on this part of his argument, it would mean that a builder might be deprived of his right to recover for work done by reason of a transfer of a licence, effected without his knowledge and which he had no reason to suspect.

The second point raised by counsel for the defendant presents more difficulty. He has to admit that no work has been done which was not authorised by the licence, but he says that a licence cannot exist, so to speak, *in vacuo*, that it must be granted to someone and that it is implicit in para. (2) that the work must be done under a licence in the name of the person at whose expense the work is to be carried out, that being the person who may be liable to a penalty under para. (6). He relies on the principles laid down by this court in *Re Mahmoud and Ispahani* (2). The regulation there in question was the Seeds, Oils and Fats Order, 1919, which prohibited the making of a contract of sale or purchase of specified articles, including linseed oil, unless buyer and seller each had a licence. The plaintiff had the requisite licence and was led by the misrepresentation of the defendant to the honest belief that the defendant also had a licence. The defendant, in fact, had not, and knew that he had not, a licence. He refused to take delivery of the linseed on the ground that the contract was illegal as he had no licence. The defence prevailed. SCRUTTON, L.J., began his judgment by pointing out that, when considering a case of this kind, the court was not concerned with the commercial or business merits of the parties. If it were, he said ([1921] 2 K.B. 726):

" . . . there is obviously a great deal to be said for the commercial and business merits of the plaintiff, and nothing whatever for the commercial and business merits of the defendant."

The same is at least equally true in the case now before us. SCRUTTON, L.J., stated the reasons for the decision in these words (*ibid.*, 729):

" As I understand, two reasons are given why in this case the court should enforce this contract. First of all, it is said that the court will not listen to a person who says, 'Protect me from my own illegality.' In my

view the court is bound, once it knows that the contract is illegal, to take the objection and to refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether its knowledge comes from outside sources. The court does not sit to enforce illegal contracts. There is no question of estoppel; it is for the protection of the public that the court refuses to enforce such a contract."

- A That, says counsel for the defendant, is applicable here. Counsel for the plaintiff, however, relies on the next sentence from the judgment of SCRUTTON, L.J., which reads as follows (*ibid.*):

"The other point is that, where a contract can be performed lawfully or unlawfully, and the defendant without the knowledge of the plaintiff elects to perform it unlawfully, he cannot plead its illegality."

- B Here, says counsel for the plaintiff, the contract could have been performed legally since the defendant could have performed the contract lawfully by scrapping the old licence and getting a new licence in the names of Mr. Lament and the defendant. That argument seems to us to fail *in limine*, since there was no contract by the defendant to obtain a licence, but merely a false representation that he had one. Moreover, acceptance of the argument of counsel for the plaintiff on this point would make evasion of the regulation too easy. If it is necessary that the name of the person or persons at whose expense the work is being done should be in the licence, we think the onus is on the builder to see that it is there. In this connection the observations of DENNING, L.J., in *Dennis & Co., Ltd. v. Munn* (3), though directed to the question of authorised work, seem to us in point. DENNING, L.J., said ([1949] 2 K.B. 332):

"They [the builders] must not simply take the owner's word that there is a licence. They should ask to see it. If they do not do so, and it turns out that he has no licence at all, they have acted illegally and can recover nothing. They cannot recover even the amount permitted by the free licence, because they did not act under it and could not act under it."

- E He was dealing there with the facts of that particular case. He continued (*ibid.*):

"The work done here was more extensive than that permitted by the licence. Of course, if the employer knowingly deceives them, they may have an action for fraud on that account; but nothing of that kind can be suggested here."

- F It is equally true that here there is no claim for fraud. We have, therefore, no case of fraud to deal with, and we do not think it necessarily follows from the facts of this case.

- G We are, however, unable to accept the argument of counsel for the defendant that the work has been done in breach of para. (2) of the regulation. The regulation imposes a penalty, and in construing such a regulation we are directed by the House of Lords that we must not hold that the regulation has been infringed unless the breach is clearly established. The principles applicable are clearly stated by LORD SIMONDS in *London and North Eastern Ry. Co. v. Berri-man* (4). LORD SIMONDS said ([1946] 1 All E.R. 270):

- H "That rule of construction is very well settled; though not always easy of application. I will state it by three familiar citations. In *Tuck & Sons v. Priestler* (5) LORD ESHER, M.R., said (19 Q.B.D. 638): 'We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.' LINDLEY, L.J., in the same case

said (*ibid.*, 645): ‘ . . . the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it . . . ’ Finally I will cite the words of JAMES, L.J., delivering the judgment of the Privy Council in *Dyke v. Elliott* (6) (L.R. 4 P.C. 191): ‘ . . . where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.’ It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in *Tuck’s* case (5), the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court.”

That was a case under the Railway Employment (Prevention of Accidents) Act, 1900, but the principle is applicable to the case before us. In para. (2) of reg. 56A there is no express provision prohibiting the doing of the work unless the name or names of the persons at whose expense the work is being done is or are named in the licence. Counsel for the defendant says that the standard form of application indicates that this should be implied. We doubt whether, if we looked at the application form, we should reach that conclusion. Be that as it may, we do not think that in determining whether there is a breach of the regulation we can look at the application form: see *R. v. Barnet, etc., Rent Tribunal. Ex p. Reeds Investments, Ltd.* (7).

Counsel for the defendant then suggested that, unless that implication were made, there was a great opportunity for evasion. He propounded an imaginary case where a landlord of tenement flats obtained a licence for work on four flats at a total cost of £80. The tenant of each flat then did work covered by the licence, but the aggregate cost of the work done by them exceeded £80. In those circumstances, counsel for the defendant suggested, no one could be prosecuted unless the implication for which he contended was made. It is, of course, extremely unlikely that such a thing would occur, but, if it did, we think the court would have no difficulty in holding that the work must be looked at as a whole and that all four tenants were liable to a penalty. We are, however, of opinion that there is strong reason for not making the implication. The policy of the regulation is to prevent work of a kind or at a cost not covered by a licence, or, we think, for a purpose not covered by a licence. We do not consider that this policy requires that the name of the person paying for the work should be the recipient of the licence. On the other hand, it seems to us natural to impose the penalty on the person at whose expense the work is being done, since he must be in a position to control the builder and prevent unauthorised work being done. We can find no justification for reading into the penal provisions of para. (2) of the regulation words which it does not contain.

We may, perhaps, point out that, if the point raised by counsel for the defendant was well founded, it could have been taken by the defendant in *Bostel Brothers, Ltd. v. Hurlock* (1), since the licence in that case had been granted to a Mrs.

Pierson, and not to the defendant, Hurlock. The point, however, was not taken, and we cannot, therefore, treat that case as an authority binding on us. We would add that we can hardly imagine a case more plainly outside the mischief which the regulation was framed to prevent. The work was authorised work, it was being done to meet the requirements of the person to whom the licence was granted, and the cost of the work was being paid in part by the licensee. In those circumstances we are glad to have been able to reach the conclusion that we are not required to hold that the enforcement of the contract would be against public policy. For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Thomas V. Edwards* (for the defendant); *Howard, Kennedy & Co.* (for the plaintiff).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

HALES v. BOLTON^{*} LEATHERS, LTD.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), November 28, 29, 30, 1950, March 1, 1951.]

Industrial Injury—Industrial disease—Dermatitis—Attack before July 5, 1948—Recurrence after that date—Right of workman to workmen's compensation—National Insurance (Industrial Injuries) Act, 1946 (c. 62), s. 55 (1), s. 89 (1), proviso (a).

On Nov. 27, 1947, a workman was certified to be suffering from dermatitis, a disease coming within the Workmen's Compensation Act, 1925, s. 43, and now dealt with as a "prescribed disease" under the National Insurance (Industrial Injuries) Act, 1946, which came into force on the "appointed day," July 5, 1948. He received compensation under the Act of 1925 in respect of total incapacity until Dec. 12, 1947, when he returned to work. On Aug. 14, 1948 (*i.e.*, after the appointed day), he was again disabled by a recurrence of the original disease from which he had never been completely cured, and since then he had been wholly or partially incapacitated. He claimed compensation under the Workmen's Compensation Act on the ground that he was within proviso (a) to s. 89 (1) of the Act of 1946, as his right to compensation arose in respect of employment before the appointed day and he was not insured under the Act of 1946 in respect of the disease. Section 89 (1) of the Act of 1946 provides that workmen's compensation is not to be payable in respect of any employment on or after the appointed day, and (*inter alia*) the Workmen's Compensation Acts are repealed as from that day, but by proviso (a) to the subsection: "the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury."

HELD: (i) (LORD OAKSEY *dissenting*) on the true construction of proviso (a) to s. 89 (1) of the Act of 1946, the right to compensation, *i.e.*, to receive

a weekly sum during incapacity, did not arise until it had been established as a legal right by agreement or award, and the right did not "arise" within the meaning of the exception to the proviso until, on a recrudescence of the disease after the appointed day, the present right to receive a weekly payment was established; therefore, the first condition in the exception to the proviso was satisfied, as on the appointed day the workman had no incapacity, and, accordingly, no right to a weekly payment, and it was only after the appointed day that the incapacity supervened and the right arose.

(ii) (*per* LORD SIMONDS, LORD NORMAND and LORD MACDERMOTT) as the disease was clearly due to the nature of the workman's employment, within s. 55 (1) of the Act of 1946, the workman was to be regarded as insured under the Act, within the exception to proviso (a) to s. 89 (1), if the disease "developed on or after the appointed day" within the meaning of s. 55 (1); (*per* LORD SIMONDS and LORD NORMAND, LORD OAKSEY dissenting) on the true construction of s. 55 (1), the word "developed" is apt to cover, not only an original outbreak of the disease, but also a recrudescence of it after it has been inactive, and, therefore, the condition from which the workman suffered on Aug. 14, 1948, was a development of the disease within the meaning of the sub-section, and the workman was insured under the Act of 1946 against that disease; and, accordingly, as both the conditions for the application of the exception in proviso (a) to s. 89 (1) were satisfied (*i.e.*, the workman's right to compensation did not arise before the appointed day, and, when it arose, he was insured under the Act of 1946 against that disease), he was not entitled to compensation under the Workmen's Compensation Act, 1925.

(*Per* LORD MACDERMOTT) to determine whether the disease "developed on or after the appointed day," within s. 55 (1) of the Act of 1946, it was necessary to look at the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, and on the true construction of reg. 8 (1) and (5) the disease in respect of which the claim was made was to be treated as having developed on or after the appointed day, as at the date of the claim the workman was not receiving weekly payments under the Workmen's Compensation Act, nor was he entitled to any such payments under any award or agreement, within the meaning of the regulation, and, therefore, he was insured under the Act of 1946 within the meaning of proviso (a) to s. 89 (1), and was not entitled to compensation under the Workmen's Compensation Act.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 149), *affirmed*.

[FOR THE NATIONAL INSURANCE (INDUSTRIAL INJURIES) ACT, 1946, see HALSBURY'S STATUTES, Second Edition, Vol. 16, p. 797.]

Cases referred to:

- (1) *King v. Port of London Authority*, [1920] A.C. 1; 88 L.J.K.B. 889; 121 L.T. 587; 34 Digest 434, 3548.
- (2) *Richards v. Goskar*, [1936] 3 All E.R. 839; [1937] A.C. 304; 106 L.J.K.B. 85; 156 L.T. 52; Digest Supp.

APPEAL by the workman from an order of the Court of Appeal (BUCKNILL, SOMERVELL and DENNING, L.JJ.), made on Dec. 20, 1949 (reported [1950] 1 All E.R. 149), reversing an order made by His Honour JUDGE WALMSLEY, K.C., at Bolton County Court on June 15, 1949, whereby he awarded compensation to the workman under the Workmen's Compensation Act, 1925. The learned judge held that in the case of an industrial disease the right to compensation arose once for all as soon as the workman was certified to be suffering therefrom, so that in the present case the right had arisen before the appointed day and was not excluded by the National Insurance (Industrial Injuries) Act,

1946. The employers' appeal from this decision was allowed by the Court of Appeal. The workman had received compensation in respect of his later incapacity under the National Insurance (Industrial Injuries) Act, 1946, and before the learned county court judge and in the Court of Appeal the case proceeded on the footing that the workman became insured under the Act of 1946 before his right to compensation arose. Before their Lordships it was contended *inter alia* for the workman that he was not within the Act of 1946.

A The facts appear in the opinion of LORD SIMONDS.

Paull, K.C., C. M. W. Elliott and Marven Everett for the workman.

Beney, K.C., and R. Lambert for the employers.

The House took time for consideration.

Mar. 1. The following opinions were read.

B LORD SIMONDS: My Lords, on Nov. 27, 1947, the appellant, while in the employment of the respondents, was certified to be suffering from dermatitis produced by dust or liquids, a disease coming within s. 43 of the Workmen's Compensation Act, 1925, and to be thereby disabled from earning full wages at the work at which he had been employed. Nov. 26, 1947, was certified as the date of the commencement of the disablement. He was off work, totally disabled, until Dec. 12, 1947, when he returned to his old work with the respondents. He remained at that work until Aug. 14, 1948, when he was again disabled by a recurrence or recrudescence of his original disease from which he had never been completely cured. Since that date he has been wholly or partially incapacitated and in respect of his incapacity was, by an award made by His Honour JUDGE WALMSLEY sitting as arbitrator on June 15, 1949, awarded various sums under the Workmen's Compensation Acts. The question is whether, having regard to the provisions of the National Insurance (Industrial Injuries) Act, 1946, the award was rightly made. This question the Court of Appeal has answered in the negative. I agree with its conclusion and with the lucid exposition of the Act given by SOMERVELL, L.J.

E The long title of the Act of 1946 is:

"An Act to substitute for the Workmen's Compensation Acts, 1925 to 1945, a system of insurance against personal injury caused by accident arising out of and in the course of a person's employment and against prescribed diseases and injuries due to the nature of a person's employment, and for purposes connected therewith."

F Section 1 (1) provides:

"Subject to the provisions of this Act, all persons employed in insurable employment shall be insured in manner provided by this Act against personal injury caused on or after the appointed day by accident arising out of and in the course of such employment."

G The "appointed day" was July 5, 1948, on which day the appellant was not suffering from any incapacity. He was employed by the respondents at his old work. *Prima facie*, but subject to the provisions of this section, he became at once an insured person within this section. I can pass over the many sections in which provision is made as to contributions and benefits and kindred matters and come to Part IV, which is headed: "Extension of Insurance to Diseases, etc." Section 55 (1) provides:

H "Subject to the provisions of this Part of this Act, a person who is . . . insured against personal injury caused by accident arising out of and in the course of his employment shall be insured also against any prescribed disease and against any prescribed personal injury not so caused, being a disease or injury due to the nature of that employment and developed on or after the appointed day."

The single word in this section on which any doubt can arise is "developed." Section 55 (4) enacts that:

"Provision may be made by regulations for determining the time at which a person is to be treated for the purposes of this Act as having developed any disease or injury [as therein mentioned], and the circumstances in which any such disease or injury is, where the person in question has previously suffered therefrom, to be treated as having recrudesced or as having been contracted or received afresh."

The implication of this sub-section is that a disease may be said to "develop" whether it recrudesces or is contracted afresh. I much doubt whether I am entitled to look to the regulations for guidance on the meaning of the word in sub-s. (1), but I will say something on this point later. So far, the Act has contained no such provision for the substitution of the new system for the old as the title has indicated. It is by s. 89 (1) that this is effected. That sub-section, which is the crucial one for this appeal, provides that workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and, accordingly, that the enactments therein referred to (which are all the Acts relevant to our present purpose) shall be repealed from that day, but there is a proviso to the sub-section of which the relevant part is as follows:

"Provided that—(a) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Part IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury."

My Lords, the apparently simple words of this proviso conceal their difficulty. It is clear that, apart from the proviso, the appellant could get no benefit under the Workmen's Compensation Acts. Is he then within the proviso, and, if he is *prima facie* within it, is he, nevertheless, taken out of it by the words of exception? The difficulty of determining this question is due, I think, to the artificial character of the notional accident with which the exception deals. The case of ordinary accident is clear and straightforward. I take the illustration given by BUCKNILL, L.J., which SOMERVELL, L.J., cited ([1950] 1 All E.R. 152). A groom is kicked by his employer's horse before the appointed day. He suffers no disablement at the time, but after the appointed day he develops an injury and becomes incapacitated. His right to compensation under the Workmen's Compensation Acts arises after the appointed day, but it arises in respect of employment before that day. It is, therefore, preserved by the proviso. It was urged that a right to compensation arises when the accident occurs which causes the subsequent disablement. This is not, in my judgment, a tenable view. A right to compensation, *i.e.*, to receive a weekly sum during incapacity, does not arise until it has been established as a legal right by agreement or award. The difficulty, however, as I have said, arises in regard to the notional accidents with which the section deals by way of exception out of the proviso. They do not in any case as a practical matter fall easily within it. The legislature might, I suppose, have dealt with them in one of several ways. It might have excluded from all the benefits of the Act of 1946 for all time any person who after the appointed day suffered from a recrudescence of a prescribed disease in respect of which he had before that day had a right to compensation under the earlier Acts, leaving him to such remedy as he might have under those Acts, or it might have wiped the sheet clean, and, if the workman suffered a recrudescence of a disease in respect of which he had had before the appointed day, but had not at that day, a right to compensation, have provided benefit for him under the new system, whatever his present circumstances, or it might

adopt a compromise which would, so far as foreseen, avoid a gap between the two systems, leaving the workman in the case of a recrudescence of an old disease to his old remedies if he was not insured under the new Act, but substituting the new benefit for the old if he was so insured. This is what, I think, the words of exception to the proviso are intended to accomplish, though it may be that they do not wholly bridge the gap. For, as I read them, they provide that, if a workman is otherwise within the proviso, he is taken out of it if he satisfies two conditions: (a) that his right to compensation in respect of a disease does not arise before the appointed day, and (b) that, when it arises, he is insured under the Act of 1946 against that disease. As to the first of these conditions, I interpret the word "arise" in the same sense as before and say that the right does not arise until on a recrudescence of the disease after the appointed day the present right to receive a weekly payment is established. In other words, the right does not arise before the appointed day merely because the workman suffered from the disease before the appointed day if he had ceased to suffer from it at the appointed day. In regard to the second condition, I think that on the true interpretation of s. 1 (1) and s. 55 (1) (which determine whether a workman is "insured under this Act") the appellant was so insured. It is clear that his disease was due to the nature of his employment. The only doubt is whether it was "developed" on or after the appointed day. I should regard this word as apt to cover equally an original outbreak of disease and a recrudescence of it after it had been inactive. The manifestation of the disease and the consequent incapacity of the workman are the grounds of claim and, when these occur, I think that the disease can properly be said to "develop" within the meaning of s. 55 (1). I would, however, add two observations on this part of the case. First, if I may look at the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948 (S.I., 1948, No. 1371), made under [*inter alia*] s. 55 (4), to assist in the interpretation of the word, I agree with my noble and learned friend, LORD NORMAND, in thinking that they assist or, at the least, are consistent with this interpretation. Secondly, I think that there was much force in the argument of counsel for the respondents that this case throughout proceeded on the footing that the appellant became insured under the Act of 1946 before his right to compensation arose, but, taking the view which I do of the meaning and effect of the Act, I do not think it right to decide against the appellant on this narrow point.

LORD NORMAND: My Lords, in this appeal a difficult problem is presented on the construction of the National Insurance (Industrial Injuries) Act, 1946, which came into force on the appointed day, July 5, 1948, and which I shall hereinafter call the Act of 1946. The question relates to those diseases formerly known as industrial diseases and provided for by s. 43 of the Workmen's Compensation Act, 1925, and now dealt with as "prescribed diseases" under the Act of 1946. The matter for decision is: What are the circumstances which entitle a workman incapacitated by one of those diseases, in this case dermatitis, still to claim compensation under the Workmen's Compensation Act, 1925, notwithstanding the repeal of that Act by s. 89 (1) of, and sched. IX to, the Act of 1946? The material facts are clearly set out by the learned arbitrator in his judgment, and, in brief, the appellant, having suffered from dermatitis and received compensation in respect of a resulting incapacity to earn wages in a period which ended before the appointed day, claims compensation in respect of incapacity to earn caused by a return after the appointed day of the dermatitis, of which he had never been wholly cured.

The Act of 1946 necessarily had to deal with the difficulties of transition from the compensation scheme of the Workmen's Compensation Acts to the benefit scheme of the Act of 1946. It was apparent, for example, that there would be cases where an accident took place before the appointed day without causing

an incapacity till after the appointed day or causing an incapacity terminating before the appointed day but renewed after it, and cases where an industrial disease contracted before the appointed day might cause an incapacity whether for the first time or by recrudescence after the appointed day. Those difficult cases, as well as others more simple where a disability caused either by accident or disease began before the appointed day and continued uninterrupted until after the appointed day, were dealt with by s. 89 (1).

The enacting part of the sub-section declares that "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day," and proceeds to the repeal of the Workmen's Compensation Act, 1925, as from that date. As I read that part of the section, the words "on or after the appointed day" qualify "any employment," but I think it would make no difference in this case if they were read as qualifying "payable." Then proviso (a) deals with the transitional difficulties. It begins by continuing in force the Workmen's Compensation Act and applying it to cases to which it would have applied if the Act of 1946 had not been passed, "being cases where a right to compensation arises or has arisen in respect of employment before the appointed day." There, at any rate, "before the appointed day" qualifies "employment." Then follows an exception, applying to, *inter alia*, any prescribed disease. The exception depends on the fulfilment of two conditions: (i) that "the right to compensation" does not arise before the appointed day; and (ii) that the workman, before it does arise, has been insured under the Act against that disease. If both these conditions are fulfilled, the workman is within the Act of 1946 and entitled to benefit thereunder. If either of them is unfulfilled, he is still within the Workmen's Compensation Act, 1925. There is a clear intention that the workman suffering from incapacity caused by a prescribed disease shall be entitled either to benefit under the provisions of the Act of 1946, or to compensation under the provisions of the Workmen's Compensation Act, but not to both. Whether the first condition has been fulfilled in this case depends on the meaning of "the right to compensation" in the sub-section. This expression is not found in the Workmen's Compensation Acts, but "compensation" is a term of art in these Acts and means "weekly payments during incapacity." *Prima facie*, therefore, "a right to compensation" is a right to a weekly payment during incapacity. In the first part of the proviso "arises" looks forward from the appointed day and means "arises after the appointed day." "Has arisen" looks backward and means "has arisen before the appointed day." If "a right to compensation" has its *prima facie* meaning, there is no difficulty where there has been injury by accident arising out of and in the course of an employment before the appointed day. If the incapacity "arises" for the first time after the appointed day, the workman is entitled to compensation and not to benefit. If the incapacity "has arisen" before the appointed day and continues at the appointed day, the workman is entitled to compensation. If an incapacity "has arisen" before the appointed day, and there has been a recovery, but the incapacity again "arises" after the appointed day, the workman is entitled to compensation. Under the second part of the proviso the first condition has, in the present case, been fulfilled, for the right to compensation, meaning the right to a weekly payment as compensation for incapacity, does not arise before the appointed day. The words "does not arise before the appointed day" appear to be no more than the equivalent of "arises on or after the appointed day." There was, on the appointed day, no right to a weekly payment and there was no incapacity, and it is only after the appointed day that the incapacity supervenes and the right arises.

To understand the second condition, that the workman has been insured against "that" disease before the right to compensation arises, it is necessary to go back to s. 1 (1) and s. 55 (1) of the Act of 1946. Section 1 (1) enacts that:

"Subject to the provisions of this Act, all persons employed in insurable employment shall be insured . . . against personal injury caused on or after the appointed day by accident arising out of and in the course of such employment."

Section 55 (1) enacts that:

- A "Subject to the provisions of [Part IV of the Act] a person who is . . . insured against personal injury caused by accident arising out of and in the course of his employment shall be insured also against any prescribed disease . . . being a disease . . . due to the nature of that employment and developed on or after the appointed day."

- B There is no doubt that the disease in this case was due to the nature of the employment, and the only question is whether the disease developed on or after the appointed day. In my opinion, the word "develop" is as apt a word as can be chosen to describe what happens when a disease of gradual onset becomes active and manifests itself as a disabling condition, or, having been active and become latent, again becomes active and manifests itself as a disabling condition. The change from latency to activity and from activity to latency may occur frequently with a disease like dermatitis and each time that the change from latency to activity takes place the disease is properly said to develop. If that is the construction of the word, then the condition from which the appellant suffered on Aug. 14, 1948, was a development of a dermatitis which had been latent on the appointed day. Under s. 55 (4), however, regulations may provide for determining the time at which a person is to be treated for the purposes of the Act as having developed a prescribed disease and the circumstances in which a prescribed disease is, when the person in question has previously suffered therefrom, to be treated as having recrudesced or as having been contracted afresh. It was suggested that in this sub-section the development of the disease was to be regarded as something distinct from and opposed to recrudescence and as akin to the original contracting of a disease.
- D The wording of the sub-section does not ground such an inference, for it is consistent with a classification in which the development of a disease includes a recrudescence as well as a fresh contraction.

- E The National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, were made under [*inter alia*] s. 55 (4), and though, in my opinion, they cannot control the construction of the Act, it is yet of some importance to consider whether they fit into the construction which I think the Act properly bears. In these regulations the date of "development" is defined by reg. 6. Regulation 6 (2) (a) provides that, where the claim is for injury benefit,

" . . . the date of development shall be the first day on which the claimant was incapable of work as the result of the disease on or after the appointed day . . . "

- G It should be explained that "injury benefit" is the benefit available under insurance for the first 156 days of the incapacity, whether the incapacity is caused by accident or by disease. Regulation 8 (1) deals *inter alia* with the case in which a claim is made for benefit in respect of a prescribed disease suffered by a person to whom compensation under the Workmen's Compensation Acts had been awarded or paid in respect of the same disease and at the date of the claim for benefit the person (a) was in receipt of weekly payments in respect of such compensation, or (b) had received a lump sum in redemption of liability or had entered into a composition agreement. The regulation provides that in these circumstances:
- H

" . . . the disease in respect of which the claim is made shall be treated for the purposes of these regulations as a recrudescence of the disease . . . and not as having developed on or after the appointed day unless it is

determined [in a manner provided] that the disease was in fact contracted afresh."

So far, this provision, read with reg. 6, does not help the appellant because he was not in receipt of weekly payments at the date of any possible claim to benefit in respect of the incapacity which began on Aug. 14, 1948. It is, however, important to note that the underlying hypothesis of reg. 8 (1) is that without it the "recrudescence" would have been treated as a "development," and the regulation was made in order to prevent that. Accordingly, a workman who has been awarded or paid compensation in respect of one of the prescribed diseases, and at the date of the claim to benefit (a) is not in receipt of weekly payments in respect of such compensation, and (b) has not received a lump sum paid in redemption of liability for such compensation or entered into a composition agreement, is within the Act of 1946, because the disease is then treated as having "developed" on or after the appointed day. I must refer lastly to reg. 8 (5):

"For the purposes of this regulation, a person shall be deemed to be, or to have been, in receipt of a weekly payment of compensation if—(a) he . . . was in fact receiving such payment; or (b) he is or was entitled thereto under an award or agreement made under the Workmen's Compensation Acts."

As a last resource it was submitted that the appellant was, when he became incapacitated on Aug. 14, 1948, entitled to weekly payments under an agreement, and the agreement was said to have been formed when the respondents paid compensation to the appellant on presentation of the certificate of Nov. 27, 1947. I shall assume, contrary to my opinion, that it is open to the appellant to take this point, though he has obtained no finding from the learned arbitrator that there was an agreement, though he would not have been entitled to go to arbitration if there had been an agreement, and though the point was not taken either before the learned arbitrator or before the Court of Appeal. Yet the supposed agreement is irrelevant. Admittedly, it could not put the appellant in a better position than he would have been in if, instead of an agreement, he had obtained an award in terms of the order pronounced by this House ([1920] A.C. 38) in *King v. Port of London Authority* (1). Such an order would have entitled him to make further application in adjourned arbitration proceedings to have it determined that incapacity for work had ensued, that the incapacity was caused by the disease, and that he was entitled to a certain weekly payment, but the order itself, and without a further order, would not have entitled him to any weekly payment. In my opinion, therefore, the regulations referred to are consistent with the meaning which I think s. 89 (1) naturally bears. I hold that both the conditions for the application of the exception in proviso (a) to s. 89 (1) have been satisfied, and that the appellant is within the Act of 1946 and is not entitled to compensation under the Workmen's Compensation Act, and I would dismiss the appeal.

LORD OAKSEY: My Lords, in my opinion, this appeal ought to be allowed. There are really two questions involved: (i) whether the Workmen's Compensation Acts "continue to apply" to the case of the appellant within the meaning of proviso (a) to s. 89 (1) of the National Insurance (Industrial Injuries) Act, 1946, hereinafter called "the Act," and (ii) whether the appellant's case is within the exception to that proviso because before his right to compensation had arisen he had been insured under the Act.

The first question depends on the meaning of the words in the proviso, "cases where a right to compensation arises or has arisen in respect of employment before the appointed day." The words appear to me to deal with two classes of cases—cases where a right to compensation arises on or after the appointed day in respect of employment before the appointed day and cases

where a right to compensation has arisen before the appointed day in respect of employment before the appointed day. There can, it seems to me, be no other meaning to the words "arises or has arisen," and in the present case it is clear that a right to compensation had arisen on Nov. 26, 1947, before the appointed day, when the appellant was certified to be suffering from dermatitis and was paid workmen's compensation. The exception has, in my

A opinion, no application since the right to compensation had arisen before the appointed day. The word "the" cannot, in my opinion, be read as referring to a different right to compensation from the right to compensation referred to in the words "a right to compensation arises or has arisen." The word "the" is natural and grammatically correct as meaning "the right above referred to."

- B If this is the true view, the second question does not arise. I am, however, of opinion that the appellant was not insured under the Act because the disease was not "developed on or after the appointed day" within the meaning of s. 55 (1) of the Act. In the first place, it appears to me that these words must be words of limitation or qualification and cannot, therefore, include diseases which developed before the appointed day. The category "any prescribed
- C disease" is limited or qualified by the words "due to the nature of that employment and developed on or after the appointed day." The word "developed," therefore, cannot be construed as meaning "manifesting itself" or "breaking out" or "causing incapacity," because in these senses a disease may have developed both before and on or after the appointed day. The Act, however, does not leave the matter there. It provides, by s. 55 (3), for regulations which
- D may provide that a person who developed the disease at a time before the regulations came into force *but not before the appointed day* shall be treated as if the regulations had been in force when he developed the disease. This subsection, in my view, supports the construction I put on the word "developed," namely, that regulations under the section could only apply to diseases developed on or after the appointed day. Again, s. 55 (4) appears to me to
- E support this construction. The regulations are:

"for determining the time at which a person is to be treated as . . . having developed any disease . . . and the circumstances in which any such disease . . . is, where the person . . . has previously suffered therefrom, to be treated as having recrudesced or as having been contracted or received afresh."

- F In my opinion, it is clear that "recrudescence" is treated by the Act as something different from "development." The provision for regulations dealing with circumstances in which, although the person has previously suffered from the disease, it is not to be treated as having recrudesced, but as having been contracted or received afresh, shows, in my opinion, that "development" really
- G means "being contracted or received afresh" although the person may have "previously suffered from the disease." I agree with your Lordships in thinking that the regulations themselves cannot alter the meaning of the words of the statute, but they may, I think, be looked at as being an interpretation placed by the appropriate government department on the words of the statute. Regulations 6, 7 and 8 distinguish and contrast "recrudescence" and "develop-
- H ment." Regulation 8 (5) (b) provides that, if a person is or was entitled to compensation under an award or agreement under the Workmen's Compensation Acts, he shall be deemed to be or to have been in receipt of a weekly payment of compensation, and by reg. 8 (1) his disease shall be treated as a recrudescence and "not as having developed on or after the appointed day unless it is determined . . . that the disease was in fact contracted afresh." These are the very words of the regulations, and, in my opinion, they demonstrate that in such a case as the present, where the person in question has been found as a fact to

be suffering from a prescribed disease which has recrudesced, he would not have been treated under the regulations as being insured under the Act. For these reasons, and for the reasons stated by His Honour JUDGE WALMSLEY, with which I agree, I am of opinion that the appeal should be allowed.

LORD MORTON OF HENRYTON: My Lords, the relevant facts have already been stated and I shall only re-state them so far as is necessary in order to explain the view which I take of this appeal. The "appointed day" referred to in the National Insurance (Industrial Injuries) Act, 1946 (hereinafter called "the Act of 1946") was July 5, 1948. On Aug. 14, 1948, the appellant was totally incapacitated from work by dermatitis and the arbitrator (His Honour JUDGE WALMSLEY) has found as a fact that this attack was a "recurrence or recrudescence" of an attack of dermatitis which had disabled the appellant from Nov. 27, 1947, till Dec. 12, 1947. The appellant had returned to his old work after the earlier attack and had received full compensation, in respect of the period of sixteen days just mentioned, from his employers, the respondents. I need not set out the appellant's medical history since Aug. 14, 1948. It is enough to state that he applied for, and has received, under the Act of 1946, injury benefit for the maximum period of 156 days and thereafter disablement benefit. He now contends that his application, which was not, I think, made under professional advice, was misconceived, that he has never been entitled to benefits under the Act of 1946, and that he is entitled to claim compensation from the respondents under the Workmen's Compensation Acts.

I turn first to s. 89 (1) of the Act of 1946 which has already been read. It is, I think, clear that, if there had been no proviso to s. 89 (1), the appellant's present claim would have been untenable, but it is necessary to consider whether the appellant's case falls within the first part of proviso (a) and, if it does, whether it is taken out of the proviso by the exception. In my opinion, "a right to compensation" does not "arise," within the meaning of this proviso, until the workman has a present right to receive a money payment. This seems to me to be the natural meaning of the words used. They are not technical words and the industry of counsel has not revealed any instance of their use in the Workmen's Compensation Acts. Counsel for the appellant invited us to hold that a workman had a right to compensation if an order had been made in his favour in the terms set out ([1920] A.C. 12) in *King v. Port of London Authority* (1) and that the appellant's "right to compensation," in respect of the recurrence of the disease on Aug. 14, 1948, "arose" on Nov. 27, 1947. I am wholly unable to accept this very artificial construction of these ordinary English words, and I can find nothing in the context which should lead your Lordships to give these words any unusual meaning. On the contrary, I think that the meaning which I have described as their natural meaning is the one which fits most naturally into the scheme of the Act of 1946.

Turning again to the proviso, I am prepared to assume that counsel for the appellant is right in contending that the appellant's case is one in which "a right to compensation has arisen in respect of employment before the appointed day," because the attack of Aug. 14, 1948, was a recurrence of a disease which arose out of employment before the appointed day. Whether this contention is right or wrong, I am clearly of opinion that the appellant had no "right to compensation" during the period from Dec. 12, 1947, to Aug. 14, 1948, when he was in full work, and that "the right" arose on Aug. 14, 1948, when he was again incapacitated. Thus, "the right" did not arise before the appointed day, and the appellant falls within the exception to proviso (a) to s. 89 (1) if it is correct to say of him that he was insured against this attack of dermatitis before it arose.

Now, my Lords, comes a difficulty. Counsel for the appellant now invites your Lordships to hold that, even if the right to compensation arose after the appointed day, the appellant had not been, before the right arose, "insured

under this Act against that disease or injury," within the meaning of the exception in proviso (a) to s. 89 (1). Unfortunately, your Lordships have not the advantage of a finding on this point by the learned arbitrator. He stated the issue between the parties as being

" . . . whether the right to compensation, that is to say, to the compensation which is now being claimed, arose before or after the appointed day."

A

Later he stated:

" It is common ground that, if the right to compensation arose after the appointed day, the applicant had become insured under the National Insurance Act before it arose."

B

Your Lordships heard a statement by the two junior counsel who appeared before the arbitrator, from which it appears that both counsel then agreed that " this workman was on a disease-producing occupation," and that counsel for the present appellant did not contend that he was not insured under the Act of 1946 before Aug. 14, 1948. In those circumstances it is not, perhaps, surprising that the learned arbitrator made the statement set out in my second quotation from his judgment. SOMERVELL, L.J., in delivering the judgment of the Court of Appeal, said ([1950] 1 All E.R. 153):

C

" In the present case, in our opinion, the right to compensation in respect of the incapacity as from August, 1948, arose after the appointed day. The Workmen's Compensation Acts do not, therefore, apply if the workman has been insured under the Act of 1946 against that disease. It is

D

agreed that this condition is fulfilled."

Counsel for the appellant bases his contention that the appellant was not so insured on reg. 8 of the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948, made under [*inter alia*] s. 55 (4) of the Act of 1946. Counsel for the respondents submits that this contention involves the decision of matters of fact, and that the appellant ought not to be allowed to raise it at this stage. He also submits that there is no trace of this contention in the appellant's Case. For my part, my Lords, I do not think that this House should decide on this question, which is said to be of great general importance, on the material now before it. If the appellant is to be allowed to raise this contention at this stage—and that is a matter for serious consideration—I think that the case should be remitted to the arbitrator to decide on the matter which he described as being " common ground."

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LORD MACDERMOTT: My Lords, on the arguments presented at the Bar this appeal raises two main questions. The first of these is as to the true construction of proviso (a) to s. 89 (1) of the National Insurance (Industrial Injuries) Act, 1946, under which the repealed Workmen's Compensation Acts

G

are to continue to apply to certain cases. On this question I find myself in substantial agreement with the views expressed by the Court of Appeal and, for that reason, I shall state my conclusions as briefly as possible. Proviso (a) relates to cases " where a right to compensation arises or has arisen in respect of employment before the appointed day." It is, I think, plain that the last five words must be read together and that the employment referred to is employment before the appointed day, which was July 5, 1948. On the other hand, it is, in my opinion, no less clear that the expression " arises or has arisen " looks to either side of the appointed day, " arises " being apt to connote what may arise thereafter and " has arisen " what has or may have arisen before that day, which, it will be remembered, is also the date of repeal. That being so, the phrase " a right to compensation " must include not only a right to compensation which has ripened before the appointed day, but also a right which, though its source lies in something that happened before the

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appointed day, does not arise as a "right to compensation" until after that day. This conforms with what I take to be the policy of the Act, namely, that the employers' liability should, in general, continue after repeal towards those whose accident occurred before, but whose compensatable incapacity did not occur (or re-occur if it had stopped) till after, the appointed day, as well as towards those whose right to a weekly payment was complete by that day. The words "a right to compensation" must, therefore, mean more than the inchoate right which accrued to a workman once he had sustained, or was deemed to have sustained, personal injury by accident arising out of and in course of his employment. They contemplate that that inchoate right may have required some interval ending beyond the appointed day, in order to mature into a right to receive compensation. On these grounds, and also because it is reasonable to assume that the legislature intended the words to mean the same thing irrespective of whether the right arose before or after the appointed day, I am of opinion that they must be read as connoting a present right to receive compensation, as distinct from a right to compensation which is contingent on some future event, *e.g.*, the occurrence or re-occurrence of incapacity.

Before going further it will be convenient to see how this construction affects the appellant's case. At the appointed day he was at work and suffering no incapacity. But he had been in receipt of compensation previously on account of dermatitis and I think it is apparent from the decisions of this House in *King v. Port of London Authority* (1) and *Richards v. Goskar* (2) that immediately before that day he had a right *in respect* of compensation in the sense that if incapacity recurred he would be entitled to have his weekly payments continued without starting *de novo* and on a new certificate. But that was not "a right to compensation" if the meaning I have given those words is correct. A right to compensation had not, therefore, arisen by the appointed day. But such a right did arise, within the meaning of the first part of proviso (a), thereafter, that is after Aug. 14, 1948, when incapacity due to the original disease again supervened. I am, therefore, of opinion that, unless the exception to proviso (a) otherwise requires, the Workmen's Compensation Acts would continue to apply to the appellant's case.

The second question is whether the words of that exception touch the appellant. If they do, proviso (a) will not be in point and the said Acts will no longer determine his rights. The exception comes into operation if both of two conditions are satisfied: (i) that the right to compensation did not arise before the appointed day, and (ii) that before that right arose the appellant had become insured under the Act of 1946 "against that disease." For the reasons already given, the first of these conditions must here be held satisfied. The matter, therefore, turns on the second condition and amounts to this: Had the appellant become so insured before Aug. 14, 1948? It may, I think, be taken as the intention of the legislature that the injured workman should not, if possible, be left to fall between the two stools of workmen's compensation and industrial benefit, and I, therefore, read the words "against that disease" as referring not merely to insurance against a prescribed disease, but to insurance against that disease as it hits and incapacitates the workman at the relevant time. I should mention that this question of insurability was not raised in the courts below, both of which seem to have regarded it as agreed that the appellant was so insured. I am in some doubt whether, in the circumstances, it is now open to the appellant to make the case that he was not insured at the material time. But the point is one of law, and as it was debated at some length before your Lordships I think the most convenient course will be to deal with it. On the facts the appellant must, in my view, be regarded as insured within the meaning of proviso (a) if the disease "developed on or after the appointed day" as those words are used in s. 55 (1) of the Act of 1946. For light on that one must look outside the Act to regulations made under certain of its provi-

- sions for the purpose, among others, of determining, in the words of s. 55 (4), "the time at which a person is to be treated for the purposes of this Act as having developed any disease . . ." The relevant statutory instrument is the National Insurance (Industrial Injuries) (Prescribed Diseases) Regulations, 1948. This is a formidable document, but reference need only be made to three of its regulations. Of these reg. 6 (2) (a) provides (in so far as is now material) that, for the purposes of the first claim for benefit under the Act in respect of a prescribed disease, the date of development shall be the first day on which the claimant was incapable of work as the result of the disease on or after the appointed day. Regulation 7 deals with recrudescence of a prescribed disease, but, as I read this regulation, it relates only to further attacks after a first claim under the Act and has no direct bearing on the present question. So far, there is nothing to exclude the appellant from benefit. He contends, however, that reg. 8 has that effect. This regulation is concerned with transitional cases where workmen's compensation has previously been awarded or paid in respect of the same disease. Paragraph (1) thereof, when read in conjunction with the applicable words of para. (5), provides, so far as material to the facts of this case, that the disease in respect of which a claim is made shall be treated as a recrudescence of the disease for which compensation was awarded or paid and *not as having developed on or after the appointed day* if (i) workmen's compensation has been awarded or paid in respect of the same disease, and (ii) at the date of such claim the claimant was in fact receiving weekly payments in respect of such compensation, or was entitled to such payments under an award or agreement made under the Workmen's Compensation Acts. The principal object of reg. 8 is, I think, to prevent an overlapping of compensation and benefit payments and the design of its material provisions is reasonably clear once this is recognised. If the conditions I have enumerated are not both satisfied the risk of double payment is gone, the claimant's date of development is as provided for by reg. 6 (*i.e.*, on or after the appointed day), and, in consequence, the claimant is an insured person excepted from proviso (a) and, therefore, entitled to benefit but not to compensation. But if, on the other hand, both the conditions are satisfied, then the claimant has a present right to receive compensation in respect of employment before the appointed day and, not being an insured person, stays within proviso (a) and is, accordingly, entitled to compensation but not to benefit.

- It remains to consider whether these conditions were satisfied in the appellant's case when he claimed benefit under the Act of 1946 in or about August, 1948. Condition (i) clearly was. But, in my opinion, condition (ii) was not. He was not receiving weekly payments in fact, nor was he entitled to any such payments under any award or agreement. At the time of claiming benefit the appellant's rights to workmen's compensation would not, at most, have been greater than those conferred by the form of order in *King v. Port of London Authority* (1). But that only gave a right to apply and fell far short of entitling the workman to a weekly payment. In my opinion, the terms of reg. 8 (5) (which I have incorporated in stating condition (ii)) march with the expression "a right to compensation" as used in proviso (a) and refer, not to an inchoate right but to a present right to receive compensation. For these reasons I have reached the conclusion that reg. 8 does not apply, that the appellant was, in consequence, an insured workman for the purposes of the exception to proviso (a) and, accordingly, that the Workmen's Compensation Acts did not continue to apply to his case after their repeal. I would, therefore, dismiss the appeal.

Appeal dismissed with costs.

Solicitors: *Corbin, Greener & Cook*, agents for *Morrish & Co.*, Leeds (for the workman); *Gregory, Rowcliffe & Co.*, agents for *John Taylor & Co.*, Manchester (for the employers).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

Re SHAW'S SETTLEMENT TRUSTS. *SHAW v. SHAW AND OTHERS.*

Re WISELY'S SETTLEMENT TRUSTS. *WISELY AND ANOTHER v. PUBLIC TRUSTEE AND ANOTHER.*

[CHANCERY DIVISION (Harman, J.), February 20, 26, 1951.]

Settlement—Forfeiture—Express advancement clause—Consent to advancement.

By a settlement, dated Apr. 5, 1904, in the events which happened G. became entitled to the income of certain funds "during his life unless and until some act or event shall have happened or shall happen whereby the said income or some part thereof if belonging absolutely to him would be or become vested in or charged in favour of some other person." The trustees were empowered by the settlement to advance any minor interested under the settlement, but not without the consent of prior interests. The trustees proposed to exercise their power of advancement in favour of G.'s infant son, and the question arose whether G., by consenting, would forfeit his life interest.

HELD: on the true construction of the settlement it was not intended that the consent to the exercise of the power of advancement should cause a forfeiture of the consenting party's life interest, and, therefore, G.'s consent would not cause such a forfeiture.

Re Hodgson ([1913] 1 Ch. 34), *followed*.

Re Stimpson's Trusts ([1931] 2 Ch. 77), *distinguished*.

Under a marriage settlement, dated Sept. 24, 1915, the trust funds were directed to be held during the lifetime of W. on trust to pay the income to W. "provided that at the date when such . . . income would otherwise be payable to him under this provision no forfeiture as hereinafter defined shall have been incurred and be subsisting as regards him." A forfeiture was to be incurred "if he . . . shall at any time have done or suffered or shall hereafter do or suffer some act or thing or if some event shall have happened or shall hereafter happen in consequence whereof if such annual sum or income belonged to him . . . absolutely at the time when but for such forfeiture it would be payable to him . . . hereunder the same or some part thereof would be vested in or payable to some other person or persons." The settlement also provided that: "The trustee may at any time or times but with the consent in writing of [W.] . . . raise any part or parts not exceeding together one-half of the presumptive or vested share of any child or other issue of the said intended marriage under the trusts aforesaid and may pay or apply the same for his or her advancement or benefit." An advancement of a child was proposed.

HELD, *similarly*, W., by consenting, would not incur a forfeiture of his life interest.

[AS TO FORFEITURE CLAUSE, see HALSBURY, Hailsham Edn., Vol. 29, pp. 542, 697, 790, paras. 795, 976, 1098; and FOR CASES, see DIGEST, Vol. 40, pp. 558-562, Nos. 987-1009.]

Cases referred to:

- (1) *Re Hodgson*, [1913] 1 Ch. 34; 82 L.J.Ch. 31; 107 L.T. 607; 40 Digest 562, 1008.
- (2) *Re Stimpson's Trusts*, [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249; Digest Supp.
- (3) *Re Garrett*, [1934] Ch. 477; 103 L.J.Ch. 244; 151 L.T. 194; Digest Supp.

ADJOURNED SUMMONSES each raising the question whether on the true construction of a settlement the consent by a life tenant to the exercise by the trustees of an express power of advancement would cause the life tenant to suffer a forfeiture of his life interest.

H. E. Francis for the life tenant under the settlement dated Apr. 5, 1904.

R. Cozens-Hardy Horne for the first, second and fourth defendants, interested under the discretionary trusts arising on forfeiture of the life tenant's interest under the settlement dated Apr. 5, 1904.

Burnett-Hall for the third, fifth, sixth and ninth defendants, infants interested under the said discretionary trusts.

A *Wigglesworth* for the seventh and eighth defendants, the trustees of the settlement dated Apr. 5, 1904.

H. J. Goolden for protected life tenants under the settlement of Sept. 24, 1915.

Wigglesworth for the first defendant, the sole trustee of the settlement.

Rink for the second defendant, the child whose advancement was proposed.

Cur. adv. vult.

B Feb. 26. **HARMAN, J.**, read the following judgment. The question in the first of these summonses arises under a settlement by virtue of which the plaintiff has a determinable life interest, and is whether he would, by consenting to the exercise by the trustees of a power of advancement, cause his life interest to determine. The settlement was made on Apr. 5, 1904, by Mary Jane Shaw, the plaintiff's grandmother, and was a settlement of certain colliery shares on trust for the settlor for life with remainder to her son Reginald for life with remainder to his sons. He died without issue and thereupon under further limitations of the settlement the fund became equally divisible between the plaintiff and his brother, the two sons of James Edward Shaw, second son of the settlor. The plaintiff's interest was settled on trust to pay the income to him

D "during his life unless and until some act or event shall have happened or shall happen whereby the said income or some part thereof if belonging absolutely to him would be or become vested in or charged in favour of some other person."

E There followed a discretionary trust and a remainder for the plaintiff's sons at twenty-one with divers remainders over. By cl. 9 of the settlement the trustees are empowered to advance any minor interested under the settlement, but not without the consent of prior interests. The plaintiff has an infant son, the second defendant, in whose favour the trustees propose to exercise this power of advancement and have requested the plaintiff to consent, but he, not unnaturally, is unwilling to do so at the expense of the forfeiture of his life interest.

F Both determinable life interests and provisions for the advancement of infant remaindermen have been common features of settlements for many years past. I find precedents for both in **DAVIDSON'S CONVEYANCING PRECEDENTS**, 3rd ed., vol. 3, pt. II, pp. 715, 798, published in 1873. It is not suggested in that work that consent to the exercise of the advancement power would determine the life interest. This suggestion, however, seems to have been made early in the present century, for in **KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING**, 9th ed., published in 1909, the precedent for a determinable life interest set out in vol. 2 on p. 537 includes these words

"(other than a consent to the exercise of the power of advancement hereinafter contained)."

H The question came before the court in 1913 in *Re Hodgson* (1). The main question in that case was whether the advancement clause applied to appointed shares, but **NEVILLE, J.**, also quite clearly decided that consent by the owner of a determinable life interest to the exercise of an advancement power did not work a forfeiture. On this subject the judge expressed himself as follows ([1913] 1 Ch. 39):

"The point raised in this case is a peculiar one. Under a marriage settlement the husband takes a protected life interest in the wife's settled funds

subject to the payment of £150 a year to the wife, and a clause giving over his share of the income in case he incumbers or charges it is of the widest possible description and is *prima facie* wide enough to cover what has been done in the present case, because by an act of his he has enabled income which otherwise would have been payable to him to become payable to somebody else. The settlement also contains a power of advancement, and it provides in the power of advancement that half of the share of any child may be advanced by the trustees with the consent of the husband and the wife . . . Now in order to understand what the settlement meant the whole document must be read together, and must be read intelligently, and one must consider what are the objects sought to be attained by the words that have been used. To suppose that by giving effect to the power of advancement the husband committed a forfeiture under the previous forfeiture clause would to my mind be perfectly absurd, and would be failing to give an intelligent construction to the whole of the settlement. I think it should be read as though there had been inserted at the end of the forfeiture clause 'But this provision is not to affect any steps taken by the husband to enable the advances by the trustees hereinafter provided for to take effect.' I think it is clear in the present case that nothing has been done which is not in accordance with the terms of the advancement clause, and I am bound to assume that the trustees properly exercised their discretion . . ."

At the end of the judgment, he uses these words (*ibid.*, 41):

"The forfeiture clause was never intended to operate in that direction at all, and it would be, I think, directly contrary to the whole intention of the deed if I held that it was so. I hold, therefore, that there has been no forfeiture."

Acting on this view, the editor of the edition (10th) of KEY AND ELPHINSTONE published in 1914 put the words I have already quoted from the earlier edition into square brackets and added a note that probably the words were unnecessary "but it may be safer to insert them" (see vol. 2, p. 582), and the careful draftsman before 1925 acted, I think, on this last admonition. The legislation of 1925 altered the position, first, by enacting a statutory power of advancement by the Trustee Act, 1925, s. 32, and, secondly, by providing under s. 33 of the same Act a form of determinable life interest which could be imported into settlements by expressing income to be held on protective trusts. These two sections have had the effect of shortening many documents, but some practitioners still prefer to include an express power of advancement and to set out the terms of a determinable life interest in full. The statutory protective trusts by s. 33 (1) (i) of the Act of 1925 expressly except advances under a statutory or an express power from working a forfeiture, so that this question cannot arise where this statutory form is used. The question, nevertheless, seems to have come before LUXMOORE, J., in 1930, for it appears from the report of *Re Stimpson's Trusts* (2) that he held that the plaintiff in that case, who was both trustee and beneficiary, would forfeit his interest under a will of a lady who died in 1929 if he exercised the statutory power of advancement under s. 32 of the Act. The point is not reported, and the headnote to *Re Stimpson's Trusts* (2) [in the LAW REPORTS] is misleading in that respect. The terms of the determinable life interest are set out in these words ([1931] 2 Ch. 78):

" . . . if the plaintiff should assign or charge the life interests given to him by her will or any part thereof, or become bankrupt or do or suffer any other act or thing whereby the said life interests or either of them if payable to him absolutely or any part thereof would become vested in or payable to any other person,"

then the trusts should cease. The judge decided the point, but the report, having said so much, reports the case on another point, and one does not know what arguments or authorities (if any) were cited. All the judge, as reported, says on this point is (*ibid.*, 80):

- A "The summons, in addition to asking whether the power of advancement of the defendant Thomas Edwin Stimpson is applicable in the manner provided by and subject to the conditions contained in s. 32 of the Trustee Act, 1925, also asks a further question, whether, on the true construction of the will of Mary Stimpson, in the event of the plaintiff consenting to any advancement being made to the son, he forfeits his life interest. The matter came before me on Oct. 21 last, and I then decided that if this consent was given it would in fact bring about a forfeiture of the life interest of the plaintiff."
- B

The report in the LAW TIMES (145 L.T. 249) is no more informative. Not unnaturally this has since been considered a matter of doubt: see, for instance, the note in WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES, 12th ed., vol. 2, p. 1320. This difficulty, it is said, I must now resolve.

- C If I am free to do so, I should wish to follow the judgment of NEVILLE, J., the reasoning of which appeals to me. Even though, on the wording of the forfeiture clause, it might be said to cover a consent to the exercise of the power of advancement, as NEVILLE, J., recognises, it seems absurd to suppose that the settlor intended the power to advance a minor during the lifetime of one of her grandchildren to be exercisable only at the expense of that grandchild's life interest. In effect, that would be to make it certain that the power would never be exercised. This kind of interest used to be called a spendthrift trust, and that well enough describes its object, which is to protect a life tenant against his own extravagance. It was never intended to prevent a proper use of the capital for the advantage of his children. It was pointed out to me here that the first life interest of a son of Mary Jane Shaw was not determinable, and that, if Reginald Shaw had had sons, he could safely have consented to the exercise of the power, and from this it was argued that no repugnancy in fact existed in the present case, but I cannot think that this was the draftsman's view or the settlor's intention.
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- E

- F Am I, then, precluded, by the decision of LUXMOORE, J., in *Re Stimpson's Trusts* (2) from adopting this view? I think not. In the first place, that decision is quite unsatisfactory so far as any record of it goes, as was, indeed, pointed out by counsel in argument in *Re Garrett* (3) ([1934] Ch. 480). That case did not really touch this point, though there is one observation of CLAUSON, J., which might be thought relevant. He was deciding that the existence of a restraint on anticipation did not prevent a lady from consenting to the exercise of an advancement power. In the course of his judgment he said (*ibid.*, 482):
- G

"... it is to be observed that in this will there is no forfeiture clause, the presence of which might well make a difference and introduce matter for consideration."

- H This, however, does no more than voice a doubt. Moreover, the will in *Re Stimpson's Trusts* (2) contained no advancement clause, nor, apparently, did the settlement which conferred the power exercised by the will. Both settlement and will in that case long preceded the legislation of 1925, and the statutory advancement clause cannot, therefore, have been in the mind of the settlor or testator.

In these circumstances the argument which appealed to NEVILLE, J., and appeals to me was not available. It may be that the decision in *Re Stimpson's Trusts* (2) may hereafter be followed in a case where an express advancement clause is lacking, and where, on the other hand, no use is made of the protective

trusts set out in the Trustee Act, 1925, s. 33. I leave that question to be decided when it arises. In the present case both powers are expressed in the deed, and, in my judgment, the consent to the exercise of one does not lead to the forfeiture by the consenting party of his life interest under the other.

I now turn to the second of the summonses now before me, *Re Wisely*. In this case a similar question arises under a settlement made on Sept. 24, 1915. Under the limitations of that instrument the trust funds are held during the lifetime of the first plaintiff, the husband, as to one-half on trust to pay the income to him

“provided that at the date when such . . . income would otherwise be payable to him under this provision no forfeiture as hereinafter defined shall have been incurred and be subsisting as regards him.”

After the husband's death the wife, if surviving, has a similarly forfeitable interest. The forfeiture clause is in these terms:

“a forfeiture by the husband or the wife (as the case may be) of the annual sum or income payable to him or her hereunder will be incurred if he or she (as the case may be) shall at any time have done or suffered or shall hereafter do or suffer some act or thing or if some event shall have happened or shall hereafter happen in consequence whereof if such annual sum or income belonged to him or her absolutely at the time when but for such forfeiture it would be payable to him or her hereunder the same or some part thereof would be vested in or payable to some other person or persons.”

The advancement clause is in these terms:

“The trustee may at any time or times but with the consent in writing of the husband (if living) or after the husband's death of the wife (if living) raise any part or parts not exceeding together one-half of the presumptive or vested share of any child or other issue of the said intended marriage under the trusts aforesaid and may pay or apply the same for his or her advancement or benefit.”

The plaintiffs are the husband and wife respectively taking under this instrument, and the second defendant is the only child of the marriage. Here, again, an advance in the child's favour is proposed, but the plaintiffs are unwilling to give their consents if the result be a forfeiture of their interests. In my judgment, I ought in this case also to follow *Re Hodgson* (1) and my own decision just delivered. Both the interests of the husband and the wife and the necessity for their consent to the exercise of the advancement power are expressly provided by the same instrument, and it would, in my judgment, be to construe the two parts as inconsistent the one with the other if I were to hold that consent worked a forfeiture, and I accordingly hold that the plaintiffs can safely consent to advancement without forfeiting their interests.

Order accordingly.

Solicitors: *Hunters* (for all parties to the first summons); *Strong & Co.* (for all parties to the second summons).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

CUMBES v. ROBINSON.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), February 14, 15, 1951.]

Rent Restriction—Shop and dwelling-house let together—Subsequently let separately to same tenant under two leases—Application of Rent Acts to shop—Rent and Mortgage Interest Restrictions Act, 1939 (c. 71), s. 3 (3).

- A In 1941 a landlord let to a tenant premises consisting of a dwelling-house and a shop at a rent of £1 a week. The tenant sub-let the shop to one W. at £2 a week. In June, 1948, the landlord gave W. notice to quit, but W. did not leave the premises until September, 1948. On Aug. 13, 1948, the landlord gave the tenant notice to quit, but, as a result of negotiations between their solicitors, the notice was not enforced, and, on Oct. 7, 1948, the landlord granted the tenant two separate leases, each for a term of five years, one in respect of the shop at a rent of £2 a week and the other in respect of the dwelling-house at £1 a week. On a claim by the tenant for a determination of the standard rent under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the tenant contended that, notwithstanding the two leases, by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), the shop and the dwelling-house should be regarded as one dwelling subject to the Rent Acts at the rent of the original letting, being the standard rent, *viz.*, £1.
- B
- C

HELD: there was nothing in the Rent Restrictions Acts which prevented a shop and adjoining residential premises being let separately if the parties, for some good reason and not as a device to avoid the operation of the Acts, had plainly expressed the intention that they should be so let, even although at the time of the separate letting the tenant was in possession of the residential part of the premises; in the present case the parties had expressed their intention, plainly and *bona fide*, that the premises should be let separately; and, therefore, the contention of the tenant must be rejected.

- D
- E *Phillips v. Hallahan* ([1925] 1 K.B. 756), *applied*.

County Court—Appeal—Leave—Time when application for leave should be made—Before filing of notice of appeal—County Courts Act, 1934 (c. 53), s. 105 (a).

After the decision in an action in the county court where the debt or damage claimed did not exceed £20 the party aggrieved thereby did not apply to the judge for leave to appeal, but, within the twenty-one days allowed for the entering of an appeal by R.S.C., Ord. 59, r. 34, he entered an appeal without leave. After the expiration of the twenty-one days he applied to the county court judge for leave.

HELD: the leave of the county court judge under s. 105 (a) of the County Courts Act, 1934, must be obtained before the notice of appeal is filed, but in a proper case the time will be extended.

- G [FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS ACT, 1939, s. 3 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1078; and FOR THE COUNTY COURTS ACT, 1934, s. 105, see *ibid.*, Vol. 5, p. 82.]

Cases referred to:

- H (1) *Phillips v. Hallahan*, [1925] 1 K.B. 756; 94 L.J.K.B. 694; 133 L.T. 236; 31 Digest 559, 7062.
- (2) *Mann v. Merrill*, [1945] 1 All E.R. 708; 114 L.J.K.B. 406; 173 L.T. 2; 2nd Digest Supp.
- (3) *Lewis v. Purvis*, (1947), 177 L.T. 267; 2nd Digest Supp.
- (4) *Wimbush v. Cibulia*, *Wimbush v. Levinski*, [1949] 2 All E.R. 432; [1949] 2 K.B. 564; 2nd Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE LANGMAN made at Worcester County Court, dated Nov. 15, 1950, whereby he held that a shop

and dwelling-house let to the tenant under two separate leases were, by virtue of s. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, to be treated as one dwelling to which the Rent Acts applied. The combined shop and dwelling-house had originally been let to the tenant at a weekly rent of £1. Under the two leases entered into at the tenant's request, the rents agreed between the parties were £2 for the shop and £1 for the dwelling-house. The tenant now contended that, in spite of the two leases, the shop should be regarded as let together with the dwelling-house at the original rent of £1, and he claimed to be entitled to recover £10, being excess rent paid for five weeks.

At the conclusion of the judgment of the county court judge, the landlord did not apply for leave to appeal, but filed a notice of appeal. More than twenty-one days after judgment, he applied to the judge for leave to appeal, and leave was granted. On appeal, a preliminary point was taken by the tenant that the appeal was not properly constituted.

N. F. M. Robinson for the landlord.

L. A. Blundell for the tenant.

SOMERVELL, L.J.: In these proceedings appeal is sought to be brought from the county court in a case where the claim before the county court was under £20. This circumstance brings the case within the following words of s. 105 of the County Courts Act, 1934, which deals with appeals:

"Provided that, without the leave of the judge, there shall be no appeal—
(a) in any action founded on contract or on tort (other than an action for the recovery of land or an action in which the title to any hereditament has come in question) where the debt or damage claimed does not exceed £20."

In the present case the leave of the county court judge was not asked for at the time of the trial, but notice of appeal was filed without that leave. Subsequently, application for leave was made to the judge, and, without purporting to decide the point, he said that it was a case in which he would give leave if he had jurisdiction to do so. Counsel for the tenant submits that this appeal is not properly constituted in that no leave was obtained within the twenty-one days allowed for the entering of an appeal under R.S.C., Ord. 59, r. 34. Counsel for the landlord submits that s. 105 does not make the obtaining of leave a condition precedent to the filing of a notice of appeal. I have come to the conclusion that the leave of the judge must be obtained before the notice of appeal is filed. That, however, does not end the matter, because on that view of the section a party who has omitted to get leave to appeal can apply for an extension of time in which to file a further notice if he has filed one already, and, subject to costs, the matter can thus be put in order. Normally, applications to extend the time have to be by notice of motion supported by affidavit, but this is a case which clearly involves a point of substance in which the learned judge would have given leave, as he ultimately did, and we think it right, subject to costs, to allow counsel for the landlord to apply for an extension of time. We also think that an extension should be granted so that the case can proceed.

[THEIR LORDSHIPS then heard argument on the appeal.]

SOMERVELL, L.J.: This is an appeal from a decision of His Honour JUDGE LANGMAN on an application by the tenant for a determination of the standard rent of certain premises under s. 12 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The premises in question consist of a dwelling-house and shop at 17 Bridge Street, Worcester. In 1941 those combined premises were let to the tenant at a weekly rent of £1. Later, the tenant sub-let the shop to a Mr. Wilson at a rent of £2 a week. In June, 1948, a notice to quit was served on Mr. Wilson by the landlord, but he remained in possession until September, 1948. On Aug. 23, 1948, the tenant's tenancy was determined by a notice to quit which was served on Aug. 13, 1948. It is

familiar law that if, during the period of the sub-tenancy of Mr. Wilson, the landlord had served a notice to quit in respect of the whole premises, he could have recovered possession of that part which was sub-let as business premises. The service of the notice to quit on the tenant started negotiations which, on Oct. 7, 1948, resulted in two separate leases being entered into, one in respect of the shop and the other in respect of the dwelling-house. The leases operated as from Sept. 29, 1948, and each was for a term of five years. The rent for the shop was £2 and that for the dwelling-house £1. The tenant now comes before us and says that, notwithstanding those documents, he is entitled to have both the house and the shop for five years at the old rent of £1. The learned county court judge came to the conclusion, reluctantly, that the tenant was right, and from that decision the landlord appeals.

In *Phillips v. Hallahan* (1) the premises, as here, consisted of a shop and a dwelling-house let under one tenancy. When they became vacant in 1923 the landlord let them both to one tenant, but under two separate lettings. It was held by a Divisional Court that the shop portion of the premises, while so let separately, was not within the protection of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. If both parts of the premises had been let under one lease, the tenant would have been protected in respect of the shop unless he had sub-let, when different considerations would have applied. BANKES, L.J., said ([1925] 1 K.B. 758):

"The landlord claimed to recover possession of a shop which she had let to the tenant. To that claim the tenant answered that the shop was within the protection of the Act, because it and the rooms above it constituted a house which at one time was within the Act, and as there had been no structural alteration of the premises it was said that they were still within the protection of the Act."

The court rejected that view. BANKES, L.J., held that there was nothing in the Act to prevent a landlord who had obtained possession of premises, part of which consisted of business premises, letting off that portion as business premises, although, if he let the premises as a whole, they would be within the protection of the Act. With that decision GREER, J., agreed.

The position is somewhat different here in that when the negotiations which resulted in these two documents were begun the tenant was in occupation of the living part of the premises and when they ended he was in possession of the whole of the premises. *Prima facie*, I cannot see how that makes any difference to the principle, but before considering the question in the abstract I will deal with the matters on which counsel for the tenant relies.

Section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, provides:

"Subject to the provisions of para. (a) of the last preceding sub-section, the application of the principal Acts, by virtue of this section, to any dwelling-house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade or professional purposes; and for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as amended by virtue of this section, any land or premises let together with a dwelling-house shall, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent, be treated as part of the dwelling-house."

Counsel submits that, although we have here two separate documents concerning two separate estates in law, either of which could be assigned subject to the provisions of the leases and the Landlord and Tenant Act, 1927, s. 19, we should treat the shop as let together with the dwelling-house. At first sight the wording of the section appears to refer to a letting under a single document, but that is not so, and two cases, at least, show that it must, in certain circumstances, receive a wider construction. In *Mann v. Merrill* (2), there was

a letting of a house for a term of seven years together with agricultural land of just under two acres. About a year later the landlord let to the tenant an adjoining piece of agricultural land for a term expiring on the same date. The court held that the two leases must be taken together, and that, as from the date of the second lease, there was land let together with the dwelling-house which exceeded two acres in extent. That case, however, does not support the argument of counsel for the tenant in the present case, because there was no suggestion that the parties intended, as they did in the present case under legal advice, to divide the subject-matter which had been originally held under one tenancy into subject-matters held under two separate tenancies. In *Lewis v. Purvis* (3) there were successive leases of a shop and an adjoining house, and the circumstances were such that the court held that there was no evidence on which the county court judge could come to the conclusion that there was a single letting. In *Wimbush v. Cibulia*, *Wimbush v. Levinski* (4), there were two lettings made at different times on weekly tenancies of rooms in the same house. The lettings consisted of (i) two first floor rooms and (ii) the ground floor and basement. The first floor rooms were used in one case for sleeping accommodation and in the other case as a kitchen and a living room. The rooms on the ground floor and in the basement were used, in the one case, as living room, kitchen, workroom, and larder, and, in the other case, for sleeping and as a store, workshop, and scullery. In each case the landlord gave notice to terminate the tenancy of the ground floor and basement, leaving the upstairs rooms unaffected by any notice to quit. This court held that it was impossible to say that the ground floor and basement in each case constituted a separate dwelling distinct from the first floor rooms where one of the essentials of living—in one case sleeping and in the other cooking—was carried on. It was decided that each of the cases must be referred back to the learned county court judge to decide as a fact whether they were the subject of distinct and separate lettings or whether the real agreement to be imputed to the parties involved a consolidation of the two lettings—in other words whether they came within *Mann v. Merrill* (2) or *Lewis v. Purvis* (3).

In the present case the history is of importance, though I am not necessarily saying that I should come to a different conclusion if one or other of the elements to which I am going to refer was absent. The fact that the tenant for a long time sub-let the shop at a rent of £2 per week, which is the sum fixed for it for the five years' tenancy, is important. It was probably in the landlord's mind and also in the tenant's. It is clear that the tenant for a period has traded in the shop himself under the new lease. He has not been very successful and he may have had in his mind that it would be wise to have a separate lease which he could, if necessary, assign. Negotiations started on Aug. 18, when the tenant was expressing his willingness to pay £3, for the whole premises. At some stage, acting under legal advice, the parties adopted the system of having two tenancies. I have fully in mind the principle that one cannot contract out of the Rent Restrictions Acts, but I agree completely with what was decided in *Phillips v. Hallahan* (1), viz., that there is nothing in the Rent Restrictions Acts which prevents a shop and adjoining living premises being let separately although they have at one time been let together. I cannot see why that should not be done as between a landlord and a tenant under a notice to quit, or, if they like to agree, without a notice to quit. The fact that up to very near the time when the new lease starts there was a sub-tenant in the shop may have its relevance in coming to that conclusion. The learned county court judge said:

"The premises were not severed as regards lettings when the leases were made. Different tenants were not in the occupation of the two parts and the plaintiff was still tenant of the whole premises at a weekly rent of £1."

He came to the conclusion that the plaintiff succeeded, and, after referring to *Phillips v. Hallahan* (1), he said:

"If the landlord had been in possession of the shop and dwelling-house in this case when the leases were made there would have been freedom of contract."

A With respect, I do not follow that. There is no suggestion in the present case that there was not freedom of contract, or that the tenant was intimidated or threatened or cajoled in doing what he did. The two parties were both being advised by solicitors. In respect of the shop, the tenant got considerable advantage. Before, when there was a single weekly letting, if he sub-let the shop it was outside the Rent Acts and the landlord might get possession of it, but he now has a five years' lease of the shop which he can assign. I cannot see anything in the facts or in any authority which compels one to say that because the subject-matter concerns a shop and adjoining premises one must, therefore, treat the two as let together for the purpose of s. 3 (3) of the Act of 1939 when the document shows that the parties plainly expressed the intention that they should be let separately.

B For these reasons, though it may be in many respects a question of fact, I do not think the county court judge has addressed his mind to the right issue. It seems to me that there is only one possible conclusion, namely, that these premises were not let together, but were let separately, and the tenant is not entitled to have the rent under the two separate leases reduced to the amount of the standard rent when they were let together. It is true that he would be entitled either in these or subsequent proceedings to ask the county court judge to apportion the original £1 in respect of the living premises. I think the appeal must be allowed.

D SINGLETON, L.J.: I am of the same opinion. It is, I think, of great importance that the facts should be ascertained and that the dates of the various happenings should be kept clearly in mind.

In 1941 17 Bridge Street, Worcester, which was a shop and dwelling-house combined, was let to the tenant at a weekly rent of £1. The tenant sub-let the shop at a rent of £2 a week and retained the dwelling-house for his own use. E The shop was let to a man named Wilson who, in June, 1948, was given notice to quit, and in September, 1948, left the premises. Meantime, notice to quit had been given to the tenant by the landlord on Aug. 13, 1948, expiring on Aug. 23, 1948. If proceedings had been taken by the landlord for possession of the shop in the latter part of August or early in September, 1948, the landlord might well have obtained an order for possession of the shop, for it had been sub-let by the tenant, and Mr. Wilson remained in the shop until after the notice to quit given to the tenant had expired. Discussions between landlord and tenant followed, and a letter written by the tenant's solicitors to the landlord's solicitors, dated Aug. 18, 1948, makes it clear that from that time onwards the solicitors for the parties were in negotiation. At that time but for these negotiations the landlord might have obtained an order for possession of the shop which was in the occupation, not of the tenant, but of Mr. Wilson. G The negotiations resulted in an agreement from which there flowed the leases dated Oct. 7, 1948. These are two entirely separate leases, one of "all that messuage dwelling-house and premises over and at the rear of a lock-up shop known as No. 17 Bridge Street, Worcester" and the other of "all that lock-up shop situated and known as No. 17 Bridge Street, Worcester." Each of them H is to run from Sept. 29, 1948, for a term of five years. The result is that the tenant has a lease for five years of a shop at a rent of £2 a week and a lease of a house at the rent of £1 a week. He is then able to sub-let one without the other. He is in an advantageous position as the result of the negotiations which have taken place between his solicitors and the landlord's solicitors. I appreciate there can be no contracting out of the Rent Restrictions Acts, but at the time when these negotiations were entered into the landlord was in a position in which he might have obtained an order for possession of the shop. Now

the tenant claims that one ought to regard both premises as falling under s. 3 (3) of the Act of 1939, the shop being regarded as premises "let together with a dwelling-house." I do not see why one should regard the shop as let together with the dwelling-house if the parties, under advice, decide that there should be separate lettings of the two premises according to their user, the one as a house and the other as a shop. It was agreed that they should be treated separately. During the negotiations they were occupied separately and by different people. I do not know why parties cannot by their agreement do that which these parties did. A

Counsel for the tenant submits that that which the parties did provides evidence on which the learned county court judge could find that the shop was premises "let together with a dwelling-house." I do not think that he came to a finding on that basis. For myself, though I recognise the Rent Acts create in some cases a somewhat artificial position, I think it is a matter for regret that if, fairly soon after the parties have entered into arrangements of this kind, an effort should be made to set aside that agreement. I agree that the appeal should be allowed. B

DENNING, L.J.: I agree. This is another case, of which we have had many lately, in which a tenant seeks to push to an extreme the advantages conferred on him by the Rent Acts. In this case there was a shop with dwelling-rooms above. The tenant at his own request was granted a lease for five years of the shop at £2 a week and another lease for five years of the dwelling-rooms at £1 a week. Now he says that the rent which he should pay for the whole is only £1 a week and that he can keep both leases for their full term of five years at the total rent of £1, apportioned between the two, say 10s. a week each. Let me test the position in this way. Suppose he sub-lets the shop to a respectable and responsible person, as he is entitled to do, then the shop is clearly outside the Rent Acts. The tenant is under no restriction as to the rent he can charge to the sub-tenant. He can charge £2 a week or more to the sub-tenant for the remainder of the full contractual term of five years. Is he allowed to do this and yet only pay 10s. a week to the landlord? C

I do not believe the Acts compel us to that result. I think it is quite lawful for a landlord and a tenant to agree on separate leases for a shop and a dwelling-house, so long as it is not a device to avoid the operation of the Act, but is a genuine separation into two tenancies for some good reason, as, for instance, when it is done to enable the tenant to dispose of the shop separately from the dwelling-house if he should thereafter wish to do so. The judges in *Phillips v. Hallahan* (1) limited their observations to cases where the landlord had obtained possession, but that was only because that was the fact in that case. The principle extends also to a case where the tenant is in possession of the whole, so long as there is a genuine separation into two tenancies for some good reason. In this case we do not know the precise reason, but there is a letter from the tenant's solicitors to the landlord's solicitors saying: D

"For reasons which he has explained to your client, he would like to have a lease of the premises and is in those circumstances prepared to pay the considerable increase in the rent now suggested." E

The first suggestion came from the tenant for his own good reasons. It seems to me that the separation into two leases was a genuine separation and is perfectly lawful. I agree that the appeal should be allowed. F

Appeal allowed with costs. G

Solicitors: *Peacock & Goddard*, agents for *Johnstone, Williams & Walker*, Nottingham (for the landlord); *James Smith*, Worcester (for the tenant). H

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

SMITH v. LONDON TRANSPORT EXECUTIVE.

[HOUSE OF LORDS (Lord Simonds, Lord Normand, Lord Oaksey, Lord Morton of Henryton and Lord MacDermott), November 22, 23, 27, 1950, March 1, 1951.]

Street Traffic—Omnibus service—Powers of British Transport Commission—Delegation of powers to transport executive—Extent of powers and validity of delegation—Transport Act, 1947 (c. 49), s. 2 (1) (a), s. 14 (2).

A On Jan. 1, 1948, under s. 12 (1) of the Transport Act, 1947, and sched. III thereto, the undertaking of the London Passenger Transport Board vested in the British Transport Commission, which, under s. 14 (2), had thenceforward all the rights and was subject to all the liabilities of the board. Before that date the appellant held a road service licence under B s. 72 of the Road Traffic Act, 1930, and operated a passenger omnibus service between H. and W., which, save for some four hundred yards, was within the London Passenger Transport Area. On Feb. 18, 1948, the respondents, an executive constituted under the Act of 1947, began to operate an omnibus service in competition with the appellant's service, C claiming, under s. 65 (1) of the Act of 1947, as a body acting as agent of the commission, to be entitled to do so on an approved route without a road service licence granted to them under s. 72 (1) of the Road Transport Act, 1930.

D In exercise of the powers conferred by s. 5 of the Act of 1947 the commission made a scheme of delegation of functions which provided " (1) . . . 'the executive' means the London Transport Executive . . . (2) This scheme applies to . . . (a) activities which the commission are empowered to carry on by virtue of the transfer to them under Part II of the Act of the undertaking of the London Passenger Transport Board; (b) activities which the commission are empowered to carry on by virtue only of the powers conferred on them by s. 2 (1) of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (a) of this paragraph or are ancillary to such activities . . . (3) subject to the provisions of this scheme, the commission hereby delegate to the executive the functions of the commission in relation to their activities set out in sub-para. (a) and sub-para. (b) of para. 2 of this scheme to the intent that . . . all the rights powers and liabilities of the commission in connection with those activities shall be exercisable and dischargeable by the executive . . . "

F HELD: (i) (LORD OAKSEY and LORD MACDERMOTT *dissentiente*) the commission had power to operate the service in question under the general authority of s. 2 (1) (a) of the Act of 1947.

G (ii) (LORD OAKSEY *dissentiente*) the commission had power, as successors of the London Passenger Transport Board under s. 14 (2) of the Act of 1947, to operate the service in question subject only to the route being approved by the proper licensing authority under s. 65 (1), which approval had, in fact, been duly obtained. Since the service was provided by the commission "otherwise" than under a scheme, the commission was relieved from the necessity of obtaining a road service licence under s. 72 of the Road Traffic Act, 1930.

H (iii) the powers of the commission were properly delegated to the respondents. The terms of para. 2 (a) of the scheme of delegation clearly included the right to carry on the service in question, except, possibly, in respect of the picking up and setting down of passengers over the four hundred yards of the route outside the London Passenger Transport area, but para. 2 (b) of the scheme was apt to fill that gap, since this activity was carried on "in connection with" the activities inherited from the London Passenger Transport Board or was ancillary to them.

Decision of the COURT OF APPEAL ([1949] 2 All E.R. 295), *affirmed*.

[FOR THE TRANSPORT ACT, 1947, s. 2, s. 12, s. 14 and s. 65, see HALSBURY'S STATUTES, Second Edn., Vol. 19, pp. 1019, 1032, 1033, and Vol. 24, p. 785.]

Case referred to:

- (1) *Rhondda's (Viscountess) Claim*, [1922] 2 A.C. 339; 92 L.J.P.C. 81; 128 L.T. 155; 42 Digest 613, 137.

APPEAL by the plaintiff from an order of the Court of Appeal (SIR RAYMOND EVERSHED, M.R., SOMERVELL and JENKINS, L.JJ.), dated July 6, 1949, and reported [1949] 2 All E.R. 295, affirming a decision of VAISEY, J., dated July 1, 1948, and reported [1948] 2 All E.R. 306.

The appellant, who operated a motor omnibus service between Hitchin and Weston in Hertfordshire, brought an action to restrain the respondents, the London Transport Executive, from operating a similar service in competition with his service and for a declaration that such operation by the respondents was *ultra vires*. VAISEY, J., held that the provision of the service in question was within the powers of the British Transport Commission and that these powers had been properly delegated to the respondents. The Court of Appeal affirmed this decision.

Sir David Maxwell Fyfe, K.C., and *G. R. F. Morris* for the appellant.
Paull, K.C., and *J. P. Ashworth* for the respondents.

The House took time for consideration.

Mar. 1. The following opinions were read.

LORD SIMONDS: My Lords, for some time before the commencement of the action out of which the present appeal arises, the appellant had operated a service of stage carriages between Hitchin and Weston in the county of Hertford. This he did under the authority of a road service licence issued to him by the traffic commissioners for the metropolitan area under s. 72 of the Road Traffic Act, 1930. On or about Feb. 18, 1948, the respondents, whose origin and functions I will presently explain, started to operate a new service of stage carriages over the same route. The appellant, alleging that their action was unlawful and wrongful and that he had suffered damage thereby, on Mar. 23, 1948, issued a writ against them claiming an injunction and damages. His action was dismissed by order of VAISEY, J., and his appeal from that order was dismissed by the Court of Appeal. So, also, in my opinion, should his appeal to this House be dismissed.

Two questions are here involved: (i) whether the British Transport Commission, a statutory body set up by the Transport Act, 1947, itself had power under that Act to run the service in question subject only to the route being approved by the proper licensing authority, and (ii) whether, if it had that power, it effectively delegated it to the respondents. I will hereafter call the British Transport Commission "the commission" and the Transport Act, 1947 "the Act of 1947."

It is necessary to look back to the position in this area before the enactment of the Act of 1947. Under the London Passenger Transport Act, 1933 (which I will call "the Act of 1933") a board, called the London Passenger Transport Board, was set up with very wide powers of which I think it necessary only to mention (i) that *inter alia* by s. 3 (3) (a) it was empowered, subject to the provisions of the Act, to maintain, manage, carry on, extend and improve its undertaking, and (ii) that by s. 15 it was empowered (subject to the provisions of the said section) to provide road services of stage carriages on any of the following roads, but not otherwise, that is to say—(a) on any road within the area comprised within the continuous purple line shown on the deposited map (in the Act referred to as the "London Passenger Transport Area"), and (b) on any road outside that area, being a road marked by broken blue lines or by broken yellow lines on the said map provided that the board should not both

pick up and set down a passenger on a road marked by yellow broken lines on the said map.

The route between Hitchin and Weston lies within the London Passenger Transport Area save that for a distance of about four hundred yards it lies outside that area, but along a road marked by yellow broken lines. It is unnecessary to do more than mention that the same map marked another area surrounded by a black line. In this area, within which the route in question did not lie, the board had, by virtue of other provisions of the Act of 1933, an effective monopoly of passenger road service. It had no such monopoly in the area lying outside the black line but within the purple line. On the contrary, as I have already said, the appellant was himself running a stage service in this area and the board, if it wished to operate a similar service, was under the necessity of applying for and obtaining a road service licence from the traffic commissioners under s. 72 of the Road Traffic Act, 1930. It had, in fact, made its application on Mar. 4, 1947. The appellant had lodged his objection to the grant, and the matter had not been disposed of when, on Jan. 1, 1948, the Act of 1947 came into force. This, the respondents contend, altered the position. It was, they say, no longer necessary for the commission, or for the respondents as its delegate, to obtain a road licence, but only to obtain a route approval and this they obtained. It is necessary, then, to examine somewhat closely the provisions of the Act of 1947.

By s. 1 of the Act of 1947 the commission was set up. I need not further refer to its terms. Section 2 is an important section, for it is on its provisions that the respondents in the alternative rely for the authority to operate the service in question. The opening words of sub-s. (1) are "Subject to the provisions of this Act, the commission shall have power," words that are apt to enact that the powers thereafter given are subject to restrictions or limitations to be found elsewhere in the Act. The sub-section proceeds to enumerate the powers, which are (a) to carry goods and passengers by rail, road, and inland waterway within Great Britain; (b) to provide, within Great Britain, port facilities and facilities for traffic by inland waterway; (c) to store goods within Great Britain, whether or not those goods have been or are to be carried by the commission, but subject to the conditions therein stated; (d) to consign goods; (e) to provide hotels and other accommodation; and (f) to provide other amenities and facilities as respectively therein mentioned. The sub-section ends with a proviso that the commission shall not have power to carry passengers by road in a hackney carriage as therein described, a typical limitation on the generality of the power previously given. Sub-section (2) also opens with the words "Subject to the provisions of this Act" and proceeds to elaborate the powers given by sub-s. (1). It includes power to acquire by agreement the whole or any part of any undertaking of any other person, the activities whereof are wholly or mainly such activities as are specified in sub-s. (1). It, too, ends with limiting provisos. Sub-section (3) provides that where, whether by agreement or otherwise, the commission acquire the whole or any part of any undertaking of any other person, they may, subject to the provisions of the Act (the same words again), carry on any activities, whether mentioned in sub-s. (1) or not, which were theretofore carried on for the purposes of that undertaking or part of an undertaking or were authorised by any statutory provision to be carried on for the purposes thereof.

I pause to note, first, that this is *prima facie* an enabling sub-section, and, secondly, that it is in the widest possible terms which do not suggest that the word "acquire" is limited to any particular mode of acquisition. I pass over a number of sub-sections, observing only that in many of them there are limitations or restrictions on the exercise of the preceding powers and come to sub-s. (8), which is in these terms:

"For the avoidance of doubt, it is hereby declared that the preceding

provisions of this section relate only to the capacity of the commission as a statutory corporation, and nothing in the said provisions shall be construed as authorising the disregard by the commission of any enactment or rule of law."

It is not very clear why it was necessary to insert this provision, for without it I do not see how the sub-section could be read as authorising a disregard of the general law, but, perhaps, in the atmosphere of such an Act as this it might be thought wise *ex abundanti cautela* to make it clear that the commission was not omnipotent. In any event, reading the sub-section as a whole, I cannot regard it as supporting the view that the section is not an enabling one which by itself confers the powers enumerated in it.

Section 3 (1) states the general duty of the commission. It is

" . . . so to exercise their powers under this Act as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard to safety of operation . . . "

I pass over s. 4 which deals with the powers of the Minister in relation to the commission, and come to s. 5 which provides for the setting up of a number of public authorities known as "executives," among which are the respondents, whose duties are, as agents for the commission, to exercise such of its functions as are for the time being delegated to them under a scheme made by the commission and approved by the Minister. Sub-section (10) of this section provides that, in addition to the powers exercisable by an executive by virtue of any delegation, every executive shall, except so far as the commission may otherwise direct, have power at the request of the commission or of any other executive to do as agent for the commission or that other executive anything which the commission or that other executive has power to do. Section 6 sets up consultative committees and can be ignored. Section 7 provides that where the commission has power under the preceding provisions of the Act to acquire an undertaking or part of an undertaking by agreement, the persons theretofore carrying on that undertaking may, notwithstanding anything to the contrary in any statutory provision or other instrument relating to their functions, make and carry out agreements with the commission for the transfer to the commission of the whole or any part of that undertaking. Very wide powers are given to the Minister to make regulations to give effect to this provision.

Part II of the Act, which begins with s. 12, provides for the vesting of existing undertakings in the commission with consequential provisions as to compensation and other matters. Among the undertakings so vested is that of the London Passenger Transport Board. Section 14, which is of great importance, provides, so far as material:

" (1) The provisions of this section shall, subject to the other provisions of this Act, have effect where, under the preceding provisions of this Part of this Act, the whole of the undertaking of any body is to vest in the commission. (2) Subject to the provisions of this section, all the property of the body immediately before the date of transfer shall vest in the commission and, as from the date of transfer, the commission shall, to the exclusion of the body, have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer."

I pause here to observe that I find neither in its immediate context nor in the general scheme of transfer any reason for limiting the meaning of the word "rights" in this sub-section. It must be construed to include all rights known to the law. Other sub-sections of this section were relied on by the appellant as pointing to some limitation, but, having considered them, I have come to

the conclusion that they have no such effect and I do not think it necessary to set them out.

So far, then, the Act has provided for the exercise of wide and diverse powers by the commission, the acquisition of undertakings by agreement, and the vesting of undertakings under the Act itself. It remains only to refer to a fasciculus of sections in Part IV of the Act dealing with passenger road transport. By s. 63 (which looks back to s. 3) it is provided that the commission may at any time prepare and submit to the Minister a scheme as to the passenger road transport services serving such area as may be specified in the scheme, being a scheme devised for the purpose of promoting or facilitating the promotion of the co-ordination of the passenger transport serving the area, whether by road or by rail, and the provision of adequate suitable and efficient passenger road transport services to meet the needs of the area, and shall, as soon as may be, review the passenger road transport services operating in Great Britain with a view to determining the areas with respect to which schemes shall be prepared and submitted as aforesaid. Your Lordships were told that no schemes under this sub-section had as yet been prepared and submitted. It is clear from the terms of sub-s. (2) that the preparation of a scheme, involving consultation with numerous bodies, including other persons providing passenger transport services who were likely to be affected by the scheme, would be a long and arduous task. Section 64 prescribes the contents of a scheme, and I think it necessary only to note that it may provide for the constitution of bodies to provide services within the area and for the transfer to such bodies of undertakings within the area the activities of which consisted wholly or partly of operating such services and in that event for the compensation of the owners of the transferred undertakings. The relevance of this provision is that it appears that, if a scheme had been made affecting the area within which the appellant operates, he might have become entitled to some compensation. Section 65 (the last section to which I shall refer) is of crucial importance. It provides by sub-s. (1) that s. 72 to s. 76 of the Road Traffic Act, 1930 (which relate to road service licences) shall not apply to any passenger road transport service provided, whether under a scheme under the preceding provisions of Part IV of the Act or otherwise, by the commission, or by any person acting as agent for the commission, but that neither the commission nor any such person as aforesaid shall use any public service vehicle for the conveyance of passengers for hire or reward at separate fares except (a) on a route approved, as respects so much thereof as falls within any traffic area, by the licensing authority for public service vehicles for that area, and (b) in accordance with restrictions imposed by that authority as therein mentioned. It is under this section that the respondents claim that they are authorised to operate the service now in question without obtaining a road service licence. They have satisfied the condition that the route must be approved by the licensing authority. It has been assumed that route approval does not involve the consideration of such questions as sufficiency of existing services and other matters which would be relevant if the grant of a road service licence were in issue. I am content to assume that this is so without deciding it. I am not influenced by this assumption in my consideration of the matter under appeal. I have only to add that the Act of 1947 repeals the Act of 1933 except certain sections of which s. 3 (3) alone is relevant.

The first question, then, which I am now in a position to consider, is whether the commission could itself operate the service in dispute. The respondents say it could do so both under the general authority of s. 2 (1) and as successors of the board under s. 12 and s. 14 and in either case under s. 65 without obtaining a road service licence. The appellant says that on the true construction of the Act none of these sections gives the necessary authority. To deal first with the scope and effect of s. 2 (1), the appellant contends that this section

does not, of itself, confer powers on the commission. His contention rests, I think, on a meaning being given to the opening words "Subject to the provisions of this Act," which they cannot bear. He would read them as equivalent to "in accordance with the provisions of this Act" or "in such manner as is provided in this Act" and thus limit the exercise of the powers enumerated in the sub-section to the specific methods for which provision is made in other sections of the Act. These he classified as powers acquired on the acquisition of an undertaking by agreement (see s. 2 (2) (f) and s. 7), rights transferred on the vesting of undertakings under s. 12, and powers embodied in a scheme made pursuant to s. 63. He fortifies this argument by reference to the general scheme of the Act, saying with some force that it is not consistent with a power in the commission to operate a service wherever it likes, and, in the course of doing so, to drive other services off the road without compensation. But, though I am attracted by this argument, I find the words of s. 2 (1) too clear to admit of any doubt. The words "Subject to the provisions of this Act", which are repeated in sub-s. (2) and in sub-s. (3), are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation on that authority will be found. As I look through the several powers enumerated, not only in sub-s. (1), but also in sub-s. (2) and sub-s. (3), I find again and again examples of powers given which are necessary for the proper exercise by the commission of its functions, but are not specifically or by implication given by later provisions of the Act. I must, therefore, conclude that the commission had power to operate this service under s. 2 (1).

Had it, then, power to do so without obtaining a road service licence under the Act of 1930? Clearly, I think, it had. For I see no reason for narrowing down the plain meaning of the relevant words of s. 65,

"provided, whether under a scheme under the preceding provisions of this Part of this Act or otherwise, by the commission . . ."

The service in dispute is provided by the commission "otherwise" than under a scheme. It is, therefore, relieved from the necessity of obtaining a road service licence.

Assuming, however, that the appellant is right, and the respondents wrong, as to the scope of s. 2 (1), the question would remain: What are the powers of the commission as successors of the board? The undertaking of the board with all its rights (a word whose meaning in s. 14 I have already defined) was vested in the commission. Immediately before the transfer the board had certain rights to operate road services. So far as material they were defined in s. 15 of the Act of 1933 which I have already set out. This section was repealed by the Act of 1947, but, by virtue of s. 14 (2) of the latter Act, the same rights were revived in the commission. The rights which in the board were subject to the provisions of s. 70 to s. 72 of the Road Traffic Act, 1930, were, however, by virtue of s. 65 of the Act of 1947 freed from the fetters of those provisions as soon as they were vested in the commission. The position, therefore, clearly emerged that, whereas the board had to obtain a licence under the Act of 1930, and, subject to obtaining it, had the statutory right to operate the service, its successor, the commission, had the same statutory right, but had no need to obtain a licence, though it had to obtain a route approval. It is true that in the result there is some duplication, inasmuch as the commission has a twofold authority to operate the service in question. This is not surprising in legislation on so intricate and complex a subject-matter. In any event, it is not a result which should lead to a rejection of the plain meaning of any of the provisions of the Act. I have some doubt whether, so far as the service extends for four hundred yards along the road marked with broken yellow lines, the commission can derive its authority to pick up and set down passengers from any other source than s. 2 (1), but for reasons that will appear I do not think it necessary to determine this.

I turn now to the second question. If, as I hold, the commission was empowered to run the service, has it delegated that power to the respondents? If it has not done so already, it can make good the defect by a stroke of the pen, but the point must now be decided, for it has a bearing on costs and possibly on damages. The issue turns on the meaning of a few words of the scheme of delegation which was approved by the Minister of Transport under s. 5 of the Act of 1947.

A Paragraph 2 of the scheme is in these terms:

"This scheme applies to the following activities of the commission:

(a) activities which the commission are empowered to carry on by virtue of the transfer to them under Part II of the Act of the undertaking of the London Passenger Transport Board; (b) activities which the commission are empowered to carry on by virtue only of the powers conferred on them by s. 2 (1) of the Act so far as those activities are carried on in connection with the activities referred to in sub-para. (a) of this paragraph or are ancillary to such activities; . . ."

Paragraph 3 of the scheme is as follows:

C "Subject to the provisions of this scheme, the commission hereby delegate to the executive the functions of the commission in relation to the activities set out in sub-para. (a) and sub-para. (b) of para. 2 of this scheme to the intent that, subject as aforesaid, all the rights powers and liabilities of the commission in connection with those activities shall be exercisable and dischargeable by the executive . . ."

D There is nothing else in the scheme to which I need refer. My Lords, I do not think that this is an occasion for too narrow an interpretation of an instrument. We have, on the one hand, the commission, a statutory body with, as I have decided and will assume, ample power to run the services in question or to delegate that power, and, on the other, the executive, its delegate, which can fairly be assumed not to be acting without the knowledge and authority of

E its principal. The scheme of delegation is couched in language of wide generality. The terms of sub-para. (a) clearly include the right to carry on the service in question except possibly in respect of the picking up and setting down of passengers over the four hundred yards to which I have referred, and sub-para. (b) is, in my judgment, apt to fill that gap. It is, I think, manifest that the commission, faced with the physical situation and assumedly aware that

F as successors of the board they were not authorised to pick up and set down over the four hundred yards, would assert the right to do so under s. 2 (1) in connection with the route which they were otherwise authorised to serve, and, having done so, could properly say that this activity was carried on "in connection with" the activities inherited from the board or was ancillary to them. I am, therefore, of opinion that on this question also the appeal fails. I move

G accordingly, that the appeal be dismissed with costs.

LORD NORMAND: My Lords, I concur in the opinion which has just been delivered by my noble and learned friend on the Woolsack.

LORD OAKSEY: My Lords, the question of general importance on the present appeal is whether the British Transport Commission (hereinafter called
H "the commission") have power under the Transport Act, 1947, to carry passengers over any road in Great Britain on obtaining from the licensing authority for public service vehicles for the area their approval of the route as a route, but without obtaining a road service licence under s. 72 to s. 76 of the Road Traffic Act, 1930, that is to say, without satisfying the licensing authority that the service is necessary or desirable in the public interest, and without regard to the extent to which the needs of the proposed routes are already adequately served or the other considerations specified in s. 72 of that Act. This is a question

of the utmost importance both to the public and to those who are already operating road passenger services with the license of the licensing authority, for if there is nothing unsuitable in the route or the class of vehicle proposed to be used, the commission with its vast resources may use vehicles in competition with every private passenger road transport service in the country notwithstanding that the licensing authority may already have refused licences to other would-be competitors on that route. The question is whether this is the result of the true interpretation of the Transport Act, 1947. A

The respondents' argument and the Court of Appeal's judgment are based principally on the construction which they put on s. 2 (1) and s. 65 of the Transport Act, 1947, and the question appears to me to depend primarily on the true construction of s. 2. If that section not only gives the commission "power" in the sense of "capacity" to carry passengers by road anywhere within Great Britain, but also gives them the right to exercise that power, it is argued that this is a general right in addition to the specific rights to carry out schemes authorised under s. 63 and s. 64 and to carry on undertakings which are vested in or purchased either compulsorily or by agreement by the commission in accordance with the express terms of the Act (see s. 12 to s. 14, s. 16, s. 39, s. 47, s. 55, s. 63, s. 64). It is clear that in these specific ways, *i.e.*, by vested undertakings, acquired undertakings and schemes, the commission can carry out the general duty imposed on it by s. 3, but it is equally clear that in so far as by so doing it acquires or interferes with the rights of other operators of road services it must pay compensation: see, especially, s. 64 (4). B

The argument of the respondents, however, is that, notwithstanding these express, but qualified, rights which enable the commission to provide road services anywhere in Great Britain, the commission can disregard them all and compete with any undertaking or individual already operating a road service by virtue of the powers conferred by s. 2 without paying any compensation. Such competition might be entirely opposed to the public interest at any rate until the commission had driven its competitors from the field. In my opinion, this is not the true construction of the Act. The provisions of s. 2 (1) are expressly interpreted by sub-s. (8) by the words: C

"For the avoidance of doubt, it is hereby declared that the preceding provisions of this section relate only to the capacity of the commission as a statutory corporation . . ."

My Lords, what other meaning can be given to these words but that power or capacity is conferred by this section, but not the right to exercise the power. In my opinion, sub-s. (8) means that the commission, being a statutory corporation and not an individual, has the capacity as an individual might have, but not the right to exercise the powers so conferred. No other explanation of sub-s. (8) has been suggested, and the respondents' argument, in my opinion, gives no meaning to the declaration that the provisions of s. 2 relate only to capacity. It is obvious that it is one thing to be capable of doing something; it is another to have the right to do it. D

Then it is said that s. 65, which expressly excludes the road licensing provisions of the Road Traffic Act, 1930, negatives this interpretation by the provision in s. 65 of the Transport Act, 1947, that s. 72 to s. 76 of the Act of 1930 shall not apply to any passenger road transport service provided by the commission whether under a scheme under the Transport Act or otherwise. My Lords, the words "or otherwise" are perfectly apt to refer to the other ways in which the commission may provide passenger road transport services under the specific terms of the Act, *viz.*, by vested or acquired undertakings, and cannot, in my opinion, be construed to alter the construction of s. 2 of the Act. It is intelligible that where the commission was operating a scheme approved by the Minister, or an undertaking vested in or purchased by the commission, the licensing provisions of the Act of 1930 might be modified, but it seems E

to me impossible that it can have been intended to enable the commission to avoid the necessity of making schemes or acquiring existing undertakings by exercising the capacities or powers assumed to have been conferred by s. 2.

A It is also contended that, apart from s. 2, s. 14 of the Act confers the right as successor to the London Passenger Transport Board to run over the Hitchin—Weston route, including the four hundred yards in question, freed from the restriction to which the said board was subject, namely, not both to pick up and set down passengers thereon. In my opinion, s. 14 has no such effect. By sub-s. (2) it expressly provides that the commission

“shall . . . have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer.”

B There is no question that, immediately before the date of transfer, the London Passenger Transport Board had no right to pick up and set down on these four hundred yards, and it appears to me, therefore, that this section does not confer that right.

C Then it is contended by the respondents that they are entitled by virtue of s. 3 (3) of the London Passenger Transport Act, 1933, which empowered the London Passenger Transport Board to extend their undertakings, when coupled with the repeal of s. 15 of that Act, to operate over these four hundred yards without any restriction such as was imposed by the Act of 1933. In my opinion, the words of s. 3 (3) ought to be read in the same sense as they bore in the Act of 1933 when it was passed and do not empower the commission

D to extend the undertaking of the London Passenger Transport Board outside the limits specified or to alter the condition of operation. If the construction contended for by the respondents is correct, the commission can extend the undertaking of the London Passenger Transport Board all over England and disregard all the other provisions of the Act of 1947 by virtue of the vesting of the undertaking of the London Passenger Transport Board in the commission.

E I agree with what the noble Lord on the Woolsack has said on the question of delegation, but for the reasons which I have stated I think the appeal ought to be allowed so far as the four hundred yards are concerned, and a declaration made that the respondents have no power both to pick up and set down passengers over the four hundred yards referred to.

F **LORD MORTON OF HENRYTON:** My Lords, I have had the advantage of reading in print the speech which has just been delivered by the noble Lord on the Woolsack. I agree with it and I do not desire to add any observations of my own.

G **LORD MACDERMOTT:** My Lords, since Feb. 18, 1948, the respondents, purporting to act as agents for the British Transport Commission, have operated a passenger omnibus service between Hitchin and Weston in the county of Hertford. The appellant, who has lawfully operated a passenger omnibus service on the same route for some sixteen years, challenges the right of the respondents to engage in this particular activity, and, alleging loss and damage due to the respondents' competition, has brought the present proceedings for (*inter alia*) a declaration that the respondents have no statutory power or authority to operate the service carried on by them as aforesaid. In its substance the answer of the respondents is that the commission have power to run the service in question under the provisions of the Transport Act, 1947, and that they, the respondents, were duly authorised to exercise the functions of the commission respecting this service under a scheme of delegation made and approved in December, 1947, pursuant to the provisions of s. 5 of the said Act. The appellant's allegation of damage does not appear to have been actively contested and the respondents raise no point as to his right to sue.

The first question for determination, therefore, is whether the Act of 1947 empowered the commission to operate the service in dispute. The respondents contended for this power on two main grounds. First, they said that the Act of 1947 conferred on the commission a broad power to run passenger road services on any highway in Great Britain, subject only to obtaining the approval of the appropriate licensing authority under s. 65, and that such approval (hereinafter called "route approval") had been duly granted in respect of the service now in question before it was started. And, secondly, they relied on the provisions of the Act of 1947 under which the undertaking of the London Passenger Transport Board (hereinafter called "the board") and certain rights and powers relating thereto became vested in the commission, and submitted that in operating the said service they were but exercising a right which had belonged to the board and had been transferred to the commission by reason of those provisions.

The first of these submissions raises a matter of considerable general importance. It was based on that part of s. 2 of the Act of 1947 which reads:

"(1) Subject to the provisions of this Act, the commission shall have power—(a) to carry goods and passengers by rail, road and inland waterway, within Great Britain . . ."

Sub-section (8) of the same section was also relied on. It reads:

"For the avoidance of doubt, it is hereby declared that the preceding provisions of this section relate only to the capacity of the commission as a statutory corporation, and nothing in the said provisions shall be construed as authorising the disregard by the commission of any enactment or rule of law."

My Lords, the subsequent sections of the Act of 1947 contain certain provisions under which the commission obtain or may obtain limited or localised powers of operating road passenger services. They obtain such powers under Part II of the Act on the vesting of the undertaking of the board, as one of the bodies listed in sched. III. They may also acquire a passenger road transport undertaking by agreement under s. 2 (2) (f), and, having done so, may be empowered by the Minister to carry on the undertaking. That is under s. 7 (2) which says—and this is of interest having regard to the nature of the right claimed under s. 2 (1) (a):

"Where any such agreement is made, the Minister may make regulations for enabling the undertaking or part of an undertaking to be carried on by the commission in lieu of the persons theretofore carrying it on . . ."

And again, the elaborate provisions of s. 63 and s. 64 as to the preparation and approval of area passenger road transport schemes (which may be promoted to meet the needs of any area in Great Britain) empower the Minister to specify the body or bodies to provide services for the area embraced in the scheme, and enact (s. 64 (2)) that the commission "may be the body specified, or one of the bodies specified."

With these enabling provisions in mind counsel for the appellant submitted that the initial words of s. 2 (1)—"Subject to the provisions of this Act"—should be read as referring thereto and as meaning "in accordance with the provisions of this Act." I am not inclined to accede to that argument in so far as it is based merely on the meaning to be ascribed to the opening phrase. That is an expression commonly used to avoid conflict between one part of an enactment and another, and I have difficulty in reading into it more than it says. But greater weight should, I think, be attached to the wider submission that the whole scheme and policy of the Act, as manifested by its terms, are such as to impose on s. 2 (1) (a) very much the same kind of qualification. The drafting and arrangement of the Act are not, as it seems to me, what one would

expect if, behind all the special provisions under which power to run passenger road services for particular areas is or may be conferred on the commission, there exists all the time the general and pervading power for which the respondents contend: see, for example, the enabling provisions of s. 7 to which I have already referred. Again, when one considers the duties of the commission under s. 63 regarding the preparation and submission of area schemes for passenger road transport services, there is, to my mind, difficulty in thinking that the legislature intended to confer on the commission a general power to provide such services anywhere, subject only to securing route approval under s. 65. The provisions of s. 63 (2) which direct the commission, before submitting a scheme, to consult, among others, " . . . any other person providing passenger transport services who, in the opinion of the commission, is likely to be affected by the scheme," and the provisions of s. 64 (4) for the payment of compensation to a person whose passenger undertaking is not taken over, but whose road services within a scheme area are prohibited or restricted by the scheme, appear to me strangely at variance with a power by which the commission, if they so choose, can, without any scheme or any compensation, enter into competition with a duly licensed private undertaker and use their enormous resources to drive him off the road. I do not suggest that that is the policy of the commission or that their operation of a service on the route now in question is inspired by anything other than a desire to meet the public need. But, if the respondents are right, the fact remains that the power to act in this way exists and could be exercised over a very wide field. This consideration would lose some of its force if the legislature had provided means whereby the commission's alleged right to run passenger road services at large could be effectively controlled so as to ensure that the public need in the area served by any route was met without a superfluity of services or wasteful competition with existing undertakings. Section 72 to s. 76 of the Road Traffic Act, 1930, were enacted to provide that sort of control throughout Great Britain and did so by a road service licensing system administered by traffic commissioners (now re-named for each area "the licensing authority for public service vehicles") whose duties, so far as relevant, are set out in s. 72 (3). The material part of this sub-section reads thus:

"The commissioners . . . in exercising their discretion to grant or to refuse a road service licence in respect of any routes and their discretion to attach conditions to any such licence shall have regard to the following matters:—(a) the suitability of the routes on which a service may be provided under the licence; (b) the extent, if any, to which the needs of the proposed routes or any of them already are adequately served; (c) the extent to which the proposed service is necessary or desirable in the public interest; (d) the needs of the area as a whole in relation to traffic (including the provision of adequate, suitable and efficient services, the elimination of unnecessary services and the provision of unremunerative services), and the co-ordination of all forms of passenger transport, including transport by rail; and take into consideration any representations which may be made by persons who are already providing transport facilities along or near to the routes or any part thereof or by any local authority in whose area any of the routes or any part of any of the routes is situate."

But, by s. 65 (1) of the Act of 1947, s. 72 to s. 76 of the Road Traffic Act, 1930, are not to apply to services provided by the commission or their agents, and, instead of the former road service licence, the commission or their agents must obtain from the licensing authorities concerned what I have already referred to as route approval. In giving such approval the authorities, who are not placed under any obligation to consider representations by interested persons, may impose restrictions as to the class of vehicle to be used and as to where passengers may be taken up or set down on the route approved. I am by no

means clear as to the precise considerations which the licensing authorities should have regard to in deciding to grant or withhold route approval, but the parties did not attempt to construe s. 65 (1) as providing, in a new form, the kind of control of transport facilities secured by s. 72 to s. 76 of the Act of 1930, and were at one, as I followed the arguments, in saying that route approval was directed to little, if anything, more than road conditions. I think there is much to be said for that view, and I shall assume it to be correct. But, if so, there is nothing in s. 65 (1) to meet the difficulties regarding the respondents' construction of s. 2 (1) (a) to which I have referred.

That view of s. 65 (1) raises another consideration also pointing, as it seems to me, against that construction and the extensive powers which flow from it. It must not be forgotten that the Act of 1947 does not purport to nationalise the road passenger transport industry. Section 72 of the Act of 1930 still applies throughout most of Great Britain, and the licensing authorities thereunder have still, in the exercise of their licensing powers, a duty which, to put it shortly, is to maintain a proper and ordered balance between the public need and the facilities available. They can, for example, refuse a licence on the ground that the route on which the applicant desires to run is already adequately served. But if the commission have the wide powers said to be conferred by s. 2 (1) (a) of the Act of 1947, and route approval under s. 65 (1) thereof has nothing to say to the needs of the public or the avoidance of redundant services, then, as it appears to me, the whole vital policy of s. 72 of the Act of 1930 is invaded and the power of the licensing authorities to regulate services according to requirements is seriously impaired. It would, indeed, be strange if the commission had power to run a service along a route which the licensing authority considered adequately served and in respect of which it had for that reason already refused to grant further licences. I am not satisfied that the legislature intended to render such a situation generally possible or to encroach to such an extent on the province and functions of the licensing authorities. It is true that under s. 3 (1) of the Act of 1947 there is laid on the commission the duty so to exercise their powers " . . . as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport . . ." in Great Britain, but their views as to what is adequate, etc., in relation to road passenger services may not be those of the licensing authorities, and, if the commission have the right to provide such services throughout Great Britain as now claimed, there arises a possibility of conflict in the traffic areas which one would not expect from a measure such as the Act of 1947. I do not forget that in s. 65 (1) route approval is substituted for a road service licence in respect of any service provided by or on behalf of the commission "whether under a scheme . . . or otherwise," and that the respondents laid stress on the words, "or otherwise." I would agree that these words are wide and apt to embrace all the powers to provide road services which the commission may possess. But I do not think they fortify the respondents' claims as founded on s. 2 (1) (a) for they are sufficiently explained and satisfied by powers conferred by the vesting provisions and by regulations made under s. 7. The application of s. 65 (1) to these latter powers and to those conferred by area schemes would, no doubt, oust the jurisdiction of the licensing authorities to some degree, but the effect would be of minor importance compared with that which would result were the commission armed with general running rights; and it is also to be observed that the specific powers, relating as they do to existing undertakings, vested or to be acquired, or to area schemes, must necessarily be concerned with what has already been or will in future be regarded by some competent authority as in the public interest.

My Lords, it is trite law that general words in a statute have to be read with reference to the subject-matter and design of the legislation and may on

occasion be restricted or reduced in their generality thereby. As VISCOUNT HALDANE said in *Rhondda's (Viscountess) Claim* (1) ([1922] 2 A.C. 383):

A "General words have, of course, on occasions been given by the courts a restricted interpretation. But that has been only when the scheme of the statute read as a whole, or the special character of the purpose as expressed by the legislature in the statute itself or in some other statute or law on which it bears, indicates such a restriction as intended by the legislature itself."

It seems to me that the considerations to which I have referred indicate that the legislature did not intend to confer on the commission general running powers throughout Great Britain in respect of passenger road services. And, if that is so, I think the only alternative to the respondents' interpretation is to construe s. 2 (1) (a) as endowing the commission, in relation to such services, B with but the capacity to exercise the carrying rights which are or may be granted under the subsequent provisions of the Act. It may be added in support of this construction that, though, no doubt, placing a restriction on general words, it but repeats a similar restriction which must, in my opinion, necessarily attach to the equally general language of the section as applicable to carriage by rail and inland waterway. For, despite the powers to construct what is needed C for their activities and to buy land which are conferred on the commission by para. (a) and para. (c) of sub-s. (2) of s. 2, I do not think it could be contended that sub-s. (1) (a) authorised the commission to do more in the way of constructing new railways and new canals and running services thereon than the undertakers named in sched. III to the Act could have done. In short, there D seems to be no power under s. 2 (1) (a) to operate specific services by rail or inland waterway apart from the subsequent provisions of the Act as to vesting. Sub-section (8) of s. 2 also appears to me to lend support to the construction I favour. I think it makes plain that the function of the section is to clothe the new corporate body with the *vires* needed to exercise the rights and discharge the duties that are subsequently provided for and to do all that is ancillary and incidental thereto. It is, so to speak, the commission's charter, sustaining E rather than extending the activities described or contemplated in what follows.

I am, accordingly, of opinion that the operation of the service complained of cannot be justified on the ground that it is authorised by s. 2 (1) (a). I turn, therefore, to inquire if such justification is to be found in the respondents' second submission which is grounded on the effect of the vesting in the commission of the undertaking of the board by the Act of 1947.

F It was conceded that the board were one of the bodies referred to in s. 12 of that Act, and, in consequence, that their entire undertaking was transferred to the commission on the date stated in that section as the date of transfer, namely, Jan 1, 1948. The board were established and their undertaking constituted by the London Passenger Transport Act, 1933. Section 3 thereof must G be referred to. Sub-section (1) of that section laid down the general duty of the board to provide an adequate and properly co-ordinated passenger transport system for the London Passenger Transport Area. Sub-section (2) provided for the unification of the board's undertaking. Sub-section (4) enacted that the undertaking was to be conducted so as to secure that revenue was sufficient to defray revenue charges. Sub-section (3) says that:

H "Subject to the provisions of this Act, the board may in the exercise of their duty as aforesaid—(a) maintain, manage, carry on, extend and improve their undertaking; . . ."

Section 15 is also important. It conferred power on the board to run certain public road services. Its opening words are:

"(1) Subject to the provisions of this section, it shall be lawful for the board to provide road services of stage and express carriages on any of the following roads, but not otherwise . . ."

The full details of the roads mentioned need not be set out. It will suffice to say that they included (a) the roads within the London Passenger Transport Area, and (b) certain roads outside that area and marked yellow on the signed map. Sub-section (1) of s. 15 enacted, *inter alia*, that the board should not both pick up and set down a passenger on any of these "yellow" roads; and sub-s. (3) provided that s. 72 to s. 76 of the Act of 1930 should not apply to any of the roads at (a) above which were also within the London Traffic Area, or "special area" as it was called therein.

It will now be convenient to consider the situation under these provisions in relation to the route in question as on Dec. 31, 1947, that is, the day before the date of transfer. The route lay entirely outside the special area, and entirely within the London Passenger Transport Area save for one short stretch of four hundred yards outside that area and along a "yellow" road. The board were, therefore, immediately before the date of transfer, authorised by s. 15 to run passenger road services along this route subject to the restriction, imposed by that section, about picking up and setting down on the four hundred yards of "yellow" road, and subject also, as respects the whole route, to obtaining a road service licence under the general law as enacted in s. 72 to s. 76 of the Act of 1930. The board had applied for a road service licence for the said route, but had not obtained it by the date of transfer. Thereafter the respondents applied for and obtained route approval for the same route. Section 14 of the Act of 1947 deals with the consequences of the vesting of the undertakings of the board and other bodies in the commission, and sub-s. (4) has the effect, as regards the board, of substituting for references thereto in the Act of 1933 a reference to the commission as respects anything falling to be done on or after the date of transfer. Now, that might have placed the commission firmly and without question in the shoes of the board had the material provisions of the Act of 1933 continued unimpaired. That, however, did not happen, for the Act of 1947 repealed s. 15 of the Act of 1933 *in toto*, as well as all of s. 3 save sub-s. (3) thereof, and this repeal was as from Jan. 1, 1948. Section 14 (4) of the Act of 1947 cannot, therefore, operate to clothe the commission with the rights conferred on the board by s. 15 of the Act of 1933. It was, if I have gathered the argument aright, contended by the respondents that the application of s. 3 (3) of the Act of 1933 to the commission, when read in relation to the board's undertaking as defined by that Act, was effective to transfer the running rights conferred by s. 15. I do not think this is sound. Section 3 (3) still means, presumably, what it meant before s. 15 was repealed, and I do not see any ground for saying that the rights so specifically granted by s. 15 could at any time have also been spelt out of s. 3 (3). I, therefore, do not think that s. 14 (4) sustains the respondents' case. The same difficulty does not arise on the wording of sub-s. (2) of s. 14 of the Act of 1947 which must now be examined. It reads as follows:

"Subject to the provisions of this section, all the property of the body immediately before the date of transfer shall vest in the commission and, as from the date of transfer, the commission shall, to the exclusion of the body, have all rights and be subject to all liabilities which the body had or to which the body were subject immediately before the date of transfer."

In my opinion, the word "rights" in this sub-section must be given its general meaning and cannot be limited to rights which are of a proprietary nature. If so, the question is whether the board on Dec. 31, 1947—that is *before* the date of transfer and the repeal of s. 15—had a "right" to provide an omnibus service along the route in dispute. In my opinion, they had. It is true, this route being outside the special area, that the board could not make use of that right until they had obtained a road service licence in respect of the vehicles to be employed. But I do not think this means that the board had no relevant

- right under s. 15, for the purposes of s. 14 (2) of the Act of 1947, before such a licence was granted. In the popular sense of the word rights may be qualified as well as absolute, and it seems to me that before the date of transfer it would have been entirely correct to say that the board had a right under s. 15, in respect of this route, which they would not have had had it lain outside the areas and roads therein particularised. I am, accordingly, of opinion that the effect of s. 14 (2) of the Act of 1947 was to transfer to the commission the rights of the board under s. 15 of the Act of 1933 in regard to the route under discussion, and that it was open to the commission, or their duly authorised agents, to perfect those rights and make them capable of immediate enjoyment by obtaining (as was done) the route approval required by s. 65 (1). I do not think the rights over this route have been transferred to the commission otherwise, and it would, therefore, seem, if I am correct in my views regarding s. 2 (1) (a), that on the four hundred yards along the "yellow" road the commission and the respondents (if entitled to exercise the commission's powers) are still subject to the restriction as to both picking up and setting down which was expressly imposed by s. 15 of the Act of 1933. This consideration serves to point the distinction between general powers and the special powers which I have already drawn, but, as I understand the appellant's case, it does not affect the outcome of this appeal. What the appellant has disputed throughout is the right of the respondents "to operate a road passenger transport service of stage carriages along the route between Hitchin and Weston and Weston and Hitchin" and I do not think this minor restriction really concerns him if the respondents are otherwise entitled to operate a service along that route.
- I come now to the scheme of delegation. Does it authorise the respondents to run this service on this route as the commission might have done? I think the answer must be in the affirmative if this activity falls within para. (a) of cl. 2 of the scheme. That paragraph runs thus:

- "(a) activities which the commission are empowered to carry on by virtue of the transfer to them under Part II of the Act of the undertaking of the London Passenger Transport Board; . . ."

- Part II of the Act of 1947 includes s. 14, and, if I am right in what I have already said as to the effect of sub-s. (2) thereof, I think it must follow that the activity in dispute comes within this paragraph. If, as I consider, the commission were put in a position to apply for the necessary route approval because s. 14 (2) gave them the board's rights under s. 15 of the Act of 1933, I can see no good ground for saying that the words "by virtue of the transfer" are not satisfied. For these reasons I think the appeal fails and must be dismissed.

Appeal dismissed with costs.

- Solicitors: *Mawby, Barrie & Letts* (for the appellant); *M. H. B. Gilmour* (for the respondents).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

NOTE.**JOYCE v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.**

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Denning, L.JJ.), March 2, 1951.]

Factory—Chemist's shop—Staff comprising manager, dispenser, assistants, and porter—Porter alone employed in manual labour—Factories Act, 1937 (c. 67), s. 151 (1). A

APPEAL by the plaintiff from an order of SLADE, J., made on July 13, 1950, and reported [1950] 2 All E.R. 719, in an action for damages for breach of statutory duty and for negligence.

The plaintiff, who was employed as a porter by the defendants, multiple chemists, in one of their branch shops, tripped over a piece of linoleum, fell down a flight of stairs, and sustained injuries. SLADE, J., held that the shop was not a factory within the meaning of the Factories Act, 1937, s. 151 (1), and, even if it were, that the defendants were not guilty of a breach of s. 25 (1) or s. 26 (1) of the Factories Act, 1937, and there was no negligence by the defendants at common law. B

Edgedale, K.C., and *J. G. K. Sheldon* for the plaintiff. C

Marven Everett and *Croom-Johnson* for the defendants.

The COURT OF APPEAL dismissed the appeal on the ground that SLADE, J., having heard all the evidence, had come to the conclusion that there was no breach of duty by the defendants, whether as occupiers of a factory or at common law. In the circumstances the court could not interfere in a case of that nature. D

Appeal dismissed.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Seaton Taylor & Co.* (for the defendants).

J.D.P. E

THOROGOOD v. VAN DEN BERGHS AND JURGENS, LTD. F

[COURT OF APPEAL (Cohen, Asquith and Birkett, L.JJ.), February 8, 9, 12, 13, March 2, 1951.]

Factory—"Place" used for purpose other than processes carried on in factory—Use for purpose other than processes for and incidental to main purpose of factory—Maintenance shop "within curtilage forming factory"—Repair of plant used in factory—Factories Act, 1937 (c. 67), s. 14 (1), s. 151 (6). G

Master and Servant—Liability of master—Reasonable foreseeability of injury to servant—Intermediation of act of inadvertence by employee.

The plaintiff was employed as an electrician by the defendants, the occupiers of a factory which they used for the manufacture of margarine. Within the curtilage of the factory was a separate building which was used for maintenance work in connection with the machinery and plant in the factory. While the plaintiff was testing in this maintenance shop an electric fan which was used to extract steam in a ventilator in a room in the factory where one of the processes of the manufacture of margarine was carried on and which had been removed to the maintenance shop for repair, his hand was caught in the rotating blades of the fan and he was injured. The plaintiff could not remember how his hand was caught H

in the fan, and the court took the view that it resulted from some inadvertent act on his part. He claimed damages from the defendants for the breach by them of their duty under the Factories Act, 1937, s. 14 (1), to fence securely dangerous machinery, and, alternatively, for negligence.

HELD: (i) assuming that the maintenance shop was a "place" within the curtilage of the factory within s. 151 (6) of the Act, such a place, to be deemed not to form part of the factory for the purposes of the Act, must be used for some purpose other than processes for and incidental to the main purpose of the factory; the testing of machinery used in the factory was a process for and incidental to the main purpose of the factory; and, therefore, the maintenance shop was to be deemed to be part of the factory and the plaintiff was entitled to recover under s. 14 (1).

(ii) although reasonable foreseeability of possible injury is the true criterion where negligence *vel non* is the issue, an employer who has created or permitted a dangerous condition to arise is reasonably expected to foresee and provide against the possibility of injury resulting therefrom, even though it so results through the intermediation of an act of inadvertence by an employee and even though that act of inadvertence be of a character which cannot be precisely forecast and remains in the event unexplained; on the evidence there was negligence on the part of the defendants and the plaintiff's injury resulted therefrom; and, therefore, the plaintiff was entitled to recover on the ground of negligence also.

Re Polemis & Furness, Withy & Co., Ltd. ([1921] 3 K.B. 560), stated not to have been overruled by any decision of the House of Lords.

D [AS TO A MASTER'S DUTY AT COMMON LAW, see HALSBURY, Hailsham Edn., Vol. 22, p. 187, paras. 313 and 314; and FOR CASES, see DIGEST, Vol. 34, pp. 194-199, Nos. 1580-1626, and Digest Supp., and 2nd Digest Supp.]

FOR THE FACTORIES ACT, 1937, s. 14 and s. 151 (1) (x) and (6), see HALSBURY'S STATUTES, Second Edn., Vol. 9, p. 1009, p. 1113, p. 1114 and p. 1115, respectively.]

E Cases referred to:

- (1) *Parvin v. Morton Machine Co., Ltd.*, 1950 S.C. 371.
- (2) *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee*, [1941] 3 All E.R. 252; [1942] 1 K.B. 53; 111 L.J.K.B. 113; 165 L.T. 409; 105 J.P. 399; 2nd Digest Supp.
- (3) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 2nd Digest Supp.
- (4) *Tuck & Sons v. Priester*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 42 Digest 729, 1516.
- (5) *Dyke v. Elliott, The Gauntlet*, (1872), L.R. 4 P.C. 184; 41 L.J. Adm. 65; 26 L.T. 45; 42 Digest 730, 1526.
- (6) *A.-G. v. Lockwood*, (1842), 9 M. & W. 378; 152 E.R. 160; *affd. on other grounds sub nom. Lockwood v. A.-G.*, 10 M. & W. 464; 42 Digest 767, 1934.
- (7) *Regional Properties, Ltd. v. Frankenschwerth*, [1951] 1 All E.R. 178.
- (8) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1939] 3 All E.R. 722; [1940] A.C. 152; 108 L.J.K.B. 779; 161 L.T. 374; 2nd Digest Supp.

- H** (9) *Re Polemis & Furness, Withy & Co., Ltd.*, [1921] 3 K.B. 560; 90 L.J.K.B. 1353; 126 L.T. 154; 41 Digest 419, 2620.
- (10) *Aldham v. United Dairies (London), Ltd.*, [1939] 4 All E.R. 522; [1940] 1 K.B. 507; 109 L.J.K.B. 323; 162 L.T. 71; 2nd Digest Supp.
- (11) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (12) *Hay (or Bourhill) v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.

APPEAL by the plaintiff from a judgment of DEVLIN, J., given on July 27, 1950, dismissing the plaintiff's claim for damages for personal injuries sustained, as he alleged, through the defendants' breach of statutory duty, or, alternatively, negligence at common law. The judge found that the maintenance engineering shop in which the plaintiff was injured was a "separate factory" within the meaning of s. 151 (6) of the Factories Act, 1937, and that the ventilating fan, which was under repair in the engineering shop and was unfenced at the time of the accident, was not "machinery" requiring to be fenced under s. 14 of the Factories Act, 1937. A

Beney, K.C., and *Jukes* for the plaintiff.

Gerrard, K.C., *John Thompson* and *D. Tolstoy* for the defendants.

Cur. adv. vult. B

Mar. 2. The following judgments were read.

COHEN, L.J.: This is an appeal from a judgment of DEVLIN, J., given on July 27, 1950, whereby he dismissed a claim by the plaintiff for damages suffered by him as the result of an accident which occurred in a factory owned by the defendants. The judgment was a considered judgment, and, although I have come to a different conclusion from that reached by the judge, I should like to express my indebtedness to him, both for the conciseness with which he stated the relevant facts and the clarity with which he has brought out the points at issue. I shall adopt the paragraphs in which he has marshalled the facts and the succeeding paragraph in which he has stated the nature of the plaintiff's claim. These paragraphs read as follows: C

"On Dec. 4, 1947, the plaintiff was injured in the factory of the defendants by whom he was employed. The factory is one for the production of margarine. Within the curtilage there is a separate building in which maintenance work in connection with the main part of the factory is done. It is divided into three sections—electrical, mechanical and carpentry. The plaintiff was an electrician working in the electrical section under the supervision of a Mr. Cole. At the time of the accident, Mr. Cole and the plaintiff were testing an electric fan. The fan came from a room in which one of the processes connected with the manufacture of margarine was carried on, and it was normally situated at the mouth of a ventilator, its purpose being to serve as an extractor of steam. It is a large fan, about twenty-four inches in diameter, and the motor is housed behind the blades. In its normal position it is guarded in front by louvres set in the wall, and there is no need for any guard behind, because it is situated, as I have said, in the mouth of the ventilation duct. The fan had been taken down and brought to the electrical shop where it was laid on the floor. At the time of the accident it was connected up and the motor was running and Mr. Cole and the plaintiff were squatting down beside it to see if after running the bearings got heated or there was undue vibration. This they would do by feeling the outside of the housing with their hands. The plaintiff was kneeling on his right knee to one side of the machine with his right hand beside his knee and he put his left hand on to the housing. He did not intend to use his right hand for any purpose, but just as he put his left hand on the housing he must also have moved his right hand in some way which he cannot remember or explain and which was not observed, and it was caught in the blades and some of his fingers seriously injured. I am satisfied that the plaintiff's inability to explain what happened is quite genuine. It is not a cloak to conceal some silly action on his part, of which he is conscious. I dare say that, forgetting about the blades, he moved his hand in some half-conscious gesture. On these facts, the plaintiff claims that the defendants were in breach of their duty under the Factories Act, 1937, s. 14, and also at common law. I shall consider first the position D E F G H

under the Act. If the blades of the fan were a 'dangerous part of any machinery' within the meaning of s. 14, they certainly were not guarded. It has not been argued that they were not dangerous. The defence is that the fan was not 'machinery' within the meaning of the section."

A Section 14 is included in that part of Part II of the Factories Act, 1937, which contains provisions as to the fencing of dangerous machinery. Section 12 deals with prime movers, s. 13 with transmission machinery, and s. 14 (1) with "other machinery." So far as material it runs as follows:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . ."

B By virtue of s. 149 the operation of s. 14 is restricted to machinery in a factory as defined in s. 151. Section 151 (1) provides:

C "Subject to the provisions of this section, the expression 'factory' means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely—(a) the making of any article or of part of any article; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article; or (c) the adapting for sale of any article; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control. And (whether or not they are factories by reason of the foregoing definition) the expression 'factory' also includes the following premises in which persons are employed in manual labour, that is to say . . ."

D Then follow a list of thirteen premises, or types of premises, no. (x) of which reads:

E "any premises in which mechanical power is used in connection with the making or repair of articles of metal or wood incidentally to any business carried on by way of trade or for purposes of gain."

F It is not disputed that the defendants' margarine factory is a factory within the first part of that definition, but the defendants contend, first, that the separate building in which repairs to machinery are carried out—I shall refer to it henceforth as the "engineering shop"—is to be deemed to be a separate factory by reason of s. 151 (6), which reads:

G "Where a place situate within the close, curtilage, or precincts forming a factory is solely used for some purpose other than the processes carried on in the factory, that place shall not be deemed to form part of the factory for the purposes of this Act, but shall, if otherwise it would be a factory, be deemed to be a separate factory."

H Secondly, the defendants contend that, the engineering shop being a separate factory for the repair of plant, the ventilating fan was an article of metal which was being repaired in that separate factory and was not part of the machinery of that factory. Neither before DEVLIN, J., nor before us did counsel for the defendants formally concede that, if he was wrong in the first of these contentions and the engineering shop must be regarded as part of the margarine factory, he would necessarily fail in his defence, but he did not strenuously argue to the contrary. In this he was, I think, wise, for, if the engineering shop is to be treated as part of a factory for the making of margarine, the article for the purposes of s. 151 (1) is margarine and the ventilating fan is, in my opinion, clearly machinery within that factory.

The judge, however, held that the defendants had established both their propositions. He arrived at his conclusion as follows. He rejected the argument put forward by the plaintiff that, in deciding whether a place was used solely for some purpose other than the processes carried on in the factory within the meaning of s. 151 (6), the court looked only to see what processes were carried on in the geographical area comprised in the factory. He held, and I think rightly held, that the sub-section must be construed as if it read "for some purpose other than the processes for or incidental to the main purpose of the factory"—in the present case the making of margarine. He then proceeded to consider whether the work done in the engineering shop could be said to be a process incidental to the making of margarine and answered this question in the negative. He, therefore, held that the shop was a separate factory under s. 151 (6) since it clearly fell within para. (x) of s. 151 (1). Having reached this stage, he accepted the defendants' argument that the ventilating fan was not machinery used in the separate factory, but was an article which was being repaired in that separate factory. He considered that this conclusion was supported by a decision of LORD STRACHAN in *Parvin v. Morton Machine Co., Ltd.* (1). That decision has since been confirmed in the Inner House and is now, I understand, under appeal to the House of Lords.

The point in this reasoning at which I break away from DEVLIN, J., is where he decided that the processes in the engineering shop were not incidental to the making of margarine. In dealing with this point, DEVLIN, J., was faced with the difficulty that in *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (2) a Divisional Court held that a canteen was not a place which was "used solely for some purpose other than the manufacturing process or handicraft" carried on in a laundry. That case was a decision under the Rating and Valuation (Apportionment) Act, 1928, not the Factory Acts, but s. 3 (2) of the Act of 1928, so far as material, provided as follows:

"... the expressions 'factory' and 'workshop' have respectively the same meanings as in the Factory and Workshop Acts, 1901 to 1920."

I pause here to add that s. 149 (4) of the Factory and Workshop Act, 1901, was in all material respects identical with s. 151 (6) of the Factories Act, 1937. DEVLIN, J., recognised that, if the case cited had been a decision under the Factories Act, it would have been almost conclusive in favour of the plaintiff in the present case. He said:

"It is a decision under a Rating Act, and I do not think, paradoxical though it may sound, that a definition section which is common to two Acts is necessarily to be given the same meaning in both. The way in which sections taken from an earlier Act should be construed in the later Act has been the subject of varying judicial comment."

He then proceeded to consider a number of authorities and came to the conclusion that he had a free hand. In none of the cases he cited, however, were any words so definite as "shall have the same meaning" used. Counsel for the defendants displayed a wise discretion in not seeking to support this part of the judge's reasoning. He accepted that the expression we are considering must bear the same meaning in the Factory Acts as in the Rating Acts, but he argued that *London Co-operative Society, Ltd. v. Southern Essex Assessment Committee* (2) was wrongly decided. He admitted that the words "for or incidental to" must be read into s. 151 (6), but he submitted that only those processes which contributed directly to the making of margarine were processes "for or incidental to the making of" margarine. Neither canteens nor repair shops were, he said, incidental to the making of margarine. They might be essential to the working of the factory, but they were not incidental to the making of margarine. He argued that, unless this view was correct, there would never be a case in which the concluding words of sub-s. (6),

"but shall, if otherwise it would be a factory, be deemed to be a separate factory."

could operate.

A I do not think this is true. Suppose in the present case the defendants were to erect within the ring fence of their present factory a new building and use it for the repair of other people's machinery. That would be a process carried on within the geographical area of the margarine factory, but it would not be a process for or incidental to the making of margarine. Be that as it may, counsel for the defendants pointed out that this was an ineptly drawn sub-section which plainly contained an ambiguity. That being so, and s. 14 (1) (when read with s. 130) being a penal section, the ambiguity must, they said, be resolved in favour of the defendants. They relied in particular on the observations of LORD SIMONDS in *London & North Eastern Ry. Co. v. Berriman* (3), where he said ([1946] 1 All E.R. 270):

C "I think that the same rule of construction must apply whether the duty and the penalty are imposed by the same section of an Act, or by different sections of an Act, or the one by a rule made under the Act and the other by the Act itself. That rule of construction is very well settled; though not always easy of application. I will state it by three familiar citations. In *Tuck & Sons v. Priester* (4), LORD ESHER, M.R., said (19 Q.B.D. 629 at p. 638): 'We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections.' LINDLEY, L.J., in the same case said (*ibid.*, at p. 645): '... the well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it.' Finally I will cite the words of JAMES, L.J., delivering the judgment of the Privy Council in *Dyke v. Elliott* (5) (L.R. 4 P.C. 184 at p. 191): '... where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.' F It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in *Tuck's* case (4), the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court."

H Those observations, however, do not tell the whole story. Even penal sections must be construed reasonably. I would refer to the citation from JAMES, L.J., which I have just read, and to the speech of LORD MACMILLAN, also one of the majority in the case cited, where he said (*ibid.*, 260):

"Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language. I quote and adopt the words of

ALDERSON, B., in *A.-G. v. Lockwood* (6) (9 M. & W. 378 at p. 398): 'The rule of law, I take it, upon the construction of all statutes . . . is, whether they be penal or remedial, to construe them according to the plain, literal, and grammatical meaning of the words in which they are expressed, unless that construction leads to a plain and clear contradiction of the apparent purpose of the Act or to some palpable and evident absurdity.'

I think the construction for which counsel for the defendants contends involves placing a strained and unnatural meaning on the word "incidental." The oiling of machinery used in the manufacture of margarine is clearly incidental to the manufacture of it. So, in my opinion, is the testing of the machinery. Counsel for the defendants felt constrained to admit that, if the testing had been done *in situ* or even in the building in which the fan was normally situate, and this accident had occurred, the defendants would have been liable. I cannot think that the process of testing this vital part of the machinery ceases to be incidental to the manufacture because it is carried out under a separate roof.

Had I accepted the judge's view as to the meaning of "incidental," I should have had to consider whether he was right in holding that the ventilating fan in the engineering shop was not "machinery." He relied, as I have said, on *Parvin v. Morton Machine Co., Ltd.* (1). In that case the machine that caused the injury was the product of the factory, not part of the machinery which was used in the process of manufacture. LORD STRACHAN pointed out that so long as a machine is in the course of construction or has not been finally adjusted or tested, there may have to be work done on it which could not be done with a fence or guard in position. He came to the conclusion that there was nothing in the Act which indicated that a machine in such circumstances should be fenced. His decision was affirmed in the Inner House. The Lord Justice-Clerk (LORD THOMSON) (1950 S.C. at p. 378) said:

"At first blush I should have thought that the purpose of this part of the Factories Act was to lay down general provisions for ensuring the safety of the plant and equipment which is installed in the factory for the purposes of manufacturing whatever is the product of the factory and that the nature and character of the product was a separate matter, calling for separate treatment in appropriate cases. Indeed it is only where the product of the factory is machinery or machines that the problem arises. The argument is that the words 'any machinery' which occur in s. 14 (1) and 'any machine' which occur in s. 20 are unequivocal and adequate to cover the dough-brake and that, as the purpose of this part of the Act is the safety of the employees, we should lean to a construction which promotes safety. This argument seems to me to lay too much stress on the particular use of 'any' and to put out of view the general context in which the words 'any machinery' and 'any machine' are found. The significance of apparently general words must be governed by the setting in which they are found",

and after considering the sections he remained of the same opinion. The other learned lords agreed with him. LORD PATRICK said (*ibid.*, 381):

"The different wording of the two Acts is, in any event, not sufficiently significant to produce so major an effect as that these provisions of the Act of 1901 applied only to plant used in the process of production while the parallel provisions of the Act of 1937 apply to both plant and product. This would be a major change in the outlook of the legislature and one so drastic in effect that many of the provisions of Part II could not be complied with in the process of manufacturing machinery. Thus I agree with the Lord Ordinary that while machinery is in the course of manufacture, assembly, and testing there may have to be work done upon it while it is

in motion which could not be done with a fence in position, work which would not be 'examination, lubrication or adjustment,' which alone are permitted when the fencing is removed in the case of machinery to which this part of the Act applies."

A In the present case we are dealing, not with the manufacture of a machine, but with the repair of a machine. Bearing in mind, however, that for my present purpose I am considering the engineering shop as a separate factory the main purpose of which is repair, I think the principle of *Parvin v. Morton Machine Co., Ltd.* (1) would apply. That decision is not binding on us, but, as SIR RAYMOND EVERSHED, M.R., pointed out in *Regional Properties, Ltd. v. Frankenschwerth* (7) ([1951] 1 All E.R. 181:

B " . . . since the Acts to be construed are the same in both Scotland and England . . . it is plainly desirable that the construction of the relevant parts of the Acts should be the same on both sides of the border."

C Had I, therefore, been in agreement with DEVLIN, J., on the other points, I should have treated the principle of *Parvin v. Morton Machine Co., Ltd.* (1) as applicable and have dismissed the claim so far as it rested on breach of statutory duty.

D I turn to the common law claim. Here, too, I find myself unable to agree with DEVLIN, J. I have had the opportunity of reading the judgment which ASQUITH, L.J., is about to deliver on this point and do not desire to add any reasons of my own for considering that on this ground also the plaintiff is entitled to succeed. As to contributory negligence, I see no reason for differing from DEVLIN, J., in his conclusion that the observations of LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (8) apply and that the plaintiff's conduct was mere inadvertence and did not amount to negligence. Counsel for the defendants did not seek to question the judge's finding that the plaintiff had not bound himself by electing to take his remedy under the Workmen's Compensation Acts; nor did he question the assessment of the damages at £2,453 16s. 10d. In the result, the appeal, in my opinion, succeeds and judgment should be entered for the plaintiff for that amount with costs here and below.

F ASQUITH, L.J.: I entirely agree with what my Lord has said in regard to statutory liability under the Factories Act, 1937, and will add nothing under that head, but will confine my judgment to the claim so far as it is based on negligence at common law. The case made under this head was that the defendants had neglected their common law duty as employers to provide a safe working system and safe plant, and that the plaintiff's injuries had been caused by this culpable omission. DEVLIN, J., found negligence itself proved, but, as I read his judgment, he found it unproved that the injuries claimed G for were the direct consequence of that negligence. The negligence, according to him, consisted in placing the fan (i) for purposes of a test which required it to be set in motion, (ii) on the floor, and (iii) without a guard. The negligence lies in this triple and indivisible complex. True it is, DEVLIN, J., sometimes uses language which suggests that placing the fan on the floor amounted in itself to negligence, or that not providing it with a guard did not amount to H negligence, but he cannot possibly mean what these phrases, isolated from their context, appear to say. For, taking the "guard," for instance, he also says: "Assuming it" (that is the fan) "was in a proper place, I do not think it was negligent not to provide a guard." This implies that, placed as it was, in what the judge considered an "improper" place, it did require a guard. So, again, he sometimes speaks as though the negligence lay solely in putting the fan on the floor, but clearly he did not mean that there would have been negligence if the fan (with or without a guard) had been put on the floor and not set in

motion, or, though put on the floor and set in motion, had been provided with an adequate guard.

The negligence, therefore, notwithstanding the separatist logic which colours the language of *DEVLIN, J.*, consisted in this tripartite act. The reason why the tripartite act of operating the fan—on the floor—unfenced—was negligent, according to the judge, was because those conducting the test were likely to stoop over it, and it was reasonably foreseeable that some damage might result—for instance, a necktie or clothing might well get caught in the revolving blades and some corporal injury ensue. Indeed, he says that, if the accident had occurred in this way, he must have found the defendants liable. One is tempted to suggest that some simpler type of damage might equally be a foreseeable consequence of this state of affairs—for instance, damage arising (as the damage did in this case) from some accidental contact between these sharp blades, revolving at their tips at 120 m.p.h., and some part of the person of an employee conducting or watching the test. Let us at this stage ignore this possibility, and be content to note the judge's premise that damage of some kind might reasonably have been anticipated as likely to result.

Starting from this premise the judge goes on to quote a well-known passage from the judgment of *WARRINGTON, L.J.*, in *Re Polemis & Furness, Withy & Co., Ltd.* (9), holding (rightly, in my view) that that case has never been overruled and is still binding on this court. *WARRINGTON, L.J.*, said ([1921] 3 K.B. 574):

"The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act."

DEVLIN, J., has already performed the process described in the first of these two sentences. Applying, and rightly at this stage and for this purpose, the test whether damage of some kind (for instance, the "necktie" kind) can be reasonably anticipated as likely to result from the defendants' act, he "determines the quality of the act" as negligent. It only remains for him to perform the process described in the second sentence of *WARRINGTON, L.J.*, namely, to decide whether the "particular damages," namely, the damage actually sustained, is recoverable. In answering this second question the foreseeability of the damage actually sustained is wholly irrelevant. Directness of causation is the sole criterion of recoverability. The actual damage may be wholly different in character, magnitude, or the detailed manner of its incidence, from anything which could reasonably have been anticipated.

With the greatest respect for the very closely reasoned judgment of the judge, I cannot but think that he has at times lost sight of this principle. Take such a passage as this from his judgment:

"But in fact his injury did not happen [through a necktie or clothing being caught in the blades]. It happened in a way that is still unexplained, and since no one can do more than guess how he came to put his hand on the blades, it is impossible to say that the defendants ought to have foreseen that he might."

In this passage *DEVLIN, J.*, can hardly mean that the causation of the damage ceases to be direct by reason of the interposition, between the employers' negligence and the resulting damage, of any act of mere inadvertence (as opposed to contributory negligence) by the employee. *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (8) is an authority to the contrary and was cited to the judge. *LORD WRIGHT*, in a passage relating to statutory liability, but applicable, in my view, to common law liability as well, says ([1939] 3 All E.R. 740):

"The policy of the statutory protection would be nullified if a workman

were held debarred from recovering because he was guilty of some carelessness or inattention to his own safety, which though trivial in itself threw him into the danger consequent on the breach by his employer of the statutory duty. It is the breach of statute, not the act of inadvertence or carelessness, which is then the dominant or effective cause of the injury."

- A What DEVLIN, J., seems to mean is not that any and every intervening act of inadvertence will bar the workman's remedy by rendering the damage too "indirect" a result, but that it is the "unexplained" character of the particular act of inadvertence in the present case which constitutes such a bar. Indeed, he says in terms that the fact that its character "cannot be foreseen" is what prevents the damage from being recoverable. This is surely to re-introduce, when considering whether the damage was directly caused, a criterion which is not relevant to that question but is only relevant to the prior question of the existence or non-existence of negligence.

- B When one is considering whether the damage was directly caused it matters not whether the precise way in which in the event it came about is explained or unexplained, foreseeable or unforeseeable. It was unexplained why in *Re Polemis & Furness, Withy & Co., Ltd.* (9) the fall of the plank caused the spark. C It was unexplained in *Aldham v. United Dairies (London), Ltd.* (10) (from which the judge cites a substantial passage) why the unattended pony, who had never before been more than restive, came to bite the plaintiff. In *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (8) it was unexplained through what act of inadvertence, occurring how, Caswell was injured. D None the less these unexplained events were held to result directly from the defendants' negligence, or, at all events, not to break the chain of direct causation leading from that negligence to the damage. These consequences are, indeed, avoided if one assumes that in the passage beginning: "It happened in a way that is still unexplained," the judge has not yet addressed himself to the issue of direct causation of damage at all, but is still dealing with the issue of negligence or no negligence. E On that assumption new difficulties seem to me to emerge. For, first, he would on that view appear to be re-opening a question which he had just answered in the affirmative and giving reasons which, if relevant, are reasons for going back on that answer—an answer which, nevertheless, he re-affirms later.

- F Then, again, although reasonable foresight of possible injury is the true criterion where negligence *vel non* is the issue, an employer who has created or permitted a dangerous condition to arise is reasonably expected to foresee and provide against the possibility of injury resulting therefrom even though it so results through the intermediation of an act of inadvertence by the employee and even though that act of inadvertence be of a character which cannot be precisely forecast and remains in the event "unexplained." It is enough if he ought G reasonably to anticipate that injury or damage of (some) sort to a workman was likely to result, and in applying his foresight to this question he cannot leave out of account the tendency of factory operatives to commit acts of inadvertence such as those which occupied so much of the attention of the court in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (8). As LORD H ATKIN points out, Caswell's own injury would not have occurred without an act of inadvertence on his part the nature of which could only be conjectured.

I would add a few sentences on two other points: (i) on the question whether the workman was guilty of contributory negligence; and (ii) on the question whether the decision in *Re Polemis & Furness, Withy & Co., Ltd.* (9) is still binding on this court. (i) The chain of causation would in this case have been broken or impaired if the workman's act had gone beyond inadvertence and had amounted to an act of contributory negligence—broken, if occurring before the Law Reform (Contributory Negligence) Act, 1945; impaired, to the extent

of compelling an apportionment of the damage, if occurring after that enactment came into force. The judge has, however, found that the act was one of mere inadvertence, not rising to the level of contributory negligence. The question is one of fact and degree—a typical jury point. LORD WRIGHT in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (8) said ([1939] 3 All E.R. 738):

“The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, and where negligence begins.”

I can see no justification for disturbing the conclusion at which on this issue of fact the judge, performing the functions of a jury, has arrived. (ii) Nor do I consider that the decision in *Re Polemis & Furness, Withy & Co., Ltd.* (9) has been overruled, or its binding character, so far as this court is concerned, in any degree shaken. The utmost that can be said is that certain of the Lords of Appeal in Ordinary have reserved the right to re-consider it if and when, before the House of Lords, its authoritative character should come directly in issue. Meanwhile, it stands. It has been suggested that decisions such as *Donoghue v. Stevenson* (11) and *Hay (or Bourhill) v. Young* (12) have in some way undermined it. I respectfully dissent. The issue in both those cases was: “Did the defendant owe a duty of care to the plaintiff?” not “Did the damage suffered by the plaintiff result directly from a breach of such duty of care?” If in either case a duty existed on the part of the defendant, no one doubted that the indisposition of the plaintiff in *Donoghue’s* case (11) was directly caused by drinking contaminated ginger beer, or that the miscarriage of the plaintiff in *Bourhill’s* case (12) was directly caused by the conduct on the high road of the defendant in that case. In my view, *Re Polemis & Furness, Withy & Co., Ltd.* (9) has not been overruled, and this is all that it is necessary or proper to say here. I have thought it right, out of respect for the closely knit reasoning of a judge from whom if ever one dissents one does so with great diffidence, to deal with his reasoning in some detail, though I hope not at excessive length. My conclusion is that the claim is entitled to succeed at common law as well as under the statute and I agree that the appeal should be allowed.

BIRKETT, L.J.: I have had the advantage of reading the two judgments which have just been delivered. I agree with them both in their reasoning and in their conclusions and I do not desire to add any further words of my own.

Appeal allowed with costs.

Solicitors: *Rowley Ashworth & Co.* (for the plaintiff); *Gascoin & Co.* (for the defendants).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

BUTLER v. MOUNTVIEW ESTATES, LTD.

[KING'S BENCH DIVISION (Danckwerts, J., sitting as a judge of the King's Bench Division), February 21, 22, 1951.]

Sale of Land—Lease—Assignment—Conveyance by assignors as "beneficial owners"—Implied covenants that lease not void or voidable and that all covenants performed up to time of conveyance—Covenant to repair not performed—Condition of sale that property taken with full notice of state of repair—Liability of assignors—Rectification of lease—Law of Property Act, 1925 (c. 20), s. 76 (1) (b), sched. II, Part II.

Vendors offered to sell three leasehold properties "as beneficial owners" and subject to the Law Society's Conditions of Sale, 1934 ed., by condition 17, para. 5 of which: "A purchaser shall be deemed to purchase with full notice of the actual state and condition of the property, whether as to . . . state of repair . . . or otherwise howsoever, and shall take the same as it stands." In the case of one of the properties there was also a specific condition providing that "the purchaser shall be deemed to have notice of the actual state and condition of the property and shall take the property as it is." The purchaser inspected the properties before purchasing them, and the contracts were signed on the particulars and conditions of sale. In answer to requisitions by the purchaser's solicitors, the vendors' solicitors stated that the vendors were not aware of any breach of covenants and conditions contained in the leases, and produced the receipts for the last payments of rent due. The assignment of one of the premises was executed on May 6, 1949, and those of the other two on June 3, 1949. In each case the assignment by the vendors as beneficial owners was unqualified, and, therefore, under the Law of Property Act, 1925, s. 76 (1) (b), and sched. II, Part II, there was implied in each of the conveyances a covenant by the vendors that "the lease . . . is, at the time of conveyance, a good, valid, and effectual lease . . . and is in full force . . . and has in nowise become void or voidable, and that . . . all the covenants, conditions, and agreements contained in, the lease . . . and on the part of the lessee . . . to be . . . observed, and performed, have been . . . observed, and performed up to the time of conveyance." In the case of each property the covenants in the lease had not been fully complied with, because the premises were not in a full state of repair at the date of the assignment. The rents outstanding at the time of the sale became due on June 24, when they were paid by the purchaser and accepted by the landlord. On Sept. 30, 1949, the purchaser commenced an action against the vendors claiming damages for breach of their implied covenants of title contained in the assignments.

HELD: (i) the covenant implied in each of the assignments by sched. II, Part II of the Act of 1925, that the lease had not become void or voidable, was merely a covenant of title, and did not contain an obligation on the part of the vendors in regard to the condition or quality of the premises assigned; as the breach had been waived by the landlord by acceptance of rent, the lease was no longer voidable; and, therefore, the purchaser had no right of action in respect of that breach at the time when he issued the writ.

(ii) the breach by the vendors of the implied covenant contained in the latter part of sched. II, Part II, of the Act of 1925 (*viz.*, that all the covenants contained in the lease had been observed up to the time of conveyance) gave the landlord a right of action for damages, even if he had waived his right to re-entry; this implied covenant being another branch of the covenant for title, the breach occurred at the time of the assignment even though the landlord had made no claim, and, therefore, *prima facie*, the purchaser had a right of action against the vendors for damages in respect of the breach immediately on the execution of the assignment, the fact

that he knew of the breach being immaterial, as the covenant was unqualified.)

Page v. Midland Ry. Co. ([1894] 1 Ch. 11), *applied*.

(iii) as the vendors' liability for damages in respect of the breaches of the implied covenants would be contrary to the intention of the parties under their original contracts, there would be rectification of the assignments to give effect to the true intention of the parties (subject to a proviso in favour of purchasers for value without notice of the right to claim such rectification), even though the vendors had not counterclaimed for rectification.

[FOR THE LAW OF PROPERTY ACT, 1925, s. 76 (1), and sched. II, Part II, see HALSBURY'S STATUTES, Second Edn., Vol. 20. pp. 583 and 876.]

Cases referred to:

- (1) *Harris v. Boots, Cash Chemists (Southern), Ltd.*, [1904] 2 Ch. 376; 73 L.J.Ch. 708; 31 Digest 415, 5620.
- (2) *Page v. Midland Ry. Co.*, [1894] 1 Ch. 11; 63 L.J.Ch. 126; 70 L.T. 14; 40 Digest 282, 2450.
- (3) *Eastwood v. Ashton*, [1913] 2 Ch. 39; 82 L.J.Ch. 313; 108 L.T. 759; *revsd.*, [1914] 1 Ch. 68; 83 L.J.Ch. 263; 109 L.T. 784; *restd.*, [1915] A.C. 900; 84 L.J.Ch. 671; 113 L.T. 562; 40 Digest 335, 2838.
- (4) *Lockharts v. Rosen (Bernard) & Co.*, [1922] 1 Ch. 433; 91 L.J.Ch. 321; 127 L.T. 18; 40 Digest 196, 1635.
- (5) *Borrowes v. Delaney*, (1889), 24 L.R. Ir. 503; 30 Digest 481, *e*.

ACTION for damages for alleged breaches of implied covenants of title on the assignments of certain leasehold properties.

The plaintiff bought the properties from the defendants at an auction, one of the conditions of sale, in each case, being that the purchaser should take the property with full notice of its actual state and condition. In the assignments the defendants conveyed as "beneficial owners" without limiting, in such a manner as to carry out the terms of the original contract between the parties, the covenants implied by the Law of Property Act, 1925, s. 76 (1) (B), and sched. II, Part II. At the date of the assignments there was a breach of the repairing covenant in each of the leases, but the rents then outstanding and due on June 24, 1949, were accepted by the landlord from the plaintiff. On Sept. 30, 1949, the plaintiff issued his writ in the action, claiming damages from the vendors for breaches of the implied covenants contained in sched. II, Part II, of the Act of 1925, and the cost of putting the premises into a proper state of repair. The plaintiff contended that by reason of the lack of repair (a) there was a breach of the covenant that the leases had not become void or voidable, and (b) there was also a breach of the covenant that all the covenants contained in the leases had been performed up to the time of conveyance. The defendants contended *inter alia* (a) that, although the leases were voidable at the date of the assignment by reason of the lack of repair, the defect of title had been cured by the landlord's subsequent acceptance of rent from the plaintiff, and (b) that, until the landlord had begun a claim against the plaintiff as assignee, the plaintiff had no right of action against the defendants for the breach of the implied covenant that the covenants in the leases had been duly performed. The facts appear in the judgment.

M. Gore for the purchaser.

Cross, K.C., and *R. Cozens-Hardy Horne* for the vendors.

DANCKWERTS, J.: This is an action based on implied covenants contained in an assignment of leasehold property. It concerns three leasehold properties: 28 and 32 Lady Margaret Road, and 90 Leverton Street, all in Kentish Town. These properties, together with a number of others, were offered

for auction on Mar. 1, 1949, and conditions of sale, which contained certain special conditions, related to the various lots. In regard to 28 and 32 Lady Margaret Road, which were lots 21 and 22 respectively, the provisions were that "the vendors sell as beneficial owners," and in the case of every lot the properties were sold subject to the Law Society's Conditions of Sale (1934 ed.), so far as they were not varied by or inconsistent with the special conditions to which I have referred. Condition 17, para. 5, of the Law Society's Conditions of Sale is:

- A "A purchaser shall be deemed to purchase with full notice of the actual state and condition of the property, whether as to quantity, state of repair, means of access, enjoyment of light and air or otherwise howsoever, and shall take the same as it stands."
- B In the case of 90 Leverton Street, which was lot 8, there was a similar special condition that "the vendor sells as beneficial owner," and there was a special condition (condition 4) dealing with the question of repair which is not found in regard to the other two properties, because, apparently, the conditions of sale as regards different properties were settled by different solicitors. Condition 4 is:

- C "The purchaser shall be deemed to have notice of the actual state and condition of the property and shall take the property as it is. If the vendor shall incur or become liable for expenditure upon the property whether by virtue of any requirement made by the local authority or by a lessor or otherwise the purchaser shall take the property subject to such requirements and if before the completion of the purchase the vendor shall expend any money in complying with such requirements and/or effecting essential repairs the purchaser shall on completion of the purchase repay to the vendor the amount so expended by him and in any case indemnify the vendor in respect thereon."
- D

- The plaintiff inspected the three properties, and on Mar. 1, 1949, he attended the auction and purchased lots 8, 21 and 22, for the following prices: 90 Leverton Street, for £95; 28 Lady Margaret Road, for £265; and 32 Lady Margaret Road, for £280. The contracts were duly signed on the particulars and conditions of sale. The matter then came to the hands of the parties' solicitors. As appears from the particulars and conditions of sale, these were leasehold properties, held under comparatively long leases. In the case of 90 Leverton Street, the unexpired period of the lease at this time was sixteen and a half years, the ground rent was £3 per annum, and the rent payable by the tenant, that is to say, receivable by the purchaser, was £56 per annum. In the case of 28 Lady Margaret Road and 32 Lady Margaret Road, the unexpired period of the leases was twenty years, the ground rent was £10 per annum, and the rents receivable were £110 10s. and £110 respectively. The leases contain the usual repair covenants and the usual condition for re-entry.
- E
- F

- G When the matter passed into the hands of the solicitors, requisitions were delivered on behalf of the purchaser (the plaintiff) and were answered by the vendors' solicitors. In each case, the first requisition was:

- H "Have all the covenants and conditions contained in the lease under which the property is held been performed or observed? The receipt for ground rent due on the last rent day immediately before the day of completion, as well as the receipt for the last fire insurance premium, must be produced."

In the case of 28 and 32 Lady Margaret Road, the answer was:

"The vendor is not aware of any breach, and the last receipt when produced must be accepted as conclusive evidence."

That answer contained a misstatement of the law because, under the Law of Property Act, 1925, s. 45 (2), the production of the last receipt is not conclusive

evidence that all the covenants in the lease have been performed. It is merely *prima facie* evidence. In the case of 90 Leverton Street, the answer was not quite the same. It was:

"The vendors are not aware of any breach. The last receipt will be produced."

In each of those cases the answer was unfortunate, because the vendors and, therefore, their solicitors, were well aware that the property was not in a full state of repair, and the solicitors should have been more cautious in giving the answers which they did.

No. 2 of the requisitions was:

"Has any notice to repair or of the breach of any of the other covenants contained in the lease been served by the lessor? Anything necessary to be done to comply with any such notice must be executed before completion at the vendor's expense."

In the case of the two properties in Lady Margaret Road, the answer to that was:

"Not to the vendors' knowledge."

In the case of 90 Leverton Street, the answer was:

"The vendors are not aware of any."

That was true. One would think it might, perhaps, have been followed up by a reference to the conditions of sale.

The matters having proceeded to completion, the assignments of the leasehold premises were executed by the vendors to the purchaser, in the case of 90 Leverton Street, on May 6, 1949, and, in the case of the other two premises, by assignments dated June 3, 1949. In each case the conveyance contained an assignment by the vendors as beneficial owners of the premises:

"To hold the same unto the purchaser henceforth for all the residue now unexpired of the said term of ninety-nine years granted by the said lease subject henceforth to the payment of the rent and the performance and observance on the part of the lessee of the covenants and conditions by and in the same lease reserved and contained but discharged from all principal moneys [in the mortgage or legal charge, as the case might be]."

Accordingly, by the Law of Property Act, 1925, s. 76 (1) (A) and (B), those assignments incorporated in them the covenants implied under the provisions of the Act. In the case of assignors, the covenants which are implied are contained in Parts I and II of sched. II to the Act. The material covenant is in Part II, and is in these terms:

"Further covenant implied in a conveyance of leasehold property for valuable consideration, other than a mortgage, by a person who conveys and is expressed to convey as beneficial owner. That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsurrendered, and has in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance."

Under s. 77 (1) (c) of the Act of 1925 certain covenants are also implied on the part of the assignee. They are contained in Part IX of sched. II:

" . . . the assignees, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, duly pay all rent becoming due under the lease creating the term or interest for which the land is conveyed, and observe and perform all the covenants, agreements and conditions therein contained and thenceforth on the part of the lessees to be observed and performed: And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said rent or any breach of any of the said covenants, agreements and conditions."

Receipts for rent, the last rent payable before completion, were produced by the vendors' solicitors to the purchaser's solicitors, and, accordingly, under s. 45 (2) of the Act of 1925 the provision applied which required the purchaser to assume that the covenants had been complied with. Section 45 (2) provides:

" Where land sold is held by lease (other than an under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase."

As the actual assignments took place on May 6 and June 3, rent was outstanding, but did not become due until mid-summer, or June 24. In each case the covenants in the lease had not been complied with in full because the premises were not in a full state of repair. After the date of the assignment, rent was paid by the purchaser and accepted by the landlord, and it was not until Sept. 30, 1949, that the writ in this action was issued. That writ claims from the vendors damages for breach of the implied covenants of title contained in the assignments, *i.e.*, breach of the covenants contained in Part II of sched. II to the Law of Property Act, 1925. It is said that the breaches are two-fold: (a) it was not the fact that the lease had in no wise become void or voidable, and (b) it was not the fact that all the covenants, conditions and agreements contained in the leases had been observed and performed up to the time of conveyance. Accordingly, it is said, the purchaser is entitled to claim damages from the vendors and to recover from them the cost of putting the premises into a proper state of repair as at the date of the assignment in order to comply with the terms of the lease.

The first point to which I should turn my attention is whether that contention represents the bargain between the parties. In my view, it does not. In my view, it is plain, from the provision contained in the Law Society's Conditions of Sale, condition 17, para. 5, and *a fortiori* from the special conditions contained in the conditions relating to 90 Leverton Street, that the bargain between the parties was that the purchaser should take the property in the condition in which it then was, that he should be responsible for any further repairs that were required in respect of it, and that the vendors were not to be responsible for such repairs. The purchaser bought the property as it was, that is to say, he bought it in its unrepaid state, and, therefore, *prima facie* he would have no right to complain if, afterwards, to comply with the covenants contained in the lease, he had to expend moneys to put the property into a proper state of repair. I am satisfied that, if the vendors' solicitors had been alive to the point and had asked for the insertion of the appropriate provision limiting the implied covenants of title, to put the matter in the position required by the parties' bargain, they would have been entitled to demand such a limitation. For instance, in my view, it would have been perfectly correct for them to have asked for the insertion in the assignment of a provision like that con-

tained in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 1, p. 593, form 10, with such necessary alterations or additions as might be necessary to cover the provisions of the lease in the present case. The side note to form 10 is:

"Proviso restricting liability on sale of leaseholds subject to broken covenants."

Form 10 is:

"Provided always, and it is hereby agreed, that the covenants which are implied by reason of the said A hereby assigning and being expressed to assign as beneficial owner, shall not be deemed to imply that either of the covenants on the part of the lessee contained in the recited lease for painting or repairs to be executed upon the premises has been performed."

Accordingly, therefore, if the bargain between the parties had been carried out in the way that might have been anticipated, the implied covenants for title would have been so limited that the purchaser could not have pursued his claim in this action, but I have, first, to deal with the situation as it is in the documents which are before me, that is to say, I have an assignment which is unqualified as regards the words "as beneficial owner." It has been argued by counsel for the vendors that the provisions of Part II of sched. II to the Law of Property Act, 1925, are simply concerned with a covenant of title and are not provisions containing an obligation on the part of the assignors in regard to the condition or quality of the house or houses which are assigned. He says that, though it is true that the covenants had been broken at the date of the assignment, and the leases were, in fact, voidable by the landlord if he chose to exercise his right of re-entry, that defect has been cured by the subsequent acceptance by the landlord of rent, which amounts to a waiver of his right of re-entry as regards any breach as existing prior to the acceptance of such rent. That, so far as it goes, seems to me to be a perfectly correct contention, and the right of the landlord of re-entry for any breaches that may have been committed by the vendors has long since gone, and, therefore, though the lease may have been voidable, it is not voidable now. On the other hand, it is claimed by counsel for the purchaser that at the date of the assignment the leases were voidable and there was, at that date, a breach of the covenant for title to that extent. It seems to me that, if the writ had been issued immediately after the date of the assignment, then, on the terms of the assignment, there would have been a right of action for damages against the vendors in respect of the breach, but the defect of title has since been cured, and I do not see how there was any right of action, or, at any rate, any damage suffered by the purchaser, when he issued his writ on Sept. 30, 1949.

Counsel for the vendors is in a greater difficulty in regard to the latter part of the implied covenants, *viz.*:

"... that ... all the covenants, conditions, and agreements contained in, the lease ... and on the part of the ... grantee [*i.e.*, purchaser] ... to be ... observed, and performed, have been ... observed, and performed up to the time of conveyance."

Those obligations had not been performed, and the landlord, even if he had waived his right of re-entry, would still have a right of action for damages in respect of the breaches which existed at the date of the assignment as well as in respect of the subsequent breaches by failure of the purchaser, as assignee or tenant, to put the premises in repair in accordance with the terms of the leases. The argument of counsel for the vendors, as I understood it, was that the latter part of the provision in Part II of sched. II was to be read as part of, and controlled by, the earlier part, and that the whole matter was directed, not to the condition of the premises as a physical entity, but to the matter of the assignor's estate, and, therefore, it was a true covenant for title and nothing

more. That argument, it seems to me, would have had more force if the provision in Part II of sched. II had been expressed the other way round, that is to say, if the latter part had preceded the earlier part—in other words, if it read something like this: “All the covenants, conditions and agreements have been observed and performed,” and by inference, therefore, the lease has in “nowise become void or voidable.” It is, however, not put in that way, and it

A seems to me that the argument addressed to me by counsel for the vendors in this respect cannot succeed. Counsel for the purchaser contends that the latter part of the provision in Part II refers to another branch of the covenant for title, or the covenant implied by the words “beneficial owner,” and that there is a covenant by the assignors that, at the date of the assignment, all the covenants and conditions in the lease have been duly performed up to

B the date of the assignment. In my opinion, the contention of counsel for the purchaser is right, and, accordingly, it seems to me that there was a breach of covenant committed by the vendors during their period of ownership of the properties for which the landlord would have a right of action.

It was also contended by counsel for the vendors that a covenant of this kind was purely a covenant of indemnity, and, therefore, until the landlord

C had begun a claim against the assignee, the assignee had no right of action against his assignor. As regards the provision in the case of the implied covenant on the part of the assignee in Part IX of sched. II, it seems to be fairly clear that it is really a covenant of indemnity: see *Harris v. Boots, Cash Chemists (Southern), Ltd.* (1). As regards the covenant for title, there are authorities which establish that a breach occurred at the time of the conveyance or assignment. Accordingly,

D the statutes of limitation would begin to run at that date, and, even though the landlord had made no claim, a right of action as between the assignee and the assignor would arise immediately on the execution of the assignment in the form in question. It is also established by several cases, of which a good example is *Page v. Midland Ry. Co.* (2), that the knowledge of the assignee of the defect in the assignor's title does not limit his right of action, and, indeed,

E is not material, if there is an unqualified covenant of title contained in the conveyance. Accordingly, therefore, the fact that the purchaser knew that the property was not in full repair is *prima facie* no answer to the claim under the implied covenants for title.

There is, therefore, in my view, on the covenants as they stand, a breach of the assignor's obligation, which gave rise to a right of action immediately

F after the execution of the assignment, and, *prima facie*, it would seem that the measure of damages for such a breach is the difference between the value of the property as it is and that of the property as it would have been if the covenants had been duly performed, as required by the terms of the lease, at the date of the assignment: see *Eastwood v. Ashton* (3), *per* SARGANT, J. ([1913] 2 Ch. 55). The decision of SARGANT, J., in that case was reversed by

G the Court of Appeal, but restored by the House of Lords. Counsel for the vendors contended that, although that might be *prima facie* the measure of damages, it was subject to reduction by a number of factors. He argued that one ought to take into consideration the fact that the landlord had taken no steps to forfeit the lease, and that the damages were reduced to nothing by that situation. He also contended that, in assessing the damages, one must

H take into consideration all the factors with regard to the deterioration of the lease, and any other factors which may be relevant, including statutory provisions to that effect, which make it difficult for a landlord to recover damages for a failure to put the premises in repair. In my opinion, one must take the situation as being as it legally is, so that the landlord must be taken to be ready to enforce his legal rights, such as they may be. *Prima facie*, on the terms of this assignment and under the implied covenants, it seems to me the purchaser would have a right of action against the vendors for damages.

There is, therefore, a further matter with which I have to deal, and that is the fact that that result is plainly contrary to what was agreed between the parties. I have already referred to what I consider to be the effect of the conditions of sale, and, the situation being that the purchaser had bought property which was not fully in repair, and, as I think, subjected himself to the liability, whatever it might be, of putting the property in repair in accordance with the terms of the leases, he could not compel the vendors, if the objection had been raised before completion, to put the property in repair: see *Lockharts v. Rosen (Bernard) & Co.* (4). Accordingly, therefore, if I had to award damages to the purchaser, I would have to do it contrary to the intention of the parties as expressed in the bargain which they had concluded. In those circumstances, counsel for the vendors contends that, if necessary, the assignments should be rectified by limiting the implied covenants in the way which I mentioned by reference to KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING. No question of counterclaim was raised in the defence, which also failed to refer to the waiver of the landlord's right of re-entry by his acceptance of rent, but under the Supreme Court of Judicature (Consolidation) Act 1925, s. 40, I am required to

" . . . take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would formerly have taken notice of those matters in any suit or proceeding duly instituted therein."

In *Borrowes v. Delaney* (5), an Irish decision, a defective lease was rectified although there was no counterclaim to rectify. Normally, if a point is to be taken that a document should be rectified, it should be raised in the pleadings. That has not been done in this case, but, having regard to the circumstances, and particularly to the fact that, if the purchaser's claim were to succeed, he would be getting something to which, in my opinion, he would have no right whatever, I think that I ought to accede to the submission on behalf of the vendors. Therefore, I propose to direct the assignments to be rectified by the addition of a proviso on the lines of form 10 in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 1, p. 593, with such modifications as may be required by the circumstances of the present case. There is one further matter which is material in regard to this. The purchaser has sold the three leasehold properties in question to someone else, and, if that person is a purchaser for value without notice of the claim made by the vendors to rectify, the rectification of the assignments in question should be limited in such a way as not to affect the purchaser in those circumstances. Accordingly, some limitation of that kind must be inserted in the alteration. I direct that a copy of the order should be indorsed on the assignment, directing rectification with the words: " Provided always these alterations do not affect any purchasers for value without notice of the right to claim rectification." The action fails and must be dismissed.

Judgment for defendants.

Solicitors: *Rance & Co.* (for the purchaser); *Staddon, Pyke & Barnes* (for the vendors).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LITTMAN v. BARRON (INSPECTOR OF TAXES).

[CHANCERY DIVISION (Wynn-Parry, J.), February 27, 28, 1951.]

Income Tax—Sched. D—Relief in respect of losses—Set off against profits—Excess rent of immediate lessor—“Profits”—Leasehold properties sub-let at rents exceeding head rents and net annual values—Other properties sub-let at rents below head rents or not sub-let—Finance Act, 1927 (c. 10), s. 27 (1)—Finance Act, 1940 (c. 29), s. 15 (1).

The Finance Act, 1940, s. 15 (1), provides: “If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of sched. A . . . if the annual value of the unit had been determined . . . by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of sched. A . . . or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases.” The taxpayer, a dealer in property, held a number of leasehold properties, some of which he had sub-let at rents which exceeded both the head rent and the net annual value of the respective properties and others of which he had sub-let at rents which were below the head rent and the net annual value, still others being not sub-let. For the year 1942-43 he was assessed to tax under case VI of sched. D by virtue of s. 15 (1) of the Act of 1940 on the excess rents arising from the properties sub-let at rents exceeding the head rent and the net annual value. It was not disputed by the taxpayer that those assessments were correct, but to be entitled under s. 27 (1) of the Finance Act, 1927, he claimed to set against them the deficiencies in rent which he had suffered for the same year with regard to the properties which he had sub-let at rents below the head rent and the net annual value and on those which were not sub-let.

HELD: the “excess” taxed by s. 15 (1) of the Act of 1940 was not “profits” within s. 27 (1) of the Act of 1927, and, therefore, the taxpayer was not entitled under that sub-section to set off the amounts in question.

[AS TO DEDUCTION OF LOSSES, see HALSBURY, Hailsham Edn., Vol. 17, p. 207, para. 425; and FOR CASES, see DIGEST, Vol. 28, pp. 46, 47, Nos. 233-236.]

Case referred to:

- (1) *Fry v. Salisbury House Estate, Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 15 Tax Cas. 266; Digest Supp.

CASE STATED by the Special Commissioners of Income Tax.

The taxpayer appealed against the decision of the Special Commissioners that “excess rents” within the Finance Act, 1940, s. 15 (1), did not constitute “profits” within the Finance Act, 1927, s. 27 (1), so that he was precluded from relying on s. 27 (1) in relation to certain leasehold properties in respect of which (in the course of his business as a property dealer) he received in rent less than the amount of the rent paid by him.

Mustoe for the taxpayer.

The Solicitor-General (Sir Frank Soskice, K.C.) and *R. P. Hills* for the Crown.

WYNN-PARRY, J.: The taxpayer is a dealer in property. Part of his activity consists in holding leasehold properties, in respect of some of which he receives rent. Prior to 1940 in respect of any excess represented by a surplus over his liability under sched. A of rent received, he would not have been taxable. That position was established by a number of cases, culminating in

Fry v. Salisbury House Estate, Ltd. (1). In 1940 the legislature desired to alter that position, and for that purpose s. 15 (1) of the Finance Act, 1940, was introduced. By that section it is provided:

"If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under case VI of sched. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the rules applicable to sched. A set out in sched. I to the Income Tax Act, 1918) by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(a) the actual amount of the assessment of the unit for the purposes of sched. A, as reduced for the purpose of collection; or (b) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases."

The appeal in question concerns assessments to income tax for the years 1940-41, 1941-42, and 1942-43, but the appeal was dealt with solely by reference to the facts as they existed in the year ended Apr. 5, 1943. Shortly, the position is that the taxpayer maintains he has suffered a loss as regards five leases held by him. As regards the first two, the rent which he received was less than the rent paid by him, and as regards the other three he received no rent at all. In those circumstances he seeks to obtain relief in respect of the alleged loss by invoking the provisions of the Finance Act, 1927, s. 27 (1). That section, among other provisions, makes it clear that it relates only to a case where a person sustains a loss in respect of a particular type of transaction, namely,

"... of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof under case VI of sched. D ..."

The primary question which arises in this appeal is whether or not the commissioners were correct in their view that that which is taxable under the Finance Act, 1940, s. 15 (1), is not "profits" in the sense in which that word is used in the Finance Act, 1927, s. 27 (1). Two views were put forward. On behalf of the taxpayer it was argued that, although the word "excess" is used in s. 15 (1), in its context the word connotes a profit, and that is emphasised and underlined by the provision that that excess is to be chargeable to tax under case VI of sched. D, a case which is defined as embracing

"Tax in respect of any annual profits or gains not falling under any of the foregoing cases, and not charged by virtue of any other schedule."

It was pointed out that, unless s. 15 of the Act of 1940 was so construed, it would not be possible to invoke the provisions of s. 27 of the Act of 1927 where a loss had been sustained, and that the resulting position must be that the legislature had designed to levy a tax on what the taxpayer contends is a profit, although an artificially ascertained profit, while at the same time allowing no relief where a loss occurs.

Against that it was contended on behalf of the Crown that s. 15 does exactly what it appears to do by its language. It sets out to tax an excess which, from the artificial nature of the calculation which is required to arrive at that excess, cannot be regarded as equivalent to the word "profits" as used in s. 27 of the Act of 1927. In support of that contention the Solicitor-General put forward three hypothetical examples, into the details of which I need not go, but they showed clearly that, postulating figures not in the least degree unreasonable, the result may follow that in one case there would have to be a case VI assessment under the Finance Act, 1940, s. 15, although no profit in the business

sense existed, while in other cases the result would be that there would be no case VI assessment under that section although on the figures a profit in the business sense had been achieved. That, in my view, is a cogent reason for hesitating to give to the word "excess" in s. 15 (1) of the Act of 1940 a meaning which *prima facie* it does not bear. Then it was argued that case VI relates to tax in respect of annual profits or gains, whether those profits or gains are to be considered under sched. D or any other schedule. On the language of case VI that, no doubt, is true, and from that it follows that, so far as the courts are concerned, it would not be possible to introduce into case VI a tax of the nature which is imposed by s. 15 of the Finance Act, 1940, assuming the Crown's case to be right.

Having given this matter the best consideration I can, I do not feel any difficulty. In my judgment, the true view is that put forward by the Solicitor-General. What, in effect, has been done by the Finance Act, 1940, s. 15, is to introduce a new tax within the purview of case VI. For convenience, the machinery of case VI has been directed to be employed. It, therefore, follows from this view of the matter that, even assuming there was a transaction within the meaning of that word as used in the Finance Act, 1927, s. 27 (1), a point which I do not find it necessary to decide, nevertheless it was not a transaction of the limited class there specified in that it was not a transaction of such a nature that, if any profits had arisen therefrom, the taxpayer would have been liable to be assessed in respect of those profits. Therefore, in my view, the taxpayer is unable to pray in aid the provisions of the Finance Act, 1927, s. 27. On those short grounds this appeal fails.

Appeal dismissed.

Solicitors: *Tobin & Co.* (for the taxpayer); *Solicitor of Inland Revenue.*
[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. SILVERTS, LTD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
February 5, 6, 7, March 5, 1951.]

Profits Tax—Computation of profits—Deduction of directors' remuneration—
"Controlling interest" of directors—Shares registered in name of custodian
trustee—Finance Act, 1937 (c. 54), sched. IV, para. 11.

In June, 1940, the shares of a company consisted of A, B and C shares of which the C shares carried no voting rights and the A and B shares each carried one vote. The whole of the six thousand B shares were held by S. the managing director. The directors of the company at all material times, besides S., were X., Y., and Z. By a settlement, dated June 27, 1940, one R. appointed a banking company custodian trustee of the A shares under the Public Trustee Act, 1906, s. 4 (3). X. and Y. acted as managing trustees and the sole beneficiary under the settlement was D. On Dec. 16, 1940, the A shares were transferred into the name of the bank as custodian trustee. In assessing the company to profits tax in respect of the chargeable accounting period Jan. 1, 1947, to Dec. 31, 1947, the revenue authorities claimed to restrict the deduction of directors' remuneration under the Finance Act, 1937, sched. IV, para. 11, on the ground that the directors had a controlling interest in the company.

HELD: the rights of members of a limited company *vis-a-vis* the company (such as the right of voting control under its regulations) were to

be determined by reference only to the share register, beyond which it was not (save, possibly, in the case of mere "nominal" shareholders) permissible to look, and, therefore, the bank (which was not merely a nominee or bare trustee), as the registered holder of the A shares, must be treated as possessing the full voting rights thereof and the company was not one of the directors whereof had a controlling interest within the meaning of para. 11.

Inland Revenue Comrs. v. Bibby (J.) & Sons, Ltd. ([1945] 1 All E.R. 667), **A**
applied.

British-American Tobacco Co., Ltd. v. Inland Revenue Comrs. ([1943] 1 All E.R. 13), *distinguished.*

Shields (John) & Co. (Perth), Ltd. v. Inland Revenue Comrs. (1950) (100 L. Jo. 399), *approved.*

Decision of ROMER, J. ([1950] 2 All E.R. 271), *reversed.* **B**

[FOR THE FINANCE ACT, 1937, sched. IV, para. 11, see HALSBURY'S STATUTES, Second Edn., Vol. 12, p. 385.]

Cases referred to:

(1) *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.*, [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 **C**
 Tax Cas. 49; 2nd Digest Supp.

(2) *Inland Revenue Comrs. v. Bibby (J.) & Sons, Ltd.*, [1943] 2 All E.R. 419; 170 L.T. 8; 29 Tax Cas. 167; *reversd. Bibby (J.) & Sons, Ltd. v. Inland Revenue Comrs.*, [1944] 1 All E.R. 548; 170 L.T. 370; 29 Tax Cas. 167; *affd.*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

(3) *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.*, [1941] 2 All E.R. 86, 651; [1941] 2 K.B. 270; 111 L.J.K.B. 1; 165 L.T. 275; 29 Tax **D**
 Cas. 49.

(4) *Shields (John) & Co. (Perth), Ltd. v. Inland Revenue Comrs.*, (1950), 100 L. Jo. 399; L. (E.P.T.) 96.

APPEAL by the taxpayers from an order of ROMER, J., dated June 13, 1950, and reported [1950] 2 All E.R. 271, reversing a decision of the Special Commissioners of Income Tax. **E**

The taxpayers, Silverts, Ltd., appealed to the Special Commissioners against an assessment to profits tax for the chargeable accounting period Jan. 1, 1947, to Dec. 31, 1947, on the ground that the company was not one of the directors whereof had a controlling interest therein within the meaning of the Finance Act, 1937, sched. IV, para. 11, and that, therefore, the restrictions set out in that paragraph on the deduction of directors' remuneration in computing the profits of the company did not apply to the company. The Special Commissioners found that the company was not one in which the directors had a controlling interest, and reduced the assessment. **F**

Pennycuik, K.C., and *Honeyman* for the taxpayers. **G**

Heyworth Talbot, K.C., *J. H. Stamp* and *R. P. Hills* for the Crown.

Cur. adv. vult.

Mar. 5. **SIR RAYMOND EVERSHED, M.R.**, read the following judgment of the court. The question raised in this appeal is whether, for the purpose of computing profits tax in respect of the year which ended on Dec. 31, 1947, the directors of Silverts, Ltd., had a controlling interest therein. The tax was first imposed under the name of national defence contribution by the Finance Act, 1937, s. 19. Section 20 of the same Act provided that the tax should be computed on income tax principles subject to the terms of sched. IV to the Act, and para. 11 of that schedule imposed limits in the case of a company "the directors whereof have a controlling interest therein" on the deductions which might be made in respect of directors' remuneration. It is, **H**

therefore, in the interest of the company, Silverts, Ltd., in the present case to show that during the material year its directors did not have a controlling interest therein. This the company succeeded in doing before the Special Commissioners, but ROMER, J., came to a contrary conclusion. The company has appealed from the decision of ROMER, J.

The facts are that, at the relevant date, the issued share capital of the company consisted of six thousand A shares, six thousand B shares and two thousand C shares, all respectively of £1 each. The C shares conferred no voting rights in any circumstances, and they may be wholly disregarded. The A and B shares conferred equal voting rights on their holders and there was in the company's regulations no provision for a casting vote. In the event of a deadlock, the articles provided for a method of arbitration. The directors, at the material time, were four in number, S. J. Silvert, S. J. B. Lancashire, W. F. Lewis, and A. H. Silvert. S. J. Silvert was the registered holder of all the B shares. None of the other directors was the registered holder of any A or B shares. The A shares were all the subject of a settlement made on June 27, 1940, by one Sydney Ross in favour of his infant son, David. By the settlement, National Provincial Bank, Ltd., was appointed custodian trustee within the meaning of the Public Trustee Act, 1906. The managing trustees were the two directors, Lancashire and Lewis, the settlor reserving to himself a power at any time to remove these persons or either of them and to appoint others or another instead. As previously stated, the sole beneficiary under the settlement was the infant, David Ross.

On these facts, it would not at first sight appear that the question presented to the court should be one of great difficulty, nor would it have been so had it not been for the introduction under the settlement of the bank as custodian trustee. But two decisions of the House of Lords appear to provide a difficult problem of reconciliation. The cases are, first, *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (1) in 1942, and, secondly, *Inland Revenue Comrs. v. Bibby (J.) & Sons, Ltd.* (2) in 1945. When the *British American Tobacco Co.*'s case (1) was in the Court of Appeal, there was also heard with it a third case, *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.* (3). This last case did not proceed to the House of Lords, but, as in certain respects it has a close bearing on the facts of the present case, it will be necessary to refer to it later. The solution of the present question depends on the proper method of reconciling the *British American Tobacco* case (1) and the *Bibby* case (2), or, perhaps more accurately, on the correct appreciation of the scope of those decisions. If the office of custodian trustee had not been interposed and the A shares had, by the settlement of 1940, been vested, according to the more usual practice, in Messrs. Lancashire and Lewis as trustees in the ordinary course, it is not open to doubt that (without regard to any beneficial interests) the *Bibby* case (2) would have concluded the matter in favour of the Crown. If, again, a custodian trustee could be properly described as a bare trustee (in the sense in which that phrase was used by their Lordships in the *Bibby* case (2)) it would have been necessary to decide the precise point reserved in the *Bibby* case (2) for further consideration.

The rights and obligations of a custodian trustee are set out in the Public Trustee Act, 1906, s. 4 (2). It is sufficient to refer to the fact that, by para. (b) of that sub-section, any "power or discretion" is stated to "remain vested in the" managing trustees, but, by para. (d), the custodian trustee is not (like a bare trustee) bound to give effect, for example by voting, in all cases (not involving criminal liability) to the wishes or directions of the managing trustees. Thus, he is not so bound if the directed exercise involves a breach of trust. The distinction (between a custodian and bare trustee) is, for practical purposes, perhaps a fine one, but it is a real one. Indeed, it has not been seriously contended before us on the part of the Crown that the bank

in the present case can be properly regarded as a bare trustee in the sense intended by the House of Lords in the *Bibby* case (2), but one argument for the Crown did, in effect, invite us to hold that, in the relevant matter of voting power, the position of a custodian trustee *vis-a-vis* the managing trustees is so closely analogous to that of a bare trustee *vis-a-vis* his principal as to bring the case within the spirit, albeit not within the letter, of the exception made by LORD GREENE, M.R., and the reservation made by the House of Lords in the *Bibby* case (2).

It is convenient to turn at once to the *British American Tobacco* case (1) and the *Bibby* case (2). In the *British American Tobacco* case (1), the question before the court arose under para. 7 of sched. IV to the Act of 1937, which provides that in the case of a business carried on by a corporate body there shall, for the purposes of computing the tax, be included in its profits the profits of other corporate bodies (not themselves liable to be assessed to the tax) "in which the first-mentioned body corporate has a controlling interest . . ." The question was as to the inclusion in the profits of the British American Tobacco Co. of bodies corporate in which it held itself no interest but in which (admittedly) the controlling interest was held by other companies in which in turn the British American Tobacco Co. itself held (admittedly) a controlling interest. Though the precise problem differed from that in the present case, it equally involved the scope and meaning of the formula "controlling interest," and it has been agreed before us that the formula ought to be treated as having the same sense in all places where it is used in sched. IV to the Act of 1937 and where it is used in the relevant provisions of the Finance (No. 2) Act, 1939, which was the material Act in the *Bibby* case (2). In the *British American Tobacco* case (1), the House of Lords, affirming the decision of this court, held that the controlling interest was none the less in the British American Tobacco Co. because it was held, as it were, at a remove. VISCOUNT SIMON, L.C., with whom all the other noble Lords concurred, said ([1943] 1 All E.R. 15):

"I find it impossible to adopt the view that a person who, by having the requisite voting power in a company subject to his will and ordering, can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has, in fact, control of the company's affairs, is a person of whom it can be said that he has not in this connection got a controlling interest in the company."

In the *Bibby* case (2) the question was, as in the present case, whether the directors of the company held a controlling interest therein. The question arose in fact under s. 13 (9) of the Act of 1939, whereby, for the purpose of excess profits tax, the profits of the company increase or decrease by a statutory percentage in relation to the capital employed in the business, and in that case it was in the interest of the company to show that its directors did hold a controlling interest therein. The answer to the problem depended on whether there should be included as part of the "controlling interest" shares held by directors, not in their own right, but as trustees under a settlement of the ordinary kind. The House of Lords (again affirming the decision of this court) answered the question affirmatively. LORD GREENE, M.R., who had read the judgment of the Court of Appeal, indicated that the result would have been different had the trustees been bare trustees only, and that in such case the "controlling interest" would be in the beneficial owner. But the noble Lords in the House of Lords took so strongly the view that the question of control was to be determined by reference to the situation of the voting power under the company's regulations that they preferred rather to reserve than to affirm even the exception of a bare trustee. It is unnecessary to multiply citation. I take, therefore, two passages from the speech of LORD RUSSELL OF KILLOWEN and one from that of LORD SIMONDS. LORD RUSSELL said ([1945] 1 All E.R. 669):

"My Lords, I agree with the view of the Court of Appeal. When the

section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words 'controlling interest' is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding-up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from sub-s. (9) (a) and include it in (9) (b), is the voting power of its directors, not their beneficial interest in the company . . . As at present advised I agree with the Court of Appeal in the view that there is no half-way house between a construction which restricts the controlling interest to shares which are in the absolute beneficial ownership of the trustees and a construction which includes all shares of which the directors are registered holders. It is true that the Court of Appeal except the case of what they describe as a bare trustee, but express a view that the control would reside in the beneficial owner of the shares. The case envisaged is no doubt the case of the director who puts shares into the name of a nominee, taking probably a blank transfer executed by the nominee. I prefer to express no definite opinion in relation to this question, but to keep it as an open question to be debated when the necessity for a decision thereon in fact arises."

LORD SIMONDS said (*ibid.*, 673):

"My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be. It is for this reason that, while respectfully concurring in every other line of the judgment of LORD GREENE, M.R., I would reserve further consideration of that part of it which deals with the case of the so-called bare trustee. His case is not yet before your Lordships and perhaps never will be. If and when it is, the validity of the distinction made by LORD GREENE, M.R., will have to be considered and I should myself require a more satisfactory explanation than has yet been given of a term which, though it has statutory sanction, has never, I believe, received statutory definition."

Counsel for the company, pinning himself to the *Bibby* decision (2), says that (save for the possible case of a bare trustee) the matter is concluded by reference to the share register, subject only to this (and he claims so to "reconcile" the *British American Tobacco* case (1) and the *Bibby* case (2)), that where the registered shareholder is a body corporate, you may, at any rate for certain purposes, look beyond the register and seek the individuals who themselves control that body corporate. For the Crown, on the other hand, it is contended that the basis of the *Bibby* decision (2) is that trustees have the requisite "controlling interest" because theirs is the power and discretion to vote, theirs the will and ordering of the votes, without regard to the beneficial interest on whose behalf it is their duty to exercise their powers, and that the decision in *British American Tobacco Co., Ltd. v. Inland Revenue Comrs.* (1), when applied to the case of a trust holding, merely adds the rider that the result is the same though the trustees who have the power and discretion exercise it at one remove, for example (as here), through the instrumentality of a custodian trustee.

Counsel for the Crown point out with force that a trust with custodian and

managing trustees is in a class by itself, since it involves a statutory severance, with no counterpart elsewhere, of the functions normally combined in the office of trustee, so that the legal right to the trust property, including the legal right to exercise voting power in respect of shares subject to the trust, is vested in the custodian, whereas all powers of management, including the direction of any exercise of such voting power, are reserved to the managing trustees. Thus, it is argued, the power of voting which, *vis-a-vis* the company, the custodian trustee, as registered holder of the shares, alone can exercise, is, in truth and by force of the Act, the power of the managing trustees exercisable through him. They say, further, that the general principle is not qualified by the fact that in certain limited circumstances the custodian trustee would not conform to the directions given by the managing trustees, since it is not legitimate to test the matter save by assuming that the latter act properly in the exercise of their powers, and they say finally that any other view involves a denial of common sense. If (as LORD SIMONDS said) the line must be drawn, then let it be so drawn that all cases which should, by ordinary, reasonable standards, be found on one side of it or the other are in fact found to be there.

We confess that we feel strongly, as did ROMER, J., the weight of the argument based on common sense, and where the registered shareholder is a bare trustee, in the sense of being a mere name or "dummy" for the true owner, we should feel strongly inclined to answer the question reserved by the House in the *Bibby* case (2) in the same way as LORD GREENE, M.R. In the present case, however—perhaps fortunately—the answer would not, on an appeal to common sense, appear so clearly. It does not, of course, follow that because the settlor under the settlement of 1940 could remove Messrs. Lancashire and Lewis at will that the latter can, therefore, be regarded as mere nominees, for voting purposes, of the settlor. Still, when regard is had to all the circumstances, including the position of the bank as custodian trustee, the answer that the controlling interest in the company lies with its directors is not, we think, entirely obvious, and, at all events, it seems true to say that departure from the test of registered title involves embarking on an inquiry of the very kind which, on the grounds of difficulty and uncertainty, their Lordships in the *Bibby* case (2) declined to pursue. But, however that may be, the language of the speeches in the *Bibby* case (2) is, in our opinion, too strong for the Crown's argument.

In our judgment, the *ratio decidendi* in *Bibby's* case (2) is that, in accordance with well-established principles relating to limited companies, a question of the rights of members *vis-a-vis* the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save, possibly, in the case of mere "nominee" shareholders) permissible to look, and not that, in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise. Thus, if (because the shares were registered in the names of "nominees" or "bare trustees" or otherwise) it were in any circumstances permissible to look beyond the share register, we do not think the speeches in the *Bibby* case (2) would prevent inquiry being made whether those individuals to whom the nominee shareholders were answerable were themselves obliged by contract or otherwise to give directions in accordance with instructions received from some third party. In the present case, the National Provincial Bank is the registered holder of all the A shares, and is not merely a nominee or bare trustee. It follows, therefore, in our view, from the *Bibby* case (2), that the controlling interest in the shares must, for the purposes of the present case, be treated as being in the bank, and that it is not permissible to investigate the character in which the bank exercises its voting

rights as shareholder by reference to the terms of the settlement of 1940 or of the Public Trustee Act, 1906, s. 4, or otherwise.

It is, no doubt, true to say that their Lordships in the *Bibby* case (2) had not before them the special case of a trust with custodian and managing trustees, but we see no distinction in principle between that case and the case (say) of an ordinary settlement of shares containing a stipulation that the trustees
A (as registered holders of the settled shares) should at all times vote in accordance with the directions of the tenant for life. A stipulation of that kind clearly falls to be disregarded under the *Bibby* decision (2), and the statutory control accorded to the managing trustees over their custodian trustee is equally *res inter alios* so far as the company is concerned.

In our opinion, this result involves no conflict with the *British American Tobacco* case (1). Although (as already stated) the formula "controlling interest" ought to be treated as being used in the same sense in the Acts of 1937 and 1939, namely, in the ordinary sense of the English language, yet (as observed by ROMER, J.) the questions posed in the *British American Tobacco* case (1) and in the *Bibby* case (2) were different. In neither case was the question the general one: "Who controls the company?" In the *British American Tobacco* case (1)
B the question was whether (in the ordinary and proper sense of the words) company A held a controlling interest in company C, though the control was exercised, not directly but indirectly through the agency of company B. If the question were raised under some other taxing provision: "Has company B a controlling interest in company C?" an affirmative answer to that question might be given consistently with the affirmative answer to the first question
D in the *British American Tobacco* case (1). So, in the *Bibby* case (2) and in the present case, the question: "Have the directors a controlling interest in the company?" falls to be answered, aye or no, without regard to the possible question (if asked) whether some other person or body has (indirectly) a controlling interest in the same company. Agreeing, therefore, with ROMER, J., that the questions in the two cases are different, we disagree with the learned
E judge in that, in our view, the question in the present case is essentially the same as that in the *Bibby* case (2) and that the answer to the question is to be found, accordingly, by reference to the *Bibby* case (2) rather than to the *British American Tobacco* case (1).

We referred earlier in this judgment to *Inland Revenue Comrs. v. Clark (F. A.) & Son, Ltd.* (3). Although *Clark's* case (3) was heard and decided in the Court of Appeal with the *British American Tobacco* case (1), the question to be determined was (as in the present case) whether the directors of the company held a controlling interest therein within the meaning of para. 11 of sched. IV to the Act of 1937, and not (as in the *British American Tobacco* case (1)) whether, under para. 7 of the same schedule, a body corporate held a controlling interest in another body corporate not itself subject to the tax imposed by the Act. The facts were that certain shares which were at all material times registered in the names of two directors of the company had been held in fact on trust for one of the directors for life and subject thereto for the other of them absolutely. The two directors had then sold their respective interests in the shares to another company (the Phoenix company) so that the Phoenix company became absolutely entitled to the shares. The two directors between
G them held (admittedly) a controlling interest in the Phoenix company. As part of the sale agreement, the two directors undertook to execute such transfers of the shares as the Phoenix company might require so as to vest in the Phoenix company the legal estate in the shares. But the shares in fact (as already stated) remained, at all material times, registered in the names of the two directors, who may, accordingly, be said to have been bare trustees thereof for the Phoenix company. The Clark company sought to maintain (as do Silverts, Ltd., in the
H present case) that the directors did not have a controlling interest in the com-

pany, and the argument for the company rested on the assertion that, in the circumstances of the case, the control was in the Phoenix company and that no regard should be paid to the fact that the Phoenix company was itself controlled by the two directors. This court rejected that argument, holding (as in the *British American Tobacco* case (1)) that the control in fact lay with the directors. According to the judgment of SCOTT, L.J. ([1941] 2 All E.R. 655) the phrase "controlling interest"

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"... contemplates such a relationship as brings about a control in fact, by whatever machinery or means that result is effected."

But the Phoenix company was not on the register. The directors were. No point appears to have been made in the argument of that essential fact. Had the point been made, the result would, indeed, have been, in our judgment, the same. In the circumstances, the case can bring no comfort or support to either side in the present case.

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In the result, and for the reasons which we have attempted to state, we think the appeal should be allowed. We add that our attention was also drawn to the case in Scotland of *Shields (John) & Co. (Perth), Ltd. v. Inland Revenue Comrs.* (4), the report of which has been published since this matter was before ROMER, J. In that case, the question was (as in the *Bibby* case (2)) whether the directors had a controlling interest in the company for the purposes of s. 13 of the Act of 1939. More than half the share capital of the company was registered in the names of certain persons, being trustees of the will of the former governing director. The right of voting was in the trustee first on the register who was not a director. In accordance with their powers under the articles of association of the company, the trustees appointed one of themselves, Farquharson, to be governing director, and he was in a position accordingly to arrange at any time for his own name to appear first on the register in respect of the shareholding. He had not, however, in fact exercised that power. The Court of Session held that, in the circumstances, the directors of the company had not a controlling interest therein. In our judgment, the decision of the Scottish court is in accordance with the interpretation we give to the two House of Lords cases, and should, therefore, be followed.

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Appeal allowed with costs.

Solicitors: *Clifford-Turner & Co.* (for the company); *Solicitor of Inland Revenue.*

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

F

CRESSWELL v. HODGSON.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.JJ.), February 12, 1951.]

Rent Restriction—Possession—Reasonableness—Discretion of judge—Matters for consideration—Interests of parties concerned—Public policy—Landlord's only motive financial gain—Landlord offering, as "suitable alternative accommodation," new house at higher rent, so as to sell old house at greater profit—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (c. 32), s. 3 (1).

H

A landlord, who sought possession of a dwelling-house which was subject to the Rent Restrictions Acts, offered to the tenant another house as "suitable alternative accommodation," within s. 3 (1) (b) of the Rent and

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A Mortgage Interest Restrictions (Amendment) Act, 1933. This other house, which also belonged to the landlord, was built by him under certain restrictions whereby the amount for which it could be sold was fixed by the local authority. The house occupied by the tenant could be sold at a higher price, and the landlord wished to sell it and realise its value. The tenant was paying 13s. 6d. a week, plus rates, for the house which he occupied, and the rent of the house which was offered to him would be 35s. a week inclusive of rates. In deciding that it was not "reasonable" in the circumstances of the case to make an order for possession, the county court judge took into consideration (a) that the landlord's only motive was pecuniary gain, while the tenant would suffer financial loss, (b) that it was a border-line case in regard to suitable alternative accommodation, and (c) that it would be contrary to public policy to permit a landlord, who was allowed to build a new house subject to restrictions in respect of the price for which it could be sold, to turn a tenant out of his present house by offering him the new house at a higher rent and then to sell the old house at a price greater than that which he was allowed to charge for the new house. On an appeal by the landlord on the ground that the learned judge had misdirected himself in law by taking into account matters which he should not have considered:

D HELD: in determining whether it was "reasonable" to make an order, within s. 3 (1) of the Act of 1933, the learned county court judge was entitled to consider all the circumstances and to exercise his discretion having regard to the interests of both parties concerned and to the interests of the public, and, on the facts of the case, he was not shown to have misdirected himself.

[FOR THE RENT AND MORTGAGE INTEREST RESTRICTIONS (AMENDMENT) ACT, 1933, s. 3, see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1048.]

E APPEAL by the landlord from an order of His Honour JUDGE BATT, made at Stockport County Court, and dated Dec. 19, 1950, whereby he dismissed the landlord's application for possession of a dwelling-house which was subject to the Rent Restrictions Acts.

F The learned judge was satisfied that suitable alternative accommodation was available for the tenant, within s. 3 (1) (b) of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, but he held that, in all the circumstances of the case, having regard to the interests of the parties concerned and the interests of the public, it would not be reasonable to make an order for possession. The landlord contended that the learned judge had misdirected himself in law, having taken into account matters which he should not have considered. The facts appear in the judgment of SOMERVELL, L.J.

Mais for the landlord.

G B. H. Gerrard for the tenant.

H SOMERVELL, L.J.: This is an appeal from a judgment of his Honour JUDGE BATT in which the landlord has undertaken the difficult task of asking this court to interfere with the learned judge's decision on the question whether it was reasonable to make an order against the tenant for possession of a dwelling-house which was subject to the Rent Restrictions Acts. The landlord seeks possession under the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1) (b). Section 3 (1) of the Act provides:

"No order or judgment for the recovery of possession of any dwelling-house to which the principal Acts apply or for the ejectment of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment, and . . . (b) the court is satisfied that suitable alternative accommodation is available for the

tenant or will be available for him when the order or judgment takes effect."

The landlord, who is a builder, had built another house under regulations which restricted the maximum amount for which it could be let to 29s. per week, and also the amount for which he could sell it. He offered that house to the tenant as "suitable alternative accommodation" within s. 3 (1) (b) of the Act of 1933. The rent which the tenant is paying in his present house is 13s. 6d., and he pays the rates. He is a policeman, and he gets a rent allowance up to 30s. per week. The rent of the new house is 29s. a week exclusive of rates, and at the present moment (the learned judge says) it would amount to about 35s. per week inclusive of rates. The learned judge referred to the possibility that the tenant may not always remain a policeman.

The first question was whether the accommodation was reasonably suitable within s. 3 (3) of the Act of 1933, which provides that "... accommodation shall be deemed to be suitable if it consists ..." of premises subject to the Rent Restrictions Acts, and

"... is ... (ii) otherwise reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character."

The learned judge, after finding that the other conditions set out in s. 3 (3) were satisfied, said that he felt considerable doubt whether, having regard to the very substantial increase on what the tenant was paying at present, he ought to come to the conclusion that the rent was reasonably suitable to the means of the tenant. However, he decided by a narrow margin that it was, and said:

"I am not prepared to put it on the side of the margin which would hold a rent of 35s. necessarily unsuitable to the means of a man earning £8 15s."

That decision was conclusive on the point.

Having decided the question of suitable alternative accommodation, the learned judge then went on to consider the question of reasonableness, and held that, having regard to all the circumstances of the case, it would not be reasonable to make the order. Counsel for the landlord submits that the learned judge took into account circumstances which, as a matter of law, he ought not to have taken into account, mainly, that the landlord would get considerable pecuniary gain. That matter arises in this way. The landlord wanted capital to pay off a bank overdraft. If he sold the house which he had just built, he could obtain only the controlled price, whereas, if he could get vacant possession of the house in which the tenant is living, he would be able to sell it for a larger sum. The learned judge refers to the fact that the landlord's only motive is pecuniary gain. The tenant, on the other hand, would have the cost of the removal and the increased rent to pay. On the matter of pecuniary gain—though I do not think he relied on it as being essential to his conclusion—the learned judge pointed out that, if he was entitled to take a wider view, the general purpose of the restriction on prices which could be got for new houses might be defeated if people were able to build a new house, get a tenant out of an old house into it, and then sell the old house at an unrestricted price. The other matter of which counsel for the landlord complains is that, in considering reasonableness, the learned judge took into account the fact that he regarded it as a border-line case so far as the means of the tenant were concerned.

I think that when the legislature gave this overriding discretion to the county court judge to consider whether it is "reasonable to make ... an order," it gave to the court a very wide discretion which it is most undesirable to seek to limit or interfere with. I think the words themselves indicate that the county

court judge must look at the effect which the order would have on each party to it. I do not see how one can consider whether it is reasonable to make an order unless one considers the effect on landlord and tenant, (a) if one makes it, and (b) if one does not. I do not think that we should say anything which restricts the circumstances which the county court judge should take into consideration. I think he is entitled to take into consideration that this is a case where the landlord is making a pecuniary gain. In some cases that might be a fact in the landlord's favour, and it might be thought reasonable that he should be given the chance of making pecuniary gain. During the argument I referred to another possible case, *viz.*, where the landlord's motive is not pecuniary gain for himself, but the desire to accommodate a third person who applies to him for a house, who is less well off than the tenant and whose means are more suitable for the house occupied by the tenant than for the alternative accommodation which is being offered to the tenant. Those are examples of the circumstances which the county court judge has to take into account. I do not think that this is a matter of law. It would not be right to say that he should exclude from his mind the fact that, in his view, it is a border-line case in regard to the question of suitable alternative accommodation, nor do I think that he is compelled by the Act to decide the matter in watertight compartments. I think that he can take all the circumstances together and exercise his discretion in the light of the whole of those circumstances. I can find nothing in this case which leads me to the conclusion that the learned judge considered matters which, as a matter of law, he ought not to consider. He may have given to some matters more weight than we should give, or more weight than another county court judge would give, but that is not the question here. The question here is whether he has so plainly gone wrong in law that this court should interfere, presumably by way of ordering a new trial. I do not think that the learned judge misdirected himself, and, in my opinion, the appeal should be dismissed.

SINGLETON, L.J.: I agree that the appeal should be dismissed. The learned judge had to consider the full effect of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, and two points arose, of which the first was whether suitable alternative accommodation, within s. 3 (1) (b) and s. 3 (3) of the Act, was available for the tenant. On that point the learned judge, after considerable hesitation, was satisfied that the landlord had shown that there was suitable alternative accommodation—suitable as to its position, extent, and rent. The other point was that under s. 3 (1) of the Act it was not open to the judge to make an order for possession unless he considered it “reasonable to make such an order or give such a judgment”. When there is an appeal to this court on that question, it has been said time and again, that it is really a question of fact, and, unless the appellant can show that the learned judge has misdirected himself in some measure, this court cannot interfere, for the decision on that question is for the county court judge. It is for him to consider whether he thinks it reasonable to make an order. Counsel for the landlord, recognising that, sought to convince this court that the learned judge had considered matters which he ought not to have considered. He directed attention to the fact that the learned judge considered that, if an order for possession was made, it would be all loss for the tenant and all gain for the landlord. Those considerations, counsel for the landlord submitted, were not proper considerations for the learned county court judge. Thereupon I thought it proper to ask counsel for the landlord what matters the learned judge could consider, and he answered that he could consider all questions which affected the tenant, financially or otherwise, why the landlord required the accommodation, and also the state of health of both parties. In other words, counsel for the landlord admitted that the county court judge must consider the position on both sides, *i.e.*, the position of the landlord and that of the

tenant. It seems to me that, if a county court judge found in a case of this kind that the landlord was in dire financial straits—and landlords sometimes are—whereas the tenant was well-to-do, that would be a matter which the county court judge could consider. Equally, if he found that the tenant would be put into grave difficulty by the making of the order whereas the landlord would not be in any difficulty because he had more means, again I think that is a matter for consideration. In this particular case the tenant was a police officer with a wage of £7 5s. and a rent allowance of up to 30s. a week. The learned county court judge was told that the rent of the house which was offered as alternative accommodation was 29s. a week plus rates. From that point of view, the tenant, having a rent allowance, was in a much better position than most tenants are, but it may well be that many persons might not have come to the conclusion at which the learned county court judge arrived. The reasons which he gave have been fully examined by counsel for the landlord in this court, but I cannot see that the learned county court judge erred in principle or that there is any mistake of law. It is solely a question of fact for his decision, and, though he or someone else might have arrived at another decision, I think it is impossible for this court to say that he was wrong, and that is why I agree that the appeal should be dismissed.

DENNING, L.J.: The Rent Restrictions Acts put a restraint on the exercise by a landlord of his common law right to possession. The restraint is not to be removed unless the county court judge thinks it reasonable. That means, I think, reasonable having regard to the interests of the parties concerned and also reasonable having regard to the interests of the public. In this case the learned judge found that it was not reasonable having regard to the interests of the parties. He also said that, in his view, it was not reasonable having regard to the interests of the public. He pointed out that it would be undesirable that a builder, who was privileged to build a new dwelling-house, should be allowed, for his own private profit, to turn a tenant out of his present house by offering him the new house at a higher rent. I think that the judge was entitled to take that into account, and I agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Coppock, Helm, Walmsley, Rhodes & Hyde*, Stockport (for the landlord); *Dangerfield, Blythe & Co.*, agents for *Bell, Hough & Hamnett*, Stockport (for the tenant).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

MONKLAND v. JACK BARCLAY, LTD.

[COURT OF APPEAL (Asquith and Birkett, L.JJ., and Danckwerts, J.), January 29, 30, 31, February 20, 1951.]

Sale of Goods—Non-delivery—Dealer to use his "best endeavours to secure delivery" within reasonable time or by specified date—Conditions in regard to sale by dealer imposed by manufacturer after date of contract between dealer and customer—Customer required to enter into covenant against re-sale—Refusal by customer to enter into covenant—Refusal by manufacturer to deliver car to dealer for appropriation to customer—Liability of dealer.

The defendants were retailers of Bentley motor cars under an agreement with the manufacturers, dated May 16, 1946, and renewed from year to year. The agreement provided *inter alia* (a) that the defendants were to sell a specified number of Bentley cars during the currency of the agreement, that they would notify the manufacturers in writing when they

required one of the cars, and that, on receipt of advice from the manufacturers that the car was ready for delivery, the property in the car should be deemed to have passed to the defendants; (b) that the defendants should be members of the British Motor Trade Association and observe the rules of the association from time to time in force; (c) that, if the defendants committed a breach of any of the terms of the agreement or acted so as to cause or suffer their name to appear on the stop list of the Motor Trade Association, it would be lawful for the manufacturers to determine the agreement; and (d) that, if before the delivery of any new Bentley car the manufacturers should have reason to believe that the defendants had violated or proposed to violate any of the terms of the agreement, it should be lawful for the manufacturers to cancel the sale of the car.

A On May 22, 1946, the plaintiff entered into an agreement with the defendants for the purchase of a new Bentley car. It was a term of the agreement that: "The sellers will use their best endeavours to secure delivery of the goods on the estimated delivery dates from time to time furnished, but they do not guarantee time of delivery, nor shall they be liable for any damages or claim of any kind in respect of delay in delivery." No estimated delivery dates were written in the space reserved for them in the order form constituting the contract, but in a letter, dated June 3, 1947, in answer to an inquiry by the plaintiff, the managing director of the defendants gave "September/October, 1947," as the date on which the plaintiff might expect delivery. During the war and until the end of 1945, no new motor car could be sold without a government permit. In August, 1946, to meet the difficulties caused by the shortage of new cars and to curb speculative buying owing to the lapse of the permit regulations, the British Motor Trade Association made a rule that on the sale of a new car its members should obtain from the customer a covenant not to re-sell within six (later amended to twelve) months of the purchase. In March, 1947, the manufacturers of Bentley cars decided to adopt the association's scheme, and on Mar. 14 they wrote to the defendants informing them that the supply of a new Bentley car would be conditional on the retail purchaser executing a covenant relating to re-sale. By a letter, dated Mar. 28, they conveyed the same information to the plaintiff, whose name had been supplied to them by the defendants as a customer who had ordered a new Bentley car.

B The plaintiff refused to execute the covenant on the ground that it was not part of his original agreement, and, in spite of repeated efforts by the defendants to persuade him to change his mind, he refused to do so. The manufacturers persisted in their decision to enforce signature of the covenant from a purchaser and the defendants continued to inform the plaintiff of their inability to procure delivery of the car unless he signed the covenant. In January, 1948, a Bentley car of the kind ordered by the plaintiff was delivered to the defendants by the manufacturers with a direction that it should be allocated to a customer, B., whose order had been placed with the defendants immediately after that of the plaintiff.

C On Mar. 12, 1948, the plaintiff commenced an action against the defendants for breach of contract. The defendants contended (a) that, in the events which had happened, the terms of the contract absolved them from liability, and, alternatively, (b) that the contract was void as being contrary to public policy.

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HELD: (i) the obligation of the defendants under their contract with the plaintiff was to use their best endeavours to secure delivery of the motor car from the manufacturers so that they themselves might make delivery to the plaintiff; to fulfil their obligation, conduct tainted with fraud towards the manufacturers was not required of them, nor were they required to violate their agreement with the manufacturers or with the Motor Trade Association; as the manufacturers refused to supply the

defendants with a car for the plaintiff unless he signed the covenant and the plaintiff persisted in his refusal to sign in spite of the defendants' efforts to persuade him to do so, the defendants had used their best endeavours to secure delivery in a reasonable time or by October, 1947, whichever was the actual obligation resting on them, and, therefore, they had committed no breach of their contract with the plaintiff.

(ii) the omission from the contract between the plaintiff and the defendants of a condition by the plaintiff that he should covenant not to re-sell within the specified time did not render the contract void as being contrary to public policy, the fact that the covenant scheme was approved by the government being relevant merely to the question of the political policy of a particular government, which was to be distinguished from public policy.

Observations of LORD TRURO in Egerton v. Brownlow (Earl) (1853) (4 H.L. Cas. 196), applied.

Decision of HUMPHREYS, J. ([1950] 2 All E.R. 715), reversed.

[AS TO NON-PERFORMANCE OF CONTRACT OWING TO CONDUCT OF PROMISEE, see HALSBURY, Hailsham Edn., Vol. 7, p. 220, para. 298; and FOR CASES, see DIGEST, Replacement Volume 12, pp. 422, 423, Nos. 3257-3267.]

Cases referred to:

- (1) *Hills v. Sughrue*, (1846), 15 M. & W. 253; 153 E.R. 844; *sub nom. Mills v. Seybourne*, 6 L.T.O.S. 414; 12 Digest, Replacement, 431, 3311.
- (2) *Hick v. Raymond and Reid*, [1893] A.C. 22; 62 L.J.Q.B. 98; 68 L.T. 175; 12 Digest, Replacement, 344, 2672.
- (3) *Hartwells of Oxford, Ltd. v. British Motor Trade Association*, [1950] 2 All E.R. 705; [1951] 1 Ch. 50.
- (4) *Fender v. Mildmay*, [1937] 3 All E.R. 402; 106 L.J.K.B. 641; 157 L.T. 340; *sub nom. Fender v. St. John-Mildmay*, [1938] A.C. 1; Digest Supp.
- (5) *Egerton v. Brownlow (Earl)*, (1853), 4 H.L. Cas. 1; 8 State Tr. N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 10 E.R. 359; 12 Digest 240, 1971.

APPEAL by the defendants, motor car dealers, from an order of HUMPHREYS, J., dated June 30, 1950, and a note of which appears in [1950] 2 All E.R. 715, whereby the learned judge awarded to the plaintiff damages for breach of contract in respect of the sale of a motor car.

In May, 1946, the defendants had agreed to sell a new Bentley motor car to the plaintiff and to "use their best endeavours to secure delivery" thereof on the estimated delivery dates, but they were not to be liable for any damages or claim of any kind in respect of delay in delivery. The contract contained no estimated delivery dates. In March, 1947, the manufacturers of Bentley motor cars decided to adopt the British Motor Trade Association's scheme that on the sale of a new motor car the retail purchaser should enter into a covenant against re-sale within a certain time. The plaintiff refused to sign the covenant and the manufacturers refused to supply the defendants with a Bentley motor car for sale to the plaintiff unless he executed the covenant. On Mar. 12, 1948, the plaintiff issued his writ in the action. The defendants contended (a) that, having regard to the circumstances, a reasonable time for delivery had not elapsed, and (b) that it would be against public policy to supply the plaintiff with a car without obtaining the covenant from him. The learned judge gave judgment for the plaintiff on both points. The defendants appealed and their main contention before the Court of Appeal was that the terms of their contract with the plaintiff absolved them from liability in the events which had happened.

Pritt, K.C., and *Aldous* for the defendants.

E. R. Richardson for the plaintiff.

Cur. adv. vult.

Feb. 20. ASQUITH, L.J., read the following judgment of the court. This is an appeal by the defendants against a judgment of HUMPHREYS, J., awarding to the plaintiff £1,500 damages for breach of contract in respect of the sale of a motor car. It is said to be a test case to which the motor trade attach much importance. It is, therefore, perhaps right to make some reference to the background against which it arises.

- A During the war and until the end of 1945 the sale of motor cars—of new cars, at least—was controlled by government regulation. No new car could be sold without a permit. These administrative provisions were allowed to lapse at the end of 1945. There was a scramble for new cars, the demand for which vastly exceeded the supply, and in this scramble there joined speculators who desired cars not for their personal use but for quick re-sale at a profit. This
- B was thought undesirable by the British Motor Trade Association, of which all dealers in this country and all manufacturers, except Rolls Royce, Ltd., and Bentleys, Ltd., were members. Accordingly, in the middle of August, 1946, the association promulgated a scheme imposing on its members a requirement that they should exact from any customer seeking to buy a new car a written and signed covenant whereby he undertook not to re-sell within a certain period
- C after his purchase. This period was at first six months, and was later extended to twelve months, at which it stood at the material time in this case. Rolls Royce, Ltd., and Bentleys, Ltd., who may be treated as a single concern for the purposes of this case, did not, when the covenant scheme was launched by the association in August, 1946, immediately adhere to it. They thought they could curb speculative buying by other means. But by March, 1947, they
- D had changed their minds and their policy. By a circular letter of Mar. 14 Rolls Royce informed all their retailers that the latter must exact signature of the covenant from customers who had placed orders for any Rolls Royce or Bentley cars not yet delivered by Mar. 15, and by a letter of Mar. 28 they conveyed the same information direct to each customer from whom their retailers had received an order for a new car. These customers included the
- E plaintiff. Thus, we may distinguish for the present purpose three periods: (i) the war period, ending Jan. 1, 1946, during which sales were subject to government permit; (ii) the so-called *interregnum*, between Jan 1, 1946, and Aug. 15, 1946, when the association launched its scheme—a period during which no controls existed: in the case of Rolls Royce and Bentleys this period endured till March, 1947; and (iii) the period March, 1947, onwards, as from
- F which Rolls Royce and Bentleys, who had stood out of this scheme, fell into line with it.

The plaintiff is an underwriting member of Lloyds. He himself does not drive a car, being unable, through an injured leg, to do so. The defendants are retailers, *inter alia*, of Rolls Royce and Bentley cars, under a written agreement of May 16, 1946, renewed from time to time. The managing director of

G the defendant company, Mr. Jack Barclay, was, from at least 1944, a personal friend of the plaintiff. As far back as 1944 Mr. Jack Barclay had suggested to the plaintiff that, if and when the government permit system was relaxed, he should buy from the defendants two cars, a new Rolls Royce "Silver Wraith" and a new 4½ litre Bentley Mark VI, which he could (said Mr. Barclay) almost certainly re-sell at a profit. Mr. Barclay even said that he would re-purchase

H the cars himself if necessary. This project took shape and matured in a contract in the period which has been called the *interregnum*. With the Rolls Royce car we are not directly concerned. It is enough at this stage to say of it that, after a long wrangle whether the plaintiff should be required as a condition of its delivery to sign the covenant, in the end, in February, 1948, as the result of legal advice, it was delivered to him without that requirement being enforced.

It is with the Bentley car that we are directly concerned. Its history was different. It is common ground that, on May 22, 1946, the plaintiff agreed to

buy and the defendants to sell to him a 4½ litre Bentley Mark VI, that the contract was a written one, and that its terms are contained in an order form. While the existence of the contract is admitted, its terms and construction are in dispute. Nevertheless, it is clear that from end to end it contained no vestige of a term that the plaintiff should, as a condition of obtaining delivery, sign the so-called covenant or give any similar undertaking. However, when in March, 1947, Rolls Royce and Bentleys came into the covenant scheme, they conveyed very clearly, by the letters which I have mentioned, to the plaintiff that he must sign the covenant and to the defendants that they must exact his signature, failing which the defendants would not be supplied with the car by Bentleys and, accordingly, the plaintiff would not be supplied with the car by the defendants. The plaintiff did not acknowledge Rolls Royce's letter of Mar. 28, 1946, but took up the matter with Mr. Jack Barclay at some time after receiving this intimation. It is a reasonable inference that he took the point promptly. He refused to sign the covenant and pointed out, with perfect truth, that his contract was with the defendants alone and contained no stipulation that he should do anything of the kind. Mr. Barclay continued to urge him to sign it and the defendants made it clear to him, on paper, that he would be well advised to do so, and, in conversation, that, if he did not, he would get no car. The following passage from the evidence of the plaintiff, which on this point is uncontradicted, Mr. Barclay not having been called, is significant. The plaintiff, having referred to the Rolls Royce letter of Mar. 28, 1947, which had insisted on signature of the covenant by him, said he did not answer that letter. There then follows this:

"Q.—Did you go and see anyone about it? A.—Every time the question of the covenant cropped up I always told Jack Barclay it was not part of our contract and I was not going to sign it.

Q.—Did he say anything about whether you would have to sign it before you got your motor car? A.—Yes. He told me I should never get it if I did not."

So far as the Bentley is concerned, the plaintiff having persisted in his refusal to sign the covenant, Bentleys persisted in their refusal to deliver unless and until the covenant was signed, and the defendants continued to affirm their inability, failing its signature, to procure delivery of the car. This went on till the writ was issued on May 12, 1948. (We state these facts dogmatically at this stage, and will justify our statement later).

The question is whether, in these circumstances, the defendants have broken or repudiated their contract. Before we come, as we will in a minute, to its terms, we would venture on three general propositions which seem to us elementary, without being irrelevant. (i) Suppose A. has contracted to sell to B. unascertained goods by description, e.g., a Bentley Mark VI (not this Bentley Mark VI), and suppose, further, that the seller expects to acquire the goods from a particular source, which may, indeed, be the only source available, the bare fact, without more, that when the time for delivery comes that source has dried up and that the seller cannot draw on it does not absolve the seller. He is still, in the absence of some contractual term excusing him, liable for non-delivery: see, for instance, *Hills v. Sughrue* (1). (ii) It is equally clear that, when A. sells subject to two conditions only, *x* and *y*, he cannot, after the contract has been entered into, refuse performance unless and until an additional unstipulated condition, *z*, is fulfilled. If he so refuses, he is guilty of a wrongful repudiation. (iii) Nor, again, is a seller, A., absolved from delivering goods under a contract with B. merely because to perform that contract would involve a breach by the seller of another contract between him and C.—for instance, in this case a contract between the defendants and the Motor Trade Association.

At first sight, if these propositions are sound, the defendants would appear,

on the facts we have recited, to have been guilty of a breach or a repudiation of their contract. The argument relied on by the defendants as repelling this conclusion can be ranged under two general heads: (a) they say that the terms of this particular contract, as to delay in delivery in particular, absolve them from liability in the events which happened; (b) alternatively, they say that, if the terms of the contract did not entitle them to act as they did, the contract was contrary to public policy and void. Under head (a) we have to ascertain, first, what were the precise obligations as to delivery imposed by the contract on the sellers, and, secondly, whether its obligations were discharged.

First, as to the nature of the obligation, if the contract had embodied an absolute obligation to deliver by a particular date, then the defendants would be liable if for any or no reason they exceeded the time limit. In the present case, however, there is no such absolute obligation. The order form embodying the terms of the contract has indorsed on it a number of conditions, of which condition 2, dealing with time for or delay in delivery, provides as follows:

"The sellers will use their best endeavours to secure delivery of the goods on the estimated delivery dates from time to time furnished, but they do not guarantee time of delivery, nor shall they be liable for any damages or claim of any kind in respect of delay in delivery."

Now it is no longer argued, as it seems to have been below, that this clause entitled the sellers for any or no reason to withhold delivery indefinitely. It obviously binds the sellers to do something—in fact, to use their best endeavours to secure delivery—to secure delivery presumably from the manufacturers, so that they themselves may make delivery to the customer. To secure delivery by the manufacturers when? "On the estimated delivery dates from time to time furnished."

The first way the argument is put by the defendants is that there were no estimated delivery dates. The heading "Estimated date of delivery (subject to condition 2)" appears on the front of the order form, but was left blank, and it is argued that that blank was never filled in by estimated dates furnished later. Hence, the sellers are merely bound to use their best endeavours to secure delivery "within a reasonable time." If so, a reasonable time means a time reasonable in all the circumstances. It may be extended beyond its normal span by special circumstances, and these may include circumstances which did not exist at the time of the contract but which supervene later, hampering performance: see *Hick v. Raymond and Reid* (2). Just such a circumstance, so the argument runs, in the present case was Rolls Royce's and Bentley's belated adhesion, in March, 1947, to the covenant scheme, coupled with their persistence in this adhesion, and their refusal to supply cars ordered by persons who declined to sign the covenant—a refusal persisted in until, and, indeed, until long after, the issue of the writ on May 12, 1948. Hence, by the date of the writ the reasonable time for delivery had not expired and the defendants—the sellers—were not in default. This line of reasoning succeeded in *Hartwells of Oxford, Ltd. v. British Motor Trade Association* (3), a decision of this court. However, the term as to time of delivery was in that case worded a little differently from that now involved. It read as follows: "The seller will use his best endeavours to secure delivery of the goods"—so far the clauses are the same—"on the date agreed, but he shall not be liable for any damages, or claim of any kind, which may arise in case of delay." No date having ever in that case been agreed, SOMERVELL, L.J., said ([1950] 2 All E.R. 708) that the clause was inoperative and the obligation was, therefore, one for delivery within a reasonable time. We consider that he would probably, however, have accepted the gloss placed on these words by JENKINS, L.J., in the same case, to the effect that, strictly speaking, the obligation of the seller is to use his best endeavours to secure delivery—viz., delivery from the manufacturers—in a reasonable time. Such is one view of the obligation.

The other way in which the argument is put by the defendants is that a reasonable time does not come into the picture, since estimated delivery dates were in fact furnished in this case—not, indeed, in the space reserved for them in the order form constituting the contract, but later, by a letter of June 3, 1947, from Jack Barclay to the plaintiff. That letter, which is the defendants' answer to a letter from the plaintiff inquiring when he might expect delivery, begins:

"I have been in touch with Messrs. Rolls Royce today and they give me the following information, which is as up to date as can be: (i) Mark VI Bentley . . . September/October, 1947."

We doubt if this is a formal contractual document fulfilling the description in condition 2 of an "estimated date of delivery from time to time furnished." If we are wrong about this, the obligation on them was to use their best endeavours to secure delivery from the manufacturers by September or October, 1947.

In our view, it matters not which of these views of the nature of the obligation is right, because on either construction it was duly discharged. It is clear that Rolls Royce and Bentleys were determined as from March, 1947, to enforce signature of the covenant by those who had placed or should thereafter place orders for their cars. This is clear from their letters of Mar. 14 and Mar. 28. It is clear from the evidence quoted above that Jack Barclay, who was continuously in touch with the manufacturers, had sounded them and satisfied himself and told the plaintiff that the manufacturers were adamant on this point and that their position was "no covenant, no car." No endeavours used by the defendants, good, bad, indifferent or "best," could budge them from this position. For this reason the defendants go on inquiring from the plaintiff whether he will sign and pressing him to do so (*e.g.*, by a letter to the plaintiff of Nov. 14, 1947), and the manufacturers go on reminding the defendants of this requirement (*e.g.*, by letter also dated Nov. 14, 1947, the defendants' letter of that date being, no doubt, later than and written in consequence of the manufacturers' letter of that date). In a letter of Nov. 19, 1947, the plaintiff persists in his refusal, and by a letter of Dec. 4, 1947, the defendants renew their pressure. Although these letters are written in reference to the Rolls Royce car and although this car was, on legal advice, in the end delivered without signature of a covenant, they indicate sufficiently the attitude in which, in relation to the Bentley car, the parties persisted to the end. By letter of Mar. 8, 1948, the plaintiff threatens legal action in respect of the non-delivery of the Bentley. On Mar. 12, the defendants write to Bentleys forwarding the plaintiff's letter and repeating that he refuses to sign the covenant. On Apr. 30, 1948, Jack Barclay once more writes to the plaintiff:

"As you know the Bentley Company will not allocate a new car to any customer where there is reason to believe that the purchaser would be unwilling to sign the covenant before taking delivery. I think the best way out of the difficulty would be for you to sign the enclosed executory agreement, which means that you would be willing to sign the covenant on delivery of your new car."

The plaintiff remained obdurate and issued his writ on May 12, 1948.

In these circumstances it would seem that the defendants did use their best endeavours to secure delivery in a reasonable time or by September or October, 1947, whichever be the actual obligation resting on them. Counsel for the plaintiff argues the contrary, and bases his argument on four main grounds. The first is that the defendants did not "use their best endeavours" in that they could have exercised, but did not exercise, against Bentleys the contractual rights to delivery of cars vested in them by the so called "retailer agreement," an agreement of May 16, 1946, renewed from year to year. The

reference here is to cl. 9 of that agreement, which provides that the retailer (Jack Barclay, Ltd.) agrees to sell during the currency of the agreement a specified number of Bentley cars (in the first agreement, fifty) and continues:

"The retailer shall notify the company in writing whenever he requires one of the cars, whereupon the company will intimate to him the price."

Clause 22, so far as it is material, reads:

- A** "The purchase price of each chassis or car shall be paid at the office of the company in London prior to delivery, or in any event not later than seven days after the receipt by the retailer of advice that the chassis or the car is ready for delivery and requiring payment thereon."

Clause 23 starts:

- B** "On receipt of such advice given in accordance with the foregoing clause the property in any car or chassis shall be deemed to have passed to the retailer."

Clauses 34 and 44 are important. Clause 34 is:

- C** "The retailer shall forthwith become and continue to be throughout the currency of this agreement a member in good standing of the Motor Trade Association and shall faithfully observe all the objects, regulations, bye-laws and rules of the association as may from time to time be in force."

Pausing there, there is some uncertainty as to when precisely the rules of the association embodying the covenant scheme were published, but the enforcement of that scheme was proclaimed to be one of its objects on or about Aug. 15,

- D** 1946. Clause 44 says:

"If the retailer shall . . . (ii) commit or suffer any breach of any of the terms of this agreement on his part to be observed and performed . . . (vii) act so as to cause or suffer his name to appear on the stop list of the Motor Trade Association . . ."

- E** it is to be lawful, but not obligatory, on the company to determine the appointment of the retailer and of the contract as to all or any of the chassis or cars covered thereby. Clause 44 proceeds:

"On the termination under this clause of the contract for sale of any chassis the company shall cease to be under any obligation to deliver the same."

- F** To this may be added the following passage from cl. 20:

"If before delivery of any new Bentley chassis or car the company shall have reason to believe that the retailer . . . has violated or proposes to violate any of the terms of this contract . . . it shall be lawful for the company . . . to cancel the sale of such chassis or car, and it shall not be incumbent on them to disclose the source of their information."

- G** If, therefore, the defendants had tried to exercise, as it is said they should have, their rights to delivery of a car in favour of a customer of theirs who refused to sign the covenant, they would be violating cl. 34 of their contract with Bentleys, and Bentleys could have terminated that contract in whole or refused to deliver the particular car involved by virtue of cl. 44, and they could have done this, by virtue of cl. 20, even if they had merely had reason to think that the defendants contemplated any such violation. This first point taken by counsel for the plaintiff is, therefore, in our view, untenable.

- H** The second point is that a letter from Bentleys of Jan. 14, 1948, negatives the proposition that the defendants had used their best endeavours to secure delivery and shows, on the contrary, that they were at that time obstructing or retarding such delivery. The letter, so far as material, is as follows:

"With regard to G. E. Monkland, order reference B.2383 [that is the order

number of the Bentley car] we understand that as this gentleman is shortly taking delivery of a Rolls Royce model you do not wish him to have early delivery of the Bentley he has on order."

It is suggested that the letter is evidence of some inducement applied by someone on behalf of the defendants to someone in Bentleys to delay delivery to the plaintiff. Leaving aside the point that neither the writer nor anyone else was called to prove that inducement and that the letter is not *per se* evidence of any facts alleged in it, there must be some misunderstanding here on the part of the writer. It is quite true that a Rolls Royce was to be delivered to the plaintiff. It is not true that this was the reason why delivery to him of the Bentley was to be refused or delayed at anyone's instance. In our view, the letter records a muddled and distorted impression of the fact that the defendants had been telling Bentleys that the plaintiff would not sign the covenant and that, if and so long as he persisted in his refusal and Bentleys in their insistence, the plaintiff would have to go down to the bottom of the queue until one or other of them changed his mind. On this view only does the letter accord with the rest of the evidence: see, for instance, the defendants' letter to Bentleys of Mar. 12, 1948.

The third point taken by counsel for the plaintiff is that the defendants did not use their best endeavours to secure delivery because a Bentley car of the kind ordered by the plaintiff was, in January, 1948, delivered or appropriated to them, and that, although Bentleys accompanied this allocation with a direction that the car was to fill the order of Mr. Brutton, the defendants were not bound by this direction and acquired an unfettered property in the car, which they ought to have delivered or appropriated to the plaintiff. I should observe that the plaintiff was No. 64 on the defendants' list of customers and Mr. Brutton was No. 65. If the defendants had acted in the manner in which it is suggested that they were bound to, they could only have done so by dishonestly pretending to Bentleys that the car which Bentleys had intended to go to Brutton and delivered or appropriated to the defendants on that understanding was in fact going to Brutton, whereas they knew and intended it to go to the plaintiff, a non-covenantor. Such conduct, tainted, as it seems to us, with fraud, is surely not required in fulfilment of an obligation to "use their best endeavours to obtain delivery." It would, incidentally, have been a breach (i) of the defendants' retailer agreement, which Bentleys could have terminated, (ii) of their agreement with the Motor Trade Association, which could, and no doubt would, have put them on the stop list, thereby killing them stone dead in a commercial sense, and (iii) of their agreement with Brutton. We, therefore, think that this point also is invalid.

Fourthly, and lastly, it is said by counsel for the plaintiff that the express obligation of the defendants to use their best endeavours to secure delivery for the plaintiff of his car implied an obligation not to secure delivery to customers out of rotation. They should be supplied in the order in which they had placed their orders with the defendants. No doubt, if all the customers had signed, or undertaken to sign, the covenant some such term might conceivably be implied. Where, however, some are covenantors and some non-covenantors, the "best endeavours" on the part of the defendants could not, in the events which happened, secure delivery to the latter in their due priority—or, indeed, at all—so long as the manufacturers continued to insist that the deliverer must be a covenantor: see, again, the defendants' letter to Bentleys of Mar. 12, 1948. We are, therefore, of opinion that there was no breach by the defendants of their obligation to use their best endeavours to secure delivery.

Counsel for the defendants does not, therefore, need his second point, *viz.*, that a contract to deliver to a customer, without the condition attached that he should covenant not to re-sell, would have been contrary to public policy, and that, if the contract between the defendants and the plaintiff contained

no such restrictive condition, it was void. It is strictly unnecessary to decide this point, but, since this case may go further and our view on the first point may prove mistaken, we will record our view on the second. Certain specific classes of contracts have been ruled by authority to be contrary to the policy of the law, which is, of course, not the same thing as the policy of the government, whatever its complexion—*e.g.*, marriage brokerage contracts, contracts for the sale of honours, contracts in restraint of trade and so on. The courts

A have again and again said that, where a contract does not fit into one or other of these pigeon-holes but lies outside this charmed circle, the courts should use extreme reserve in holding a contract to be void as against public policy, and should only do so when the contract is incontestably and on any view inimical to the public interest: see, for example, the language of the House of Lords in *Fender v. Mildmay* (4). The present contract does not seem to us

B to fit into any of the traditional pigeon-holes. The suggestion, in particular, that this contract is in restraint of trade because it does not include a condition fettering re-sale savours of paradox. The policy of the law still leans towards free trade. We are, in effect, asked to extend the doctrine to a class of contracts at present outside it. Are these contracts incontestably opposed to the public interest? The merits of the covenant scheme and the alleged disadvantages of

C not enforcing it do not seem to us in the least incontestable. Two schools of thought might well exist about its merits, and may well, for all we know, do so.

One further point was argued. It was suggested by counsel for the defendants that the Motor Trade Association's covenant scheme had the approval of the government or of government officials and that this was in some way relevant to the question whether a contract which departed from it was or was not contrary to public policy. It could only be so relevant if the government's approval was some evidence that public policy called for the enforcement of the scheme. We think that this is an unfounded suggestion. What one government approves its predecessor or successor may condemn, and, if the suggestion were acted on, precisely the same contract might have to be held void when government A. was in and valid when government B. was in power. The distinction between

D political policy and public policy was firmly drawn in *Egerton v. Brownlow* (Earl) (5), where LORD TRURO said (4 H.L. Cas. 196):

E

“ . . . [‘public policy’] has been confounded with what may be called political policy; such as whether it is politically wise to have a sinking fund or a paper circulation, or the degree and nature of interference with foreign

F States; with all which, as applied to the present subject, it has nothing whatever to do.”

For these reasons, in our view, the defendants' point on public policy is wholly unfounded, but on the other point the appeal is entitled to succeed.

Appeal allowed with costs here and in the court below.

G Solicitors: *Osmond, Bard & Westbrook* (for the defendants); *Booth & Blackwell* (for the plaintiff).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

ALLEN v. ALLEN.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins a
February 21, 22, 1951.)]

Observations of SIR RAYMOND EVERS
SHED, M.R., at p. 731, *app*
JONES v. JONES, [1953] 2 All E.R.

*Husband and Wife—Maintenance—Reasonable belief in wife's adultery—Dis-
missal of petition for divorce based on this belief—Continued validity of this
defence to claim maintenance.*

A husband withdrew from cohabitation with his wife on the ground that he suspected her of having committed adultery. The wife took proceedings for restitution of conjugal rights, and the judge, finding that the husband had reasonable grounds for his suspicions, dismissed her petition. The husband then petitioned for divorce on the ground of his wife's adultery, basing his claim on the same evidence as he had adduced in the earlier proceedings. The judge on this occasion held that adultery had not been proved and found in favour of the wife. On an application by the wife under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, for the provision of reasonable maintenance,

HELD: once the alleged adultery of the wife had been the ground of a petition for divorce which had failed, the husband was no longer entitled to resist the wife's claim for maintenance on the ground that, *bona fide* and on reasonable grounds, he believed that she had committed adultery, and, therefore, the wife was entitled to maintenance.

Glenister v. Glenister ([1945] 1 All E.R. 513), *distinguished*.

[EDITORIAL NOTE. Section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, is repealed and replaced by s. 23 of the Matrimonial Causes Act, 1950.]

AS TO DEFENCES TO CHARGE OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, p. 835, para. 1338; and FOR CASES, see DIGEST, Vol. 27, p. 322, Nos. 3000-3012.]

Cases referred to:

- (1) *Russell v. Russell*, [1895] P. 315; 64 L.J.P. 105; 73 L.T. 295; *on appeal*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 318, 2960.
- (2) *Yeatman v. Yeatman*, (1868), L.R. 1 P. & D. 489; 37 L.J.P. & M. 37; 18 L.T. 415; 27 Digest 322, 3001.
- (3) *Glenister v. Glenister*, [1945] 1 All E.R. 513; [1945] P. 30; 114 L.J.P. 69; 172 L.T. 250; 109 J.P. 194; 2nd Digest Supp.
- (4) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest 315, 2925.
- (5) *Ousey v. Ousey & Atkinson*, (1874), L.R. 3 P. & D. 223; 43 L.J.P. & M. 35; 30 L.T. 911; 27 Digest 322, 3004.
- (6) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 2nd Digest Supp.
- (7) *Synge v. Synge*, [1901] P. 317; 70 L.J.P. 97; 85 L.T. 83; *affmg.*, [1900] P. 180; 69 L.J.P. 106; 83 L.T. 224; 64 J.P. 454; 27 Digest 375, 3631.
- (8) *Wood v. Wood*, [1947] 2 All E.R. 95; [1947] P. 103; [1948] L.J.R. 784; 111 J.P. 428; 2nd Digest Supp.

APPEAL by the husband from an order of WALLINGTON, J., dated Nov. 20, 1950, made under s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, whereby he held that the husband had wilfully neglected to provide reasonable maintenance for the wife.

The husband contended that, as he had a *bona fide* belief that his wife had committed adultery, he was not bound to maintain her, and that he was none the less entitled to rely on this belief even though the alleged adultery had

been a ground for a petition by him for divorce from his wife which had been dismissed.

Vaughan, K.C., Victor Russell and A. D. Karmel for the husband.
Mais for the wife.

SIR RAYMOND EVERSHERD, M.R.: HODSON, L.J., will deliver the first judgment.

A **HODSON, L.J.:** This is an appeal from an order of WALLINGTON, J., made on Nov. 20, 1950, under the provisions of s. 5 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949, whereby he pronounced that the husband had been guilty of wilfully neglecting to provide reasonable maintenance for his wife and ordered that the wife's application be referred to one of the registrars to determine the amount of the payments which were to be made to her.

B In addition, the learned judge made an interim order for periodical payments.

The parties were married in 1936. They lived together until 1947, except during part of the war years when the husband was absent on service. In October, 1947, the events happened which started the train of litigation between them. The wife was away from home, and the husband, during her absence, found the material on which he made up his mind not to live with her any more.

C On Oct. 14, 1947, on his instructions a letter was written by his solicitors stating:

D "It appears that you have for some time past been neglecting your husband, and that your conduct and behaviour towards him has very seriously undermined and prejudiced his health, and that you have been guilty of persistent cruelty towards him. From information given us, and from letters found in the matrimonial home it also appears that you have been unfaithful to your husband while you have been staying in Paris and in this country. We are, therefore, instructed to inform you that, in view of your unfaithfulness and persistent cruelty, your husband can no longer live with you, and will not in future provide a home for you, and will issue such proceedings in divorce against you as he may be advised."

E The letter went on to say that the previous home of the parties had been let. That letter was followed by the wife taking proceedings for restitution of conjugal rights against the husband, and by answer dated Jan. 10, 1948, to the petition dated Dec. 12, 1947, the husband said he admitted he had ceased to live with his wife, but,

F "... he had and still has just cause for refusing to live with her."

He went on to allege cruelty and adultery against her and further denied that his wife sincerely desired that he should live with her.

The matter came before PILCHER, J., at the Manchester Assizes in November, 1948, and after a hearing which lasted several days the petition was dismissed.

G PILCHER, J., found that the allegations made by the husband in his answer, *i.e.*, cruelty, adultery, and want of sincerity, were not established. Those were the only matters that are raised by the pleadings, but during the course of the hearing the court seems to have been led into dealing with the case as if the husband had pleaded, not that his wife had committed adultery, but that he had reasonable grounds for so believing, and that, therefore, he was not bound to live with her. The learned judge makes it clear that, as the case

H was tried before him, the question whether or not the wife had been guilty of adultery was not in issue. He says:

"The only issue which I have to determine in this case is whether, first of all, he honestly thought, on the material he had, that his wife committed adultery, and, secondly, whether he was reasonable in so thinking."

PILCHER, J., then analysed the evidence which related to the general conduct

of the wife and her association with other men during the husband's absence, the finding of contraceptives, about which there was a conflict of evidence, and, lastly, the finding of certain documents, consisting partly of typewritten and printed matter and partly of letters, found in the wife's possession, written to her during the war by men in the forces, which were of an incriminating nature. At the conclusion of the case the learned judge said:

"I think it would have been difficult for him [the husband] on such evidence as he was able to put before the court to satisfy me that his wife had, in all the circumstances, been guilty of adultery."

The learned judge found that the husband did believe that his wife had committed adultery, that the material was such that he could reasonably form his belief, and on that basis he gave judgment for the husband. The wife did not insist on having the issue of adultery which was raised by the pleadings determined in her favour. The husband accepted the position.

The next step was that the husband took proceedings for divorce which came before WILLMER, J., in November, 1949, again at the Manchester Assizes. Substantially the same witnesses were called as at the previous hearing. It does not appear that at any time the husband sought from his wife an explanation of the matters which had roused his suspicions as to her adultery, and I should be slow to say that a man or woman who finds incriminating documents in the possession of his or her spouse is entitled by that circumstance alone to draw an inference entitling him or her to refuse to live with the spouse without giving the spouse an opportunity of making an explanation. However that may be, the wife's adultery was raised in a clear-cut form before WILLMER, J., who found that the husband had not proved his case and dismissed the petition. The husband now argues that he is not bound to maintain his wife so long as he believes, on reasonable grounds, that she has committed adultery, and he is just as much entitled to say that now as he was before the hearing before WILLMER, J. The wife's contention is that, from the time WILLMER, J., gave his decision in her favour, the husband was not entitled, as a matter of law, to say that he had reasonable ground for the belief that she had committed adultery.

It is clear, from the way in which WILLMER, J., dealt with the facts that it was for him a difficult case because he felt that there was substance in the husband's case, particularly in so far as it depended on the construction of the letters found in the wife's possession, retained by her, and being, apparently, answers from other men to her letters. The difficulty was made no less by the fact that the learned judge found himself unable to accept, at its face value at any rate, the explanations which the wife offered about those letters. So far as the rest of the case is concerned, WILLMER, J., found in favour of the wife. Evidence was called on her behalf that she was living a respectable life which discounted, or explained away, the evidence which was called against her pointing in the other direction. In the matter of the contraceptives, the learned judge accepted the wife's explanation, but the fact remains that he did not say anything like: "This is a woman who has had a shameful charge of adultery made against her without any sort of foundation." Nor did he say: "Having heard her evidence, I believe every word she has said, and I am quite satisfied she ought to leave the court without a stain on her character."

When the matter came before WALLINGTON, J., the husband made an affidavit setting out in substance that he considered he was entitled to refuse to maintain his wife because he held a belief, based on reasonable grounds, that she had committed adultery. He was closely cross-examined on that affidavit, and at the end of the hearing WALLINGTON, J., clearly had grave doubts whether the husband was in a position to say that he really believed that his wife had committed adultery. WALLINGTON, J., seems to have made the test of reasonableness of the husband's belief depend to some extent on the way in which

the learned judges in the earlier cases had expressed themselves, and counsel for the husband has argued that this was the right approach. In attacking the judgment of WALLINGTON, J., counsel says that there was some confusion in the learned judge's mind as to what the two other judges had decided. WALLINGTON, J., certainly seems to have said that this was a case in which two judges had expressed in favour of the wife the strongest possible view which the husband could not oppose.

A I think that the matter ought to be dealt with in a different way. I would not decide this case merely on the finding of fact, if such a finding of fact can be extracted from the judgment, that the husband had no belief in his wife's adultery. I propose to assume, for the purposes of my judgment, that he did have the belief, and merely to examine the question whether in the face of what has happened he can say that he has reasonable ground for holding that belief. B Before 1895, when *Russell v. Russell* (1) was decided in the Court of Appeal, it was, no doubt, thought that, to establish a defence to a petition for restitution of conjugal rights, a matrimonial offence either of cruelty or adultery must be proved. In *Yeatman v. Yeatman* (2) LORD PENZANCE put the matter in this way (L.R. 1 P. & D. 494):

C " . . . the 'cause' should be grave and weighty which, in the judgment of the court, should deprive a deserted wife of her remedy for that desertion . . . "

Those two adjectives, "grave" and "weighty" have been judicially approved from time to time since the decision of LORD PENZANCE was given. Basing D themselves on the decision in *Russell v. Russell* (1) LORD MERRIMAN, P., and PILCHER, J., sitting in the Divisional Court, in *Glenister v. Glenister* (3) considered the position of a husband, charged with desertion, who, while failing to prove his wife's adultery, had reasonable belief that she had been guilty of adultery. The President decided that such a man had a defence and decided in favour of the husband. I need not refer to the facts in detail, but the husband E had found his wife in the most incriminating circumstances in their house, and she had given no explanation of her conduct up to the moment of the trial. The learned President said ([1945] 1 All E.R. 518):

" . . . I am not sure that the magistrate has considered as a separate head of justification whether reasonable belief that his wife had been committing adultery (a belief induced by her own conduct) was of itself, though F adultery was not found, sufficient to justify his withdrawal from cohabitation, so that he ought not to be held to be a deserter. That a wife's misconduct, short of proof of a matrimonial offence, can be a justification for withdrawal from cohabitation, has been recognised ever since the well-known decision in *Russell v. Russell* (1), and it is, I think, clear, both from that case and from *Thomas v. Thomas* (4), that conduct which, though not G in itself a matrimonial offence, would afford an answer to a petition for restitution of conjugal rights, would itself be sufficient to absolve a husband from a charge of desertion. In other words, it is now recognised that the issue with regard to conduct of a wife short of a matrimonial offence is precisely the same whether the husband is resisting a decree for restitution of conjugal rights or is resisting a charge of desertion . . . If the wife H has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

Then he deals with other authority and refers, in particular, to *Ousey v. Ousey & Atkinson* (5), a decision of HANNEN, J. In dealing with that case, which was

one in which the husband alleged that the marriage was not consummated and put the blame on the wife, LORD MERRIMAN, P., says (*ibid.*, 519):

"Adultery, if proved is, of course, obviously a ground for withdrawing from cohabitation. But if refusal or failure to consummate a marriage on the part of a wife is not proved to be due to wilful refusal or to impotency, and the matter is left in doubt, and yet the husband, while unable to prove the charge against her can escape the imputation of desertion on the ground that he reasonably believed that she was in fault, why does not exactly the same thing apply to circumstances provided by the wife herself which justify him in the belief that he has been wronged in respect of adultery?"

Taken by itself, that passage may lend some support to the husband's argument, but it should be noted that in *Ousey v. Ousey & Atkinson* (5) no question arose of there having been any judicial determination of the doubtful matter in issue between the parties.

Glenister v. Glenister (3) was referred to by LORD MERRIMAN, P., sitting as President of a division of this court in *Everitt v. Everitt* (6), and he there emphasised what is, in my judgment, an essential feature of the defence which the husband sought to raise in the present case, namely, its temporary nature, because, although at one moment a person may be able to say that he or she reasonably believes in a state of facts, that reasonable belief may be dispelled at any moment. Nobody could give an exhaustive statement of the ways in which a belief could be dispelled. The question in issue in the present case is whether the husband's belief must be taken to have been dispelled when a judgment of a court of competent jurisdiction has been given in favour of the wife to the effect that the husband has failed to prove a charge of adultery against her.

In *Everitt v. Everitt* (6) LORD MERRIMAN, P., quotes from the decision of SIR FRANCIS JEUNE, P., in *Synge v. Synge* (7), who was in turn referring ([1900] P. 197) to *Ousey v. Ousey & Atkinson* (5), as follows ([1949] 1 All E.R. 912):

"The primary question to be decided is, Had the husband reasonable ground for desertion? If belief is to be taken into consideration, why should not his honest belief that his wife refused him marital rights without cause justify his conduct, even though the wife honestly believed that she had good grounds for such refusal?' Then he adds words which are of general application: 'The solution of the problem presented by such conflict of belief is, I think, to be found in holding that where the fact can be determined, the fact must prevail, and that erroneous beliefs on either side are immaterial'."

LORD MERRIMAN, P., continues (*ibid.*), using his own language:

"On this hypothesis the facts, at the earliest, were ascertained at the moment when the learned judge gave judgment. In *Wood v. Wood* (8) I called attention ([1947] 2 All E.R. 97) to this sort of position—a confession by the wife of adultery with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation, but there might come a moment when, in spite of her confession, or, indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief, but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible. If, therefore, the learned commissioner

was holding that his saying that he was not satisfied that adultery had been proved, though the wife up to then had been amply justified in believing that it existed, had brought the period of desertion pleaded in the petition retroactively to an end, he was, in my opinion, wrong."

A Counsel for the husband did not shrink from the implications of the passage which I have read, and admitted, if I understood him correctly, that the essence of his argument was to be found in the words, "... a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery." He argues, in effect, that the wife in the present case was holding herself out to be an adulteress and the husband is entitled to treat her as an adulteress, notwithstanding the findings of the court in her favour, simply because of the way in which the court, through the mouth of WILLMER, J., expressed itself. B I cannot believe that that is a valid contention. The form of order which is drawn up on the dismissal of a petition indicates that the petitioner was not sufficiently proved the contents of the petition and no more. It draws no distinction between a respondent who leaves the court triumphantly, vindicated by the judge, and a respondent who leaves the court in the state of a prisoner who has had the benefit of the doubt. I see no validity in the distinction, and, if there is no validity in that distinction, I think that counsel's C argument must fail.

The question is: Is the wife to carry the stigma of an adulteress, there being a finding in her favour in the suit for divorce? To that question I think there can be only one answer, and that is: No. The husband is not entitled, in the face of the judgment which WILLMER, J., delivered, whatever the state of his D own mind may be, to say that the belief which he entertains is entertained on reasonable grounds. The facts have been determined against him, and that is an end of the matter.

I do not propose to try to go beyond the facts of the present case, but a possible exception to the generality of what I have said appears in the notes to para. 120 in RAYDEN ON DIVORCE, 5th ed., at p. 109:

E "It is submitted that a belief that the other spouse has committed adultery ceases to be reasonable after a finding by a court of competent jurisdiction that he or she has not in fact committed adultery, unless that finding is based on a technical rule of evidence (other than the rule against hearsay) which bars the court from considering some of the information on which the belief is based."

F I express no opinion as to the possibility of an exception based on some extraneous difficulty which may make proof by the husband impossible, but I agree with the submission apart from the exception. Again, I do not think it is necessary to express a view as to what the position may be if, in the course of events as between man and wife, a belief by a husband in his wife's adultery, G may be held to be based on reasonable grounds at one moment and not at another. Suffice it to say that, in my judgment, there is nothing in the decision in the *Glenister* case (3) which makes it a proposition of law that the unsuccessful wife could not, immediately after the failure of her husband to establish the charge of adultery, have taken fresh proceedings for maintenance. A similar situation may have ensued after the judgment was given in the restitution suit H here.

I think that nothing in the present case adds anything to what has been said before on the general principle. The only difference is that here the court has before it for the first time a man who, in the face of a judgment against him on the issue of his wife's adultery, has endeavoured to set up a reasonable belief in that adultery as a defence to his wife's claim for maintenance. As counsel for the wife points out, it would be an odd thing, indeed, if the husband were to succeed, because the wife would be in a worse position than if she were

divorced. If she were divorced, she could at least seek maintenance from the court and whether she obtained it or not would be in the court's discretion, whereas, if the husband were to succeed in these proceedings, it would be almost impossible for the wife to obtain maintenance, because the burden would be on her to show that something had happened since the events to which I have referred to alter the position. As time went on it might be more and more difficult for her to discharge that burden. That, of course, is only an argument based on inconvenience, but at the same time it does seem to me to point to the absurd results—apart from what I regard as the manifestly unjust results—which would be reached if this appeal succeeded. In my judgment, the appeal should be dismissed.

SIR RAYMOND EVERSHED, M.R.: I agree with the judgment which has just been delivered. This appeal arises out of a summons by a wife against her husband for maintenance, the allegation being that the husband has wilfully neglected to provide reasonable maintenance for her. To such a claim it will be an answer if the husband can show that his wife has been guilty of some matrimonial offence that has not been condoned, but the cases to which counsel have alluded also show that in such a case it may be an answer for the husband to establish that he *bona fide* and reasonably believes that his wife has been so guilty. In so saying, he is, in effect, saying the same thing as: "My wife is an adulteress." There is, however, no case which has come before the court where the alleged adultery, or other offence, on the reasonable belief in which the husband relies, has already been the ground of a petition which has failed. As a general rule, where that has happened I think a defence based on reasonable belief in the alleged matrimonial offence is no longer available.

HODSON, L.J., has already referred to the judgment of LORD MERRIMAN, P., in the *Glenister* case (3), and particularly to the passage ([1945] 1 All E.R. 519):

" . . . if refusal or failure to consummate a marriage on the part of a wife is not proved to be due to wilful refusal or to impotency, and the matter is left in doubt, and yet the husband, while unable to prove the charge against her can escape the imputation of desertion on the ground that he reasonably believed that she was in fault, why does not exactly the same thing apply to circumstances provided by the wife herself which justify him in the belief that he has been wronged in respect of adultery? "

The question was not before the court in the *Glenister* case (3), and was not in the President's mind, whether that defence would be available if the husband had failed to prove the offence on the hearing of a petition which he had presented to the court alleging that offence. In the *Glenister* case (3) the question was of a quite different character. There had been circumstances of a remarkable nature which had occasioned in the husband's mind the belief that his wife was an adulteress. The matter came before a magistrate who found against the husband in that respect, and the only question to which this passage was directed was whether such a failure to prove the adultery operated retroactively so as to disqualify the husband from saying that, up to that time, he had reasonable ground for the belief which he had alleged. That is a different matter from the question before us. Counsel for the husband has conceded that if, on the trial of the direct issue whether there had been adultery, the judge found as a fact that the wife was not guilty and acquitted her of the charge, the husband could no longer be heard to assert, *bona fide*, a reasonable belief in the adultery. If that is right, then the question, *prima facie*, so far as I can see, must depend on the character of the judgment, by which I mean the language in which the learned judge expressed the reasons for the order he eventually made. It will depend on the degree of hesitancy and doubt expressed in those reasons by the judge. It seems to me unsatisfactory that the ability of a husband to raise this defence should depend on matters of

that kind. On the other hand, I think that, if the petition which the husband has brought alleging adultery is dismissed, whatever has been the doubt in the judge's mind, the wife is thereafter entitled to say that she stands cleared of that charge, and none the less so in the eyes of the law because the judge may have indicated, perhaps, that by her indiscreet conduct she has given good ground for the strongest suspicion to the contrary.

- A There is, I think, a fair analogy to be drawn from a criminal charge, though I must not be taken to be asserting any direct connection in point of onus of proof between the two things. If a man is charged with a criminal offence and the charge fails, that may well be because the jury have been directed that if they have reasonable doubt they must acquit. But, if the prisoner be acquitted, he is entitled to say that he has been cleared altogether of that charge.
- B If that is right, and if the general rule is as I have tried to express it, it seems to me that, if a man says: "I *bona fide* and reasonably believe that my wife is an adulteress" as a defence in proceedings of this character, the result is neither irrational nor unjust if he be regarded as saying this: "I say and allege that the evidence and materials in my possession are such that on them a court should and would find that adultery has been committed." *Ex concessis* in this case, when put to the test, the court did not so find.
- C

- C There may be exceptional cases. It is possible that, if certain evidence, which on the face of it would be conclusive, is not available because, according to technical rules, it is inadmissible, it might enable such a plea as this to be sustained, notwithstanding that the petition had been heard and failed. I do not say that that would be so. This case was not of any such exceptional character, for all the evidence which was considered before WALLINGTON, J., had previously been before two other judges, and it had never been added to in any material respect.
- D

- E Finally, unless the result is as I have suggested it ought to be, the position would be that a husband could successfully persist in refusing to discharge the obligations which lie on him as a husband by continuing to assert an honest and reasonable belief (in the sense of its being a belief that is sensible and not the result of caprice or stubborn and distorted judgment) in the proposition that his wife is an adulteress, a proposition which he has been, and continues to be, quite unable to prove in a court of law. For those reasons, in addition to the reasons HODSON, L.J., has given, and with which I entirely agree, I also think this appeal should be dismissed.

- F JENKINS, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Knight & Sons*, Newcastle-under-Lyme (for the husband); *Doyle, Devonshire & Co.*, agents for *J. F. Moxon*, Stoke-upon-Trent (for the wife).

[*Reported by F. GUTTMAN, ESQ., Barrister-at-Law.*]

YATES (INSPECTOR OF TAXES) *v.* STARKEY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.),
February 16, 19, March 5, 1951.]

Income Tax—Reliefs—Children's allowance—Maintenance order—Order providing for payment of annual sum to be held in trust for children—Treatment as husband's income of sums paid—“Settlement”—“Settlor”—Finance Act, 1936 (c. 34), s. 21 (1), (9) (b), (c).

Divorce—Maintenance—Children—Order for payment of annual sum to be held in trust for children—Power of court to create trust in favour of children—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 193 (1), (3) (added by the Matrimonial Causes Act, 1937 (c. 57), s. 10 (4)).

The taxpayer had been divorced by his wife who was given the custody of the infant children of the marriage. By an order of the Divorce Court, dated July 16, 1946, the taxpayer was ordered, *inter alia*, to pay to the wife “... the annual sum of £100 less tax in trust for each of the three children ... the [taxpayer] to claim child allowances.” The taxpayer made the payments ordered, and the wife, as guardian of the children, was allowed the appropriate repayment claims on their behalf on the footing that the effect of the order was to make the annual sums payable in respect of each child thereunder the income of that child. The taxpayer claimed to be entitled to the statutory allowances in respect of the children on the ground that the court had no power under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 190 and s. 193 (3) (as added by s. 10 (4) of the Matrimonial Causes Act, 1937), to create a trust in favour of the children. Alternatively, the taxpayer claimed that, if a trust had been created, the sums payable under it ought to be treated, by virtue of s. 21 of the Finance Act, 1936, as his income and not that of the children.

HELD: (i) on construction, the order of the Divorce Court created a trust in favour of each child of the yearly sum of £100.

(ii) the order created a “settlement” for the purposes of s. 21 (1) of the Finance Act, 1936, by virtue of the presence, in the definition of “settlement” in sub-s. (9) (b) thereof, of the words “includes any ... trust”; since the taxpayer was a person who had provided “funds ... for the purpose of the settlement” in the shape of the three sums of £100 a year paid by him in compliance with the order, he was a “settlor” within the meaning of s. 21 (9) (c); and, accordingly, these sums fell to be treated, under s. 21 (1), as his income and he was entitled to the allowances made in respect of the children.

Semble: an order made in the terms of the order in question is not an order “to secure for the benefit of the children an annual sum of money” within s. 193 (3) of the Act of 1925.

Per JENKINS, L.J.: “... there are cogent grounds for the view that the power under s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, to ‘make such provision as appears just with respect to the custody, maintenance and education of the children’ is limited in its financial aspect to the expressed purposes of maintenance and education, and does not extend to the creation of a trust in favour of a child so as to make any income so dealt with income of the child.”

Decision of VAISEY, J. ([1950] 2 All E.R. 614), affirmed.

[EDITORIAL NOTE.] Section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, was repealed and replaced, as from Jan. 1, 1951, by the Matrimonial Causes Act, 1950, s. 26.

FOR THE FINANCE ACT, 1936, s. 21 (1), (9), see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 361, 362.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s.

193 (3) (as added by the MATRIMONIAL CAUSES ACT, 1937, s. 10 (4)), see *ibid.*, Vol. 11, p. 834.]

Cases referred to:

- (1) *Stevens v. Tirard*, [1939] 4 All E.R. 186; [1940] 1 K.B. 204; 109 L.J.K.B. 202; 161 L.T. 400; 23 Tax Cas. 321; 2nd Digest Supp.
- (2) *Hood-Barrs v. Inland Revenue Comrs.*, [1946] 2 All E.R. 768; 176 L.T. 283; 27 Tax Cas. 385; 2nd Digest Supp.
- (3) *Chamberlain v. Inland Revenue Comrs.*, [1943] 2 All E.R. 200; 25 Tax Cas. 317; 2nd Digest Supp.
- (4) *Jodrell v. Jodrell*, (1851), 14 Beav. 397; 51 E.R. 339; 27 Digest 233, 2042.

B APPEAL by the Crown from an order of VAISEY, J., dated July 18, 1950, and reported [1950] 2 All E.R. 614.

In 1945 the taxpayer was divorced by his wife who was given the custody of the three children of the marriage. By an order of the Divorce Court, dated July 16, 1946, the taxpayer was ordered *inter alia* to "pay or cause to be paid to the [wife] as an interim provision until further order . . . the annual sum of £100 less tax in trust for each of the three children issue of the marriage between the parties . . .; all the said sums to be payable monthly; credit to be given for any sums paid since [Dec. 10, 1945, the date of the decree absolute], respondent [taxpayer] to claim child allowances." VAISEY, J., held that the court had power, under s. 193 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, to create a trust in favour of the children, and that the annual sums payable in trust for each of the children were paid to or for the benefit of the children by virtue or in consequence of a settlement within the Finance Act, 1936, s. 21 (1) and (9), in relation to which the taxpayer was the "settlor," and, therefore, that the sums in question were to be treated as income of the taxpayer and he was entitled to the allowances in respect of the children. On appeal, it was contended by the Crown that s. 21 of the Act of 1936 had no application, on the ground that an order of the court directing a father to make payments in trust for his children could not create a settlement or make the father a settlor within the meaning of the section, because the essential characteristic of free will implicit in the conception of "settlement" or "settlor" was wholly lacking.

F *Upjohn, K.C.*, *J. H. Stamp* and *R. P. Hills* for the Crown.
J. W. P. Clements for the taxpayer.

Cur. adv. vult.

Mar. 5. The following judgments were read.

G **SIR RAYMOND EVERSLED, M.R.:** In the present case I have had the advantage of seeing in advance the judgments about to be delivered by my two brethren. I have, although not without serious doubt on the main question argued, reached the same conclusion as they and think with them, and for the reasons which they give, that the appeal should be dismissed. I should add nothing of value to the judgments of my brethren if I stated at length reasons for my conclusions, and, in the circumstances, I wish to make but few observations.

H On the first question determined by VAISEY, J., namely, whether the order made in the present case was within the competence of the court under s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925 (as added by s. 10 (4) of the Matrimonial Causes Act, 1937), it has, by reason of the concession of counsel for the taxpayer, been unnecessary for us to express a concluded view. I must not, however, be taken to be assenting to the opinion expressed by the learned judge. I agree with my brethren in thinking that there are serious difficulties in the way of such a construction of the section. As at present advised, the section does not, in my judgment, contemplate on the

face of it an order in the form in which the order was made (and it could only be by a strained use of the language used that such an order could in any case be brought within its terms; nor does it seem to me that such a form of order achieves a particularly useful result). It will, no doubt, be considered by those responsible for such matters whether orders in this form should continue to be made.

On the other, and the main, point in the case, namely, that of the application of s. 21 of the Finance Act, 1936, the decisive words to my mind are those of the definition of "settlor" in sub-s. (9) (c), "... any person who has provided ... funds ... for the purpose of the settlement ...". Had it not been for these words I should for my part have accepted the argument of counsel for the Crown. For, although the trust created by the terms of the order is sufficient to make what the order achieves a "settlement," I do not think the taxpayer could be properly regarded as a "settlor" within the ordinary sense of the term or within the language of the definition apart from the words which I have quoted. I think these last-mentioned words are, on the whole, too strong and compelling for counsel for the Crown for the more restricted construction of the words of a taxing statute. It is true that what is signified by the words quoted is "included" in the earlier part of the definition; and I have felt the force of counsel's illustrations of the "anomalies" that, he says, must follow from the contrary argument—for example, the case of a debt owed by A. to B., but assigned by B. to trustees for the infant children of A. and then enforced against A. by the trustees. For the reasons given by my brethren and the learned judge below, I do not think these considerations are sufficient to prevail against the view that if a settlement has (as I think it has) been effected by the order, then at the time when the relevant question has to be asked, the taxpayer has in truth provided the funds for the purpose of the settlement, namely, the annual sums which are the subject-matter on which the trust (specified in the order) operates. In my judgment, the appeal fails.

JENKINS, L.J.: The question in the present case is whether in the circumstances I am about to mention the taxpayer, Dennis William Frederick Starkey, is entitled for the purposes of his assessment to income tax for the three years ended Apr. 5, 1949, to children's allowances of £60 per annum for each child under s. 21 of the Finance Act, 1920, as amended by later enactments, in respect of the three infant children of his marriage to his former wife Barbara Mary Starkey. The marriage was dissolved on the petition of the wife by a decree made absolute on Dec. 10, 1945, the custody of the three children being given to her. By an order in the divorce proceedings dated July 16, 1946, it was ordered (*inter alia*) that the respondent, the taxpayer

"do pay or cause to be paid to the said petitioner [*i.e.*, Mrs. Starkey] as an interim provision until further order [as from the date of the decree absolute] the annual sum of £100 less tax in trust for each of the three children ... all the said sums to be payable monthly; credit to be given for any sums paid since the said date, respondent to claim child allowances."

The taxpayer duly paid Mrs. Starkey the annual sum of £100 less tax for each child as required by the order, and she, as the children's guardian, made and was allowed the appropriate repayment claims on their behalf, on the footing that the effect of the order was to make the annual sum payable in respect of each child thereunder the income of that child. The taxpayer, on the other hand, claimed the statutory children's allowance of £60 for each of the three children, which he could only be entitled to do on the footing that the order did not have the effect of making the three annual sums of £100 payable thereunder income of the three children, inasmuch as under s. 21 (3) of the Finance Act, 1920, as amended by the Finance Act, 1947, s. 15 (3), the allowance is

inadmissible in respect of any child entitled in his or her own right to an income exceeding £60 a year.

- The taxpayer's claim was supported before the general commissioners and VAISEY, J., on two grounds. First, it was contended that the court had no power under s. 190 and s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10 (4) of the Matrimonial Causes Act, 1937, to create
- A a trust, and, consequently, that, notwithstanding the words "in trust for each of the three children" contained in the order of July 16, 1946, no trust in their favour was created, with the result that none of them was entitled to any income in his or her own right, and, accordingly, that the taxpayer's claim to the children's allowances was well founded. Secondly, and by way of alternative,
- B it was contended that, even if the order was effective to create a trust, the taxpayer was, nevertheless, entitled to claim the children's allowances, because on this footing (i) the order was a "settlement" in relation to which the taxpayer was the "settlor" within the meaning of s. 21 of the Finance Act, 1936; (ii) accordingly, the income paid to or for the benefit of each of the three children of the settlor (*i.e.*, the taxpayer) by virtue of the settlement (*i.e.*, the £100 paid to Mrs. Starkey in trust for each of them in accordance
- C with the order) must under the same section be treated for all the purposes of the Income Tax Acts as the income of the settlor (*i.e.*, the taxpayer) and not as the income of any other person; and (iii) it follows that for the purposes of the taxpayer's claim to children's allowances under those Acts the £100 payable in respect of each child must be treated as the taxpayer's income and not as the child's, and the claim to such allowances admitted accordingly.
- D The general commissioners rejected the first contention, but accepted the second, and VAISEY, J., on appeal by the Crown, came to the same conclusion on both points.

- The question as to the power of the court, by an order in the form here used, to create a trust is one on which I feel some difficulty. I have no doubt that s. 193 (3) of the Act of 1925 enables the court to order the husband to secure
- E an annual sum for the benefit of a child of the marriage by means of a trust. On the other hand, there are cogent grounds for the view that the power under sub-s. (1) to "... make such provision as appears just with respect to the custody, maintenance and education of the children ..." is limited in its financial aspect to the expressed purposes of maintenance and education, and does not extend to the creation of a trust in favour of a child, so as to make
- F any income so dealt with income of the child: see *per* CLAUSON, L.J., in *Stevens v. Tirard* (1) ([1939] 4 All E.R. 190). It is said on the part of the Crown that the order here in question was a perfectly good order on the taxpayer under s. 193 (3) to secure an annual sum of £100 for the benefit of each child by paying that sum to Mrs. Starkey in trust for him or her. Speaking for myself, I feel considerable doubt about this. An order "to secure" seems to
- G me to suggest a disposition or obligation of some sort, made or entered into pursuant to the order, as opposed to a mere direction to pay contained in the order itself. This is borne out by the provision for reference to conveyancing counsel at the end of sub-s. (3). It is also supported by the clear distinction drawn in s. 190 between an order on a husband to secure a gross or annual sum to the wife for any term not exceeding her life under sub-s. (1) and a
- H direction on a husband to pay to the wife during the joint lives a monthly or weekly sum under sub-s. (2).

It is, however, unnecessary to express any concluded opinion on this question, as counsel for the taxpayer admitted, in my view quite rightly, that, whether the order of July 16, 1946, was properly made in the form it takes or not, it must, as an order made and never appealed from, be accepted as between the parties to it, and for the purposes of the present proceedings, as a valid and binding order. Having made that admission, counsel confined himself on this

part of the case to an argument directed to showing that on the true construction of the order as it stands it creates no trust. I hope I will not be regarded as disrespectful to his careful argument to this effect if I dispose of it simply by saying that for my part I find the express words of trust in the order too plain to admit of any other conclusion than that the order did as a matter of construction create a trust in favour of each child of the yearly sum of £100 payable on his or her account. On the footing that the order did have this effect, it is not disputed that apart from s. 21 of the Finance Act, 1936, each of the three children became under the order entitled in his or her own right as *cestui que trust* to the annual sum of £100 payable thereunder by the taxpayer to Mrs. Starkey in trust for such child.

It remains to consider the second question, *i.e.*, whether this conclusion is displaced for income tax purposes by s. 21 of the Act of 1936. Counsel for the Crown strenuously contended that s. 21 had no application to the present case. He said in effect that wide as are the definitions of "settlement" and "settlor" in sub-s. (9) of the section, and apt as they are to include transactions which are not "settlements" and parties who are not "settlers" in the ordinary sense of those words, the section is nevertheless aimed only at "settlements" and at "settlers," and those expressions in themselves postulate at all events certain essential characteristics which are not displaced by the definitions and without which no transaction can be a settlement and no person can be a settlor within the meaning of the section, any more than they can be classed as such in the ordinary sense. These essential characteristics, counsel argued, were in the case of a settlement that it should be a disposition or obligation of some sort made or entered into by some person of his own free will, and in the case of a settlor that he should be a person who has of his own free will entered into the disposition or obligation in relation to which he is so described. Thus, he contended, an order of the court directing a father to make payments in trust for his children cannot create a settlement or make the father a settlor within the meaning of s. 21 or at all, because the essential characteristic of free will implicit in the conceptions of "settlement" and "settlor" is wholly lacking. He claimed, moreover, that this general proposition is reinforced by a critical examination of the definitions of "settlement" and "settlor" actually provided by sub-s. (9).

This argument was presented with persuasive force, and I confess that I found it at first sight attractive. In its more general aspect, I think on examination, it discloses itself to be really based on the error against which LORD GREENE, M.R., sounded a warning in *Hood-Barrs v. Inland Revenue Comrs.* (2) when he said ([1946] 2 All E.R. 773):

"Counsel for the taxpayer argued that one can only go to such an interpretation clause as this if it is doubtful whether the transaction in question falls within the word used in the original sub-section, namely, in this case the word 'settlement.' In other words, if you find in the word 'settlement' in s. 21 (1) something of doubtful import, you then turn to the interpretation clause to see whether that clause throws any light on it. Speaking for the moment without reference to authority, that appears to me to restrict the operation of such an interpretation clause as this in a quite unwarranted and unprecedented manner. The whole object of an interpretation clause expressed in this way I should have thought was to give a word, which, for the sake of convenience, is used in the body of the section, an extended meaning which it would not otherwise bear. Irrespective of what it originally may mean, and taken by itself, it is to have that extended meaning, and I can see no justification in principle or on authority for cutting it down in the way suggested."

In the succeeding passage on the same page LORD GREENE, M.R., went on to dispose, in a manner I fully accept, of the contention that authority inconsistent

with the statement of principle I have just quoted was to be found in certain observations of LORD MACMILLAN in the case of *Chamberlain v. Inland Revenue Comrs.* (3).

- A is whether the order created a settlement and the taxpayer was a settlor in relation thereto in the sense (whatever it may be) in which those terms are used in s. 21. In order to resolve this question I must, on the principle stated by LORD GREENE, M.R., in *Hood-Barrs v. Inland Revenue Comrs.* (2) approach the construction of s. 21 with no pre-conceived idea as to the meaning of "settlement" or "settlor." For their meaning in this particular section I
- B must go to the definitions provided by sub-s. (9), construe those definitions, and apply them according to their true construction, however remote from the ordinary conceptions of "settlement" or "settlor" the content of the definitions may in any given instance appear to be. Approaching the matter in this frame of mind, I find that by sub-s. (9) (b) the expression "settlement" is defined as including "any disposition, trust, covenant, agreement, arrangement or transfer of assets." The order here in question (particularly as it was not made by consent) was hardly a disposition, agreement or arrangement. It certainly was not a covenant. Nor, I think, was it a transfer of assets, though the contrary was suggested by counsel for the taxpayer and compliance with it did involve transfers of assets in the shape of the payment of three sums of £100 per annum. At all events, having regard to the admission made as to the validity of the order for the purposes of these proceedings, and in view of its express terms, it must clearly be taken to have created a trust in favour of each child with respect to the annual sum of £100 payable thereunder on his or her account. *Prima facie*, therefore, the order must be taken to have created a settlement for the purposes of s. 21 by virtue of the inclusion in the definition of "any . . . trust."
- E Passing to sub-s. (9) (c) I find further that

- F "the expression 'settlor,' in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement."

- G The taxpayer can hardly be said to have "made or entered into" the order, or the trusts thereby created, in any ordinary sense of that expression. If the order, by reason of the trusts thereby created, constitutes a settlement within sub-s. (9) (b), as, in my view, *prima facie* it does, it seems to me reasonably plain that *prima facie* the taxpayer is a "person who has provided . . . funds . . . for the purpose of" such settlement in the shape of the three sums of £100 per annum paid by him in compliance with the order.

- H In that part of his argument which turned on a close examination of sub-s. (9) (b) and (c) counsel for the Crown sought to displace the conclusions which, as above indicated, the definitions in question *prima facie* appear to suggest by contending (in effect): (i) that it is wrong to consider the definition of "settlement" in isolation, because a "settlement" must at all events be something in relation to which there is a settlor, and, therefore, the meaning of the definition of "settlement" can only be arrived at with reference to and in the light of the definition of "settlor"; (ii) that, when the definition of "settlor" in sub-para. (c) is looked at, it is found to include "any person by whom the settlement was made or entered into directly or indirectly," which

shows that the order cannot constitute a settlement within the definition contained in sub-para. (b), since an order of the court, at all events when made otherwise than by consent, cannot be said to have been "made or entered into" by anyone, unless indeed by the court itself; (iii) that for the same reason the taxpayer cannot be said to be a "settlor" in relation to the order within the definition contained in sub-para. (c); (iv) that the remainder of the definition contained in sub-para. (c), introduced by the words "and in particular" does not displace the above submissions, because it merely gives particular examples of the various ways in which a settlement is to be considered as having been made or entered into "directly or indirectly" for the purposes of the section, and does not enlarge the ambit of the definition beyond persons who have, whether directly or indirectly, made or entered into settlements, or, in other words, persons who as free agents do some act or enter into some obligation which directly or indirectly brings a settlement into being or provides it with funds on which to operate; and (v), finally, that the reference to a "person who has provided . . . funds directly or indirectly for the purpose of the settlement" is in any case wholly inappropriate to describe a person from whom funds have been compulsorily extracted by an order of the court as opposed to a person who has furnished them of his own free will.

I find myself unable to accept this argument. As to the general proposition that the "settlements" to which s. 21 applies must, as a matter of necessary implication, be limited by reference to the essential characteristic of a "settlement" in the ordinary sense as a disposition or obligation made or entered into as a matter of free will, I have already stated the primary ground on which I think this argument fails. I would, however, add that I think the suggested limitation would introduce exceptions from the operation of the section for which I, for my part, can see no warrant whatever in its terms, and would, moreover, make it capricious and uncertain in its effect. The actual case under consideration is that of a plain order on a father to make payments to a trustee for his children. What of an actual settlement on his children executed by a father under an order of the court enjoining him to do so? I would find it hard, indeed, to justify the exception of such a settlement from the provisions of s. 21 on any principle of construction, yet the father would be equally under compulsion in the latter case as in the former, and it would seem to me capricious in the extreme to treat the two cases differently. Again, what of payments made by a father in trust for his children under a consent order or an undertaking given to the court? Transactions such as these might or might not be said to possess the necessary element of free will, supposing them to have been entered into, as they well might be, under the threat of a compulsory order as the alternative. Thus, the suggested limitation soon leads to a debatable area. If such a consent order or undertaking is to be held within s. 21, while a compulsory order is outside it, the application of the section will be made to turn on what is, in effect, a distinction of form rather than substance. If, on the other hand, the consent or undertaking is held to be excluded from s. 21 as given, in effect, under compulsion, I know not what other degrees of compulsion might be held sufficient for that purpose. The argument for the suggested limitation based on reasonableness does not impress me. I fail to see why a father who is compelled by order of the court to make proper provision for his children out of income which would otherwise be his, for tax purposes should, as a matter of reasonableness, be accorded different treatment in point of tax liability from a father who makes like provision of his own free will.

As to the points made by counsel for the Crown on the construction of sub-s. (9) (b) and (c), I agree that the two definitions should be read together, but I cannot accept the conclusion he draws from so doing. I do not think the meaning of the part of sub-para. (c) introduced by the words "and in particular" is limited in the way he suggests. I think it gives particular cases of persons

who are to be considered as having made or entered into a settlement directly or indirectly for the purposes of the section, although they are not persons who can be said to have made or entered into it in the ordinary sense. That reading of it gives the proper enlarging force to the word "includes," and is borne out by the fact that the particular examples enumerated are not cases of "making or entering into" a settlement in the ordinary sense at all. The words "without prejudice," etc., are, I think, merely put in lest it might be said that the enumerated examples exclude by implication cases which apart from special definition would amount to "making or entering into" a settlement "directly or indirectly" in the ordinary sense of those words. I do not agree that the words "has provided" necessarily connote an exercise of free will. It seems to me that the taxpayer here, if asked: "Who is providing for the maintenance of your children?", could with perfect accuracy have replied: "I am doing so under an order of the court." I should add that I can derive no assistance one way or the other from the reference to "child allowances" contained in the order. For these reasons I am of opinion that the general commissioners and VAISEY, J., came to a right conclusion as to the application of s. 21 of the Finance Act, 1936, in the present case, and that the appeal, accordingly, fails and should be dismissed.

HODSON, L.J.: By an order of the Probate, Divorce and Admiralty Division made on July 16, 1946, the taxpayer was ordered, *inter alia*, to pay to his former wife

"as an interim provision until further order as from Dec. 10, 1945, the annual sum of £100 less tax in trust for each of the three children . . . respondent to claim child allowances."

The sums specified were paid less tax, and the wife as guardian of the children had preferred repayment claims on their behalf on the basis that the annual sums were the income of the respective children. The claims were allowed by the revenue authorities. The taxpayer contended that the court had no power under s. 190 and s. 193 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 10 (4) of the Matrimonial Causes Act, 1937, to create a trust in favour of the children, and that no such trust was, therefore, created. In the alternative, the taxpayer contended that, if a trust had been created, the sums payable under it ought, by virtue of s. 21 of the Finance Act, 1936, to be treated as his income. In either case the same result would be reached, for, whether the sums paid were regarded as part of the mother's income or part of his income, he would be entitled to the child allowances under s. 21 of the Finance Act, 1920, as amended by s. 24 of the Finance Act, 1940, on the footing that the children had no income of their own. The learned judge, on appeal by the inspector of taxes from the general commissioners, rejected the first contention of the taxpayer, and accepted the second. The Crown appealed to this court, and the argument has in the main centred on the question whether the judge was right in his conclusions: (a) that the order, or the trust created by the order, was a settlement within the meaning of s. 21 of the Finance Act, 1936, and (b) that the taxpayer was a settlor within the meaning of the same section. The taxpayer, however, in this court, in resisting the appeal, renewed his first argument which had failed before the learned judge, but put it in a slightly different form. He admitted that the argument based on want of jurisdiction would not avail by itself since the order could not be treated as a nullity. He did, however, contend that, on its true construction, this was an order for the payment of sums of money to the mother for the maintenance of her children *simpliciter*. He argued (i) that sums paid for maintenance of children are not at common law impressed with a trust: *Jodrell v. Jodrell* (4); (ii) that the order was, on the face of it, in excess of jurisdiction and the court should endeavour to construe the words so as to bring

them within the language of the statute under which the order was made; (iii) that the words "an interim provision" point away from the creation of a trust; and (iv) that the words "the respondent to claim child allowances" are inconsistent with the construction which makes such a claim impossible having regard to the provisions of the Finance Acts.

It is true that sums ordered to be paid for maintenance of children, *simpliciter*, are treated for tax purposes as the income of the mother: *Stevens v. Tirard* (1). In that case no question of the construction of additional words such as "in trust" fell to be considered. As to the second contention, since the order is not to be treated as a nullity, I think that effect must be given to the words "in trust" and it is inadmissible to read the order as if it had not contained these words. Thirdly, the words "as an interim provision" are not in themselves inconsistent with a creation of a trust, and, lastly, the words "the respondent to claim child allowances" can, I think, only mean that, if at any time a claim for child allowances should become competent, the taxpayer was the person designated by the order as entitled to make the claim. I am, therefore, of opinion that as between the taxpayer and the Crown the order did, as the learned judge found, create a trust in favour of each of the three children.

Since, however, we were told that orders in a form closely corresponding to the one under consideration have been made from time to time in other cases and may be made again, I think it desirable to refer to the section itself in order to avoid misunderstanding as to the limited effect of the decision of this case. By s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, it is provided that

"in any proceedings for divorce . . . the court may from time to time . . . make such provision as appears just with respect to the custody, maintenance and education of the children, the marriage of whose parents is the subject of the proceedings . . ."

Sub-section (3), added by s. 10 (4) of the Matrimonial Causes Act, 1937, provides that

"the court may, if it thinks fit, on any decree of divorce . . . order the husband . . . to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable, and the court may for that purpose order that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties . . ."

It is, I think, clearly contemplated by sub-s. (3) that there shall in the appropriate case be a transfer by the husband to trustees of securities or other tangible assets, or some other form of collateral cover, for the purpose of securing payments for the benefit of the children. An order such as that made in the present case is not, in my judgment, within the intendment of this sub-section and cannot be properly described as an order securing a gross or annual sum of money for the benefit of the children. An order to pay maintenance is properly made under sub-s. (1), and the mere addition of the words "in trust" does not, in my opinion, convert it into an order to secure under sub-s. (3).

The procedure adopted in the case of maintenance for wives under s. 190 of the same Act is analogous. There orders to secure and to pay are dealt with separately in sub-s. (1) and sub-s. (2). Sub-section (1) deals with orders to secure a gross or annual sum to a wife for any term not exceeding her life. Sub-section (2) provides that the court may, in addition to, or instead of, an order under the foregoing sub-section, direct the husband to make to the wife payments during their joint lives. The practice has always been under these sections and their predecessors to order a husband to give security when, and

only when, security in the tangible sense indicated above is available or can be made available for the purpose.

If s. 193 (3) has no application, then the order for payment in trust for the children in this case can only derive from s. 193 (1). This sub-section was expressly considered by CLAUSON, L.J., in *Stevens v. Tirard* (1). He stated ([1939] 4 All E.R. 190):

- A " . . . I should have the gravest doubt whether, under s. 193, there would be any jurisdiction in the court at all to take income away from the father and make it the infant's income, though the court has full jurisdiction to take money from the father and make it available for the benefit of the infant by putting it in the hands of the mother, in whom, under the whole scheme which is completed by this order, are vested the rights of custody and the duty of maintenance of the infant."

- B It may be said that this statement was *obiter*, but, for my part, I would respectfully agree with the opinion expressed in the passage I have read. I have dealt with this part of the case, perhaps, at undue length merely to emphasise that, in my view, nothing now decided is to be taken as authority for the validity (from the point of view of jurisdiction) of the order which is the subject of this appeal.

- C The question remains whether on the construction of the order, which *prima facie* makes the payments made thereunder the income of the children, they are affected by the provisions of the Finance Act, 1936, s. 21 (1), so as to be treated for the purpose of the Income Tax Acts as the income of the father, that is to say, the taxpayer. Section 21 (1) reads:

- D "where, by virtue or in consequence of any settlement to which this section applies and during the life of the settlor, any income is paid to or for the benefit of a child of the settlor in any year of assessment, the income shall, if at the commencement of that year the child was an infant and unmarried, be treated for all the purposes of the Income Tax Acts as the income of the settlor for that year and not as the income of any other person."

- E Sub-section (9) (b) reads as follows:

"the expression 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets."

- F Sub-paragraph (c) reads:

- G "the expression 'settlor,' in relation to a settlement, includes any person by whom the settlement was made or entered into directly or indirectly, and in particular (but without prejudice to the generality of the foregoing words of this definition) includes any person who has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement."

The definitions do not purport to cover every form of settlement or every kind of settlor, but by use, in each case, of the word "includes" show that they are designed to catch, within their net, things which and persons who otherwise might be held not to be so caught.

- H Since the order creates a trust, there is *prima facie* here a settlement within the plain words of sub-s. (9) (b), and a settlor within the meaning of sub-s. (9) (c). It is, however, contended by the Crown that a settlor, to come within the section, must be a person who acts voluntarily and not a person who acts merely under compulsion of law as the taxpayer has acted in the present case. This argument is supported by a reference to the definition clauses in sub-s. (9), since the words "entered into," "provided" or "undertaken to provide" are not at first sight very apt to describe the actions of a person who, under the

compulsion of a court order not made by consent, makes payments to another to be held in trust for his children. The words "directly or indirectly" in the definition, it is said, do not assist since a payment made directly by a voluntary act does not become an indirect payment by the intervention of compulsion. In short, an involuntary act is not indirectly voluntary. This, no doubt, is correct, but, apart altogether from the examples given in the definitions, the question still remains whether a person who makes payments in the circumstances of this case, who would otherwise be a settlor who has entered into or provided funds for the purpose of a settlement within the scope of s. 21 (1), ceases to be such a settlor because he acts under compulsion.

Counsel for the Crown argued that a compulsory settlement would not be within the intendment of the section as, if that were so, it would cover the case of a father who, sued by his own infant son in tort, paid money into court by compulsion of a judgment for the benefit of the infant until he attained the age of twenty-one, the circumstances being that the father had obtained the money under the terms of a contract with an insurance company. I confess I am not impressed by the supposed absurdity of this result, for, if the legislature has set limits to the extent to which a taxpayer may divest himself for tax purposes of income by voluntary means, I see no reason why the same principle should not be applied to income of which the taxpayer is compulsorily divested. Indeed, the argument for the Crown leads to curious results in the construction of the sections of the Supreme Court of Judicature (Consolidation) Act, 1925, dealing with settlements and variation of settlements. They are s. 191 (1) and s. 192. A settlement made under the powers conferred by s. 191 (1) is compulsory, and, therefore, if the contention of the Crown is correct, is not a settlement at all within the meaning of the Finance Act, 1936, s. 21 (1). Similarly, under s. 192 an original settlement might be within the section whereas, if it had variations compulsorily made in favour of children of the settlor, other than the acceleration of their interests, the parts of the settlements introduced by such variation would not be within the section. In my opinion, the words "settlor" and "settlement," are in their context, without straining their meaning, even though coupled with the examples given in the interpretation section, wide enough to cover transactions entered into under compulsion, and this result is reached without recourse to the words "directly or indirectly" relied on by the learned judge below. For those reasons I think the appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *James Turner & Son* (for the taxpayer).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.]

R. v. EAST NORFOLK LOCAL VALUATION COURT.

Ex parte MARTIN.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Hilbery and Hallett, J.J.),
March 5, 1951.]

Rates—Local valuation court—Withdrawal of objection to proposal to alter valuation list—Valuation court not entitled to proceed with hearing of appeal—Local Government Act, 1948 (c. 26), s. 41 (6).

A A valuation officer made proposals for the alteration of the valuation list in respect of certain hereditaments, the occupiers of the hereditaments in question served notices of objection, and the valuation officer gave notice of appeal to the local valuation court against each objection. B Before the date fixed for the hearing of the appeal, the occupiers withdrew their objections unconditionally. Notwithstanding the withdrawal of the objections, the valuation court took the view that they must deal with the appeals, and, in the absence of appearance by the parties, dismissed them.

C HELD: once an objection was withdrawn, there was nothing left on which the valuation court could adjudicate, and, therefore, they were not entitled to proceed with the determination of the appeal.

Semble: even if a person entitled under s. 48 (3) of the Local Government Act, 1948, to appear on the hearing of an appeal by the valuation court had wished to be heard, the objection having been withdrawn, there was no appeal subsisting on which such a person could have been heard.

D FOR THE LOCAL GOVERNMENT ACT, 1948, s. 41 (5), (6), see HALSBURY'S STATUTES, Second Edn., Vol. 20, pp. 237, 238.

MOTION for an order of *certiorari* to remove into the High Court to be quashed a decision of the local valuation court for East Norfolk, dismissing appeals against proposals for the valuation of certain hereditaments at Wymondham E and Norwich.

The applicant was the valuation officer for the rating areas of Wymondham urban district and Norwich county borough. He made proposals under the Local Government Act, 1948, s. 40, (i) on May 26, 1950, for the inclusion in the valuation list for Wymondham of premises, described as a bungalow and a garage, at Oak Bungalow, Chapel Road, Spooner Row, and (ii) on July 28, F 1950, for the inclusion in the valuation list for Norwich of premises described as shop used as a dental surgery and waiting room, at 9, West Earlham Centre. In each case the occupier gave notice of objection to the proposal under s. 41 (3) of the Act, and the valuation officer gave notice of appeal to the local valuation court against each objection under s. 41 (6). Subsequently, the occupiers of the premises withdrew their objections unconditionally, and the valuation G officer issued to the rating authorities under s. 41 (5) directions for the alteration of the valuation lists to give effect to his proposals. The appeals were to be heard by the local valuation court on Nov. 7, 1950, and on that day the valuation officer informed the court that the objections of the occupiers had been withdrawn. The court, however, being of opinion that once a notice of appeal had been served they must deal with it, proceeded to determine the H appeals and dismissed them.

Sir Arthur Comyns Carr, K.C., and M. L. Lyell for the applicant.
Simes, K.C., and Amies for the valuation court.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of *certiorari* directed to a local valuation court constituted from the East Norfolk local valuation panel to bring up a direction concerning certain hereditaments at Wymondham and Norwich, on the ground that the court had no

jurisdiction to hear appeals by the applicant against objections made by the occupiers of the hereditaments in question because those objections had been withdrawn. The sections in Part III of the Local Government Act, 1948, relating to valuation and rating procedure in substance provide for the valuation for rating to be transferred to valuation officers of the Commissioners of Inland Revenue. If they wish to make an alteration in the valuation list, which includes an addition thereto, they have to make in the first instance a proposal. A copy of the proposal has to be sent to the occupier of the hereditament which it is proposed to insert in the valuation list or the valuation of which it is proposed to alter. The occupier can give notice of objection to the proposal, and, instead of the onus then being on him of showing what is the proper valuation, the onus is thrown on the valuation officer, who, if he wishes to resist the objection, has to appeal against it to the local valuation court. If the objection is unconditionally withdrawn, the valuation officer is directed to make the appropriate entry in the valuation list, that is to say, either the addition or the alteration.

In the two cases with which we are dealing the valuation officer gave notice to the occupiers of the value that he proposed to put on two new hereditaments. The occupiers each served a notice of objection. Certain times are laid down for the giving of a notice of objection, and by s. 41:

“(5) Where, on the expiration of the times limited by sub-s. (3) and sub-s. (4) of this section for the service of notice of objection, no such notice has been served or where every such notice is unconditionally withdrawn, the valuation officer shall cause such alteration to be made in the list as will give effect to the proposal. (6) Where notice of objection is made and is not unconditionally withdrawn—(a) the person making the proposal may, by notice of appeal served within the time and on the persons hereinafter mentioned, appeal against the objection to a local valuation court; and (b) no alteration shall be made in the list in pursuance of the proposal except where notice of appeal is given as aforesaid, and then only either—(i) in pursuance of the directions of a court or arbitrator given under the subsequent provisions of this Part of this Act; or (ii) by agreement between all the persons entitled to be heard on the appeal.”

In the present case the notices of objection having been given within the proper time and the time limit provided in sub-s. (3) and sub-s. (4) having expired, the valuation officer served his notices of appeal. The objectors then unconditionally withdrew their notices of objection. On the day fixed by the valuation court for the hearing of the appeal, the valuation officer informed the court that the two objections had been unconditionally withdrawn and that he had made alterations in the list as he was directed to do by the provisions of s. 41 (5). The court, however, would not allow the objections to be withdrawn because they took the view that, once a notice of appeal had been served, they were bound to hear the case although the objector did not want his objection to be heard and was content with the valuation of his hereditament and the valuation officer had nothing to say because his valuation had been accepted.

The court may have thought that they were bound to hear the case because certain persons are entitled to appear and be heard at an appeal. These persons are set out in s. 48 (3), which provides:

“On the hearing of an appeal to a local valuation court—(a) the appellant; and (b) the valuation officer, when he is not the appellant; and (c) the owner or occupier of the hereditament to which the appeal relates, when he is not the appellant; and (d) the rating authority for the area in which the hereditament in question is situated, when that authority is not the appellant; and (e) in the case of an appeal against an objection, the objector, where he is not one of the persons aforesaid, shall be entitled

to appear and be heard as parties to the appeal and to examine any witness before the court and to call witnesses."

In the present case the rating authorities had not given notice of objection. The only persons who had given notice of objection were the occupiers and nobody else appeared at the court. Indeed, as I understand it, the valuation officer would not have been at the court if he had not been there to deal with some other cases, but, nevertheless, the court insisted on going on. Section 41 (6) which deals with appeals, starts with the words

"Where notice of objection is made and is not unconditionally withdrawn—(a) the person making the proposal may, by notice of appeal served within the time . . . hereinafter mentioned, appeal against the objection . . ."

The sub-section provides further that:

"(b) no alteration shall be made in the list in pursuance of the proposal except where notice of appeal is given . . . and then only either—(i) in pursuance of the directions of a court . . . or (ii) by agreement between all the persons entitled to be heard on the appeal."

These provisions apply only where a notice of objection is given and is not unconditionally withdrawn. It is quite clear that, if the objection is unconditionally withdrawn, there is nothing for the court to adjudicate on, and in those circumstances the valuation court cannot insist of its own motion in going on with an appeal. In the present case the court went on with the appeal and called on the valuation officer to give his evidence. The valuation officer stated that he had no evidence to give and the court then dismissed the appeals. In consequence the proposals were ineffective and these hereditaments were never entered in the valuation list. In my opinion, it is clear that, once an objection is unconditionally withdrawn, all the provisions in s. 41 (6) cease to have effect.

Counsel for the local valuation court has urged that very curious results would follow and that s. 48 gives power to those mentioned in sub-s. (3) thereof to attend and be heard. What may happen if the valuation court have given notice of hearing and some of those entitled to be heard appear and say they wish to be heard does not arise in the present case. Any expression of opinion, therefore, whether or not, if the objector withdraws his objection, the valuation court is still bound to hear any of the persons mentioned in s. 48 (3) if they appear and desire to be heard is not called for. My strong impression is that, once the objection has been withdrawn, there is nothing on which any person can be heard, but obviously, on the facts of the present case, that question does not arise. Therefore, the order of *certiorari* must go.

HILBERY, J.: I concur.

HALLETT, J.: I agree.

Order for certiorari. No order as to costs.

Solicitors: *Solicitor of Inland Revenue* (for the applicant); *Pollard, Stallabrass & George Martin* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

TURNER v. FORWOOD AND ANOTHER.

[COURT OF APPEAL (Lord Goddard, C.J., Singleton and Denning, L.JJ.),
February 28, March 1, 1951.]

Deed—Consideration—Nominal consideration stated—Admissibility of evidence to show true consideration.

Where the consideration is stated in a deed parol evidence to prove a larger consideration does not contradict the deed and is admissible. **A**

Clifford v. Turrell (1845) (14 L.J.Ch. 390) and *Frith v. Frith* ([1906] A.C. 254), applied.

AS TO ADMISSION OF PAROL EVIDENCE TO PROVE CONSIDERATION, see HALSBURY, Hailsham Edn., Vol. 10, p. 267, para. 333; and FOR CASES, see DIGEST, Vol. 17, pp. 335-338, Nos. 1467-1495. **B**

Cases referred to:

(1) *Clifford v. Turrell*, (1841), 1 Y. & C. Ch. Cas. 138; 62 E.R. 826; *affd.*, (1845), 14 L.J.Ch. 390; 5 L.T.O.S. 281; 17 Digest 337, 1484.

(2) *Frith v. Frith*, [1906] A.C. 254; 75 L.J.P.C. 50; 94 L.T. 383; 17 Digest 337, 1487. **C**

APPEAL by the first defendant from an order of DONOVAN, J., dated Nov. 6, 1950.

Until 1942 the plaintiff was employed by Cardigan Quarries, Ltd., as sales manager under a service agreement dated June 29, 1939, for a period of which in 1942 there were two years unexpired. The first defendant was at all material times the managing director of the company, the second defendants, in which he held the majority of the shares. In 1942, owing to the war, the company was in financial difficulties and was being pressed by creditors. The first defendant arranged with one, Napoleon Reiter, for the latter to make advances to the company, but Reiter would do so only if the company were (so far as he was concerned) relieved of certain liabilities, especially debts to employees, and if the plaintiff's service agreement were terminated. The company at that time owed some £1,215 to the plaintiff, and the first defendant wrote to Reiter that he would indemnify Reiter and the company against any claim made by the plaintiff in respect of the debt, and he further agreed that within one month he would procure the plaintiff to cancel and determine his service agreement without compensation being payable to him by the company. Reiter's solicitors prepared two documents: (i) a deed, which was executed on Mar. 14, 1942, by the plaintiff and the first defendant, and (ii) a form of notice of resignation addressed to the company, which was signed by the plaintiff. The deed recited that the company was indebted to the plaintiff in the sum of £1,215 in respect of accrued salary under his service agreement "which agreement has been determined as from Mar. 16, 1942," and that the company was not in a position to meet its liability, but at the request of the first defendant the plaintiff had agreed to assign to him the debt due from the company. The deed continued: **D**

"Now this deed witnesseth that in consideration of the sum of 10s. paid by the said [first defendant] to the said [plaintiff] the said [plaintiff] doth hereby assign and transfer to the said [first defendant]" the whole of the debt." **E**

The second document read: **F**

"With reference to my service agreement with you, under which you appointed me sales manager, I hereby tender my resignation as such sales manager and agree that the contract now subsisting between you and myself shall stand determined as from today's date. I hereby admit that **G**

H

I do not make any claim against you by reason of the determination of such agreement."

A In an action in which the plaintiff claimed £1,215 from the first defendant he alleged (i) that his signature to the documents was induced by the oral promise of the first defendant that he himself would pay to the plaintiff the amount of the debt, and (ii) that he (the plaintiff) agreed to assign the debt and to cancel his service agreement on the first defendant's oral agreement to make such payment to him. Alternatively, the plaintiff claimed £1,215 from the defendant company for services rendered under the agreement of June 29, 1942. DONOVAN, J., gave judgment for the plaintiff against the first defendant, with costs, and for the company against the plaintiff, with costs.

B *Nield, K.C.*, and *de Ferrars* for the first defendant.
Laski, K.C., and *C. G. A. Cowan* for the plaintiff.
The second defendant, Cardigan Quarries, Ltd., was not represented.

C LORD GODDARD, C.J. (having stated the facts): The first and most interesting argument which has been advanced by counsel for the first defendant is that, as the deed recited that the consideration was 10s., it was not open to the plaintiff to say that the true agreement was that the consideration for the assignment should be the payment of the whole debt by the first defendant to the plaintiff. He submitted, and at first sight I confess I was greatly taken by the submission, that, as the deed states the consideration to be 10s., it is inconsistent with the deed to say that the true consideration was £1,215, and evidence of the agreement relied on by the plaintiff ought not to have been received by the learned judge.

E A case on this subject has not been before the courts for many years. One of the cases cited to us was *Clifford v. Turrell* (1), which was heard in the court of first instance before SIR JAMES KNIGHT BRUCE, V.-C., and affirmed on appeal by LORD LYNDHURST, L.C. That case was afterwards approved by the Judicial Committee of the Privy Council in *Frith v. Frith* (2). *Clifford v. Turrell* (1) appears to lay down in the clearest possible terms that, at any rate, where there is a nominal consideration—and I am not satisfied that it is confined to cases of nominal consideration—evidence is always admissible to show that the true consideration was something more than the consideration stated in the written agreement, be it under hand or under seal. LORD LYNDHURST, L.C., said (14 L.J.Ch. 397):

F " . . . the settled rule of law is, that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it."

G In that case a deed had stated the nominal consideration of 10s. and an action for specific performance was brought in which it was alleged by the plaintiff that, in fact, there had been a further consideration for his execution of the deed, namely, a promise by the defendant to pay him an annuity of £40 a year and to give him a house worth £10 a year. The point was taken that evidence of that agreement was not admissible because it would be inconsistent with the terms of the deed which stated the consideration to be 10s.

H In *Frith v. Frith* (2) LORD ATKINSON, who delivered the advice of the Board, referred to *Clifford v. Turrell* (1) and said ([1906] A.C. 259):

" Parol evidence was admitted to prove that additional consideration was in fact given for the deed by which the plaintiff was induced to execute it, namely, an agreement by the defendant that he would pay to the plaintiff an annuity of £40 per annum during his life and give to him a house worth £10 a year to live in. Specific performance of that parol

agreement was decreed. The Vice-Chancellor . . . in delivering judgment in the case, lays down, in the opinion of their Lordships correctly, the rule of law upon this subject. He said (1 Y. & C. Ch. Cas. 149): 'Rules of law may exclude parol evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument.' And then adds: 'The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.' Their Lordships think the present case comes within that rule, that the evidence proposed to be given did not contradict the deed, and that the appellant's first contention is well founded."

That is a perfectly clear statement by the Judicial Committee approving the Vice-Chancellor that it is not a contradiction of an instrument to prove a larger consideration than that which is stated in it. For myself, I can see no difference between saying, where the consideration is stated to be 10s., that it was, in fact, £1,215—as was done in this case—and saying—as was done in *Clifford v. Turrell* (1)—that, while the consideration stated in the deed was 10s., the true consideration was a payment of £40 a year for life and a house worth £10 a year. It seems to me, therefore, that on the authorities the evidence was admissible.

It is unnecessary to go back to the origin of the rule which, no doubt, had its inception in matters to do with conveyancing and the Statute of Uses. Practically every bill of exchange which was ever drawn was for value received. When it is an accommodation bill, of course, no value has been received and, as between the parties who sue on it where the bill is not in the hands of a holder in due course, it is always open to the acceptor to say that no consideration ever passed for the bill, and that gives him a good defence. I do not see that there is any real difference in principle between the present case and one of a contradiction of the statement which appears on a bill "for value received." It always has been held that one can contradict that statement and show that no consideration has passed, and similarly to show that, whereas the consideration is stated to be nominal, the true consideration was a promise to pay a much larger sum. I think the authorities are perfectly clear on the subject, and therefore, in my opinion, the learned judge was right in accepting the evidence.

The next point which counsel for the first defendant took was that the agreement which was pleaded was not only that there should be an assignment of the debt in return for the promise of a payment of £1,215, but also that the plaintiff would treat his service with the quarry company as at an end. He said that the plaintiff had proved that the promise which had been made to him was that the first defendant would pay him £1,215 as the consideration and on those terms he made the assignment, and later the question was raised with regard to the cancellation of the agreement and he agreed to do that. I do not see that that in any way disentitles the plaintiff to insist on the promise which had been made to him to pay the £1,215. It is obvious that the learned judge was entitled to draw the inference that it was all one bargain. It would be no good having the agreement dealing with the debt unless the plaintiff also gave up his service agreement, because that was what the first defendant had himself agreed with Mr. Reiter that he would procure the plaintiff to do. The learned judge has found that the agreement was made, and there was evidence on which he could find that the agreement was that the first defendant should pay £1,215 to the plaintiff. For the reasons which I have already given I think the evidence was admissible.

SINGLETON, L.J.: Counsel for the first defendant has submitted that the plaintiff was not entitled to give evidence to dispute the fact that the consideration for the deed of Mar. 14, 1942, was correctly stated as 10s. There are two recitals in the deed of Mar. 14, 1942:

A "Whereas Cardigan Quarries, Ltd., are indebted to the said [plaintiff] in the sum of £1,215 in respect of accrued salary due under and by virtue of an agreement in writing dated June 29, 1939, and made between the company of the one part and the said [plaintiff] of the other part (which agreement has been determined as from Mar. 16, 1942) . . ."

and

B "Whereas the company are not in a position to meet their liability to the said [plaintiff] but at the request of the said [first defendant] the said [plaintiff] has agreed to assign to him the debt due by the company to him as aforesaid."

In view of those two recitals, I think it is clear that the whole arrangement between the parties is not set forth in the deed. The consideration is stated:

C "in consideration of the sum of 10s. paid by [the first defendant] to [the plaintiff, the plaintiff] doth hereby assign and transfer to the said [first defendant] all that sum of £1,215 now due and owing by the company to [the plaintiff]."

D Anyone looking at the deed would ask at once why the transaction had been carried out. If, on the face of a document such as this, it appears that the consideration is no more than nominal, it seems to me that the court is entitled to hear evidence of the true circumstances and the true consideration. I think the judge was right in allowing the evidence to be called. He preferred the evidence of the plaintiff to that of the defendant, and gave judgment for the plaintiff. I do not think this court would be right to interfere with his judgment in a matter in which he saw and heard both parties.

E **DENNING, L.J.:** I also agree. The reason for the rule in *Clifford v. Turrell* (1) is that in the old days a nominal consideration was inserted so as to make the conveyance or assignment good, but it was not inserted to state the consideration which was agreed to be given to the other party. There was, therefore, no bar to the proof of a contractual consideration because the deed was not intended to embody it. The rule excluding parol evidence only applies when the parties set down in writing the terms agreed. Parol evidence has been held to be admissible in the case of the assignment of property or in that of the appointment of an attorney: *Frith v. Frith* (2). In the present case there was an assignment, and evidence of the real contractual consideration is, in my opinion, admissible. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors: *Philip Conway, Thomas & Co.* (for the first defendant); *Golding, Hargrove & Palmer* (for the plaintiff).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

GREENWOOD v. SKETCHER AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), March 6, 1951.]

Legal Aid—Certificate—Issue more than three months after grant of emergency certificate—Validity—Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359), reg. 10 (9), reg. 12 (1), reg. 15 (9)—R.S.C., Ord. 64, r. 7.

The appellants applied to a local committee under reg. 3 (1) of the Legal Aid (General) Regulations, 1950, for a certificate to enable them to appear as "assisted persons" under the Legal Aid and Advice Act, 1949, in an appeal to the Court of Appeal from a decision of ROXBURGH, J., and on Nov. 7, 1950, the local committee granted them an emergency certificate under reg. 10 (1). On Jan. 18, 1951, the appeal was dismissed, and a provisional order was made that the appellants should pay the costs. On Feb. 18, 1951—more than three months after the issue of the emergency certificate—the local committee, under reg. 10 (8) and (9), issued to the appellants a certificate in respect of the proceedings. The certificate bore the words: "This certificate is issued to replace an emergency certificate issued on the date of this certificate," and the date of the certificate was given as Nov. 7, 1950. The appellants contended that they were not liable to pay the costs of the appeal because, a valid certificate having been issued to them in respect of the proceedings, under reg. 2 (1) they were entitled to legal aid and were "assisted persons."

Held: a certificate issued in respect of proceedings to which an emergency certificate related to be valid must be issued within the period during which the emergency certificate remained in force, namely, either six weeks or such longer period not exceeding three months as might have been allowed by way of extension under reg. 10 (9); the certificate in the present case had not been issued within a period of three months from the date of the emergency certificate and so was not valid; no valid certificate having been issued, under reg. 10 (9) the emergency certificate must be deemed to have been revoked; and, therefore, the appellants were not "assisted persons" and were liable to pay the costs of the appeal.

Quære: Whether the court has power under reg. 15 (9) and R.S.C., Ord. 64, r. 7, to extend the time of an emergency certificate beyond the period of three months.

APPLICATION with regard to costs in an appeal against an order of ROXBURGH, J., dated Oct. 28, 1950.

On Jan. 18, 1951, the appeal was dismissed by the Court of Appeal and a provisional order was made that the appellants should pay the costs. They contended that they were assisted persons and so not liable to pay the costs, and they produced an emergency certificate which had been granted to them on Nov. 7, 1950, and stated that their application for a definitive certificate was pending. The Court of Appeal directed that the order as to costs should not be drawn up, but that the appellants should be given an opportunity to obtain a definitive certificate. On the present application the appellants produced a definitive certificate, bearing the date of the emergency certificate. The respondent contended that the definitive certificate was issued on Feb. 18, 1951, more than three months after the grant of the emergency certificate, and, therefore, it was invalid and the appellants were not assisted persons.

J. F. Bowyer for the appellants.

Strangman, K.C., for the respondent.

SIR RAYMOND EVERSLED, M.R.: In my judgment, the appellants had ceased to be legally assisted persons. It appears that on Nov. 7, 1950, there was issued to them or their solicitor an emergency certificate relating

to certain proceedings, namely, an appeal to this court from a judgment of ROXBURGH, J. The Legal Aid (General) Regulations, 1950 (S.I. 1950, No. 1359) made by the Lord Chancellor pursuant to s. 12 of the Legal Aid and Advice Act, 1949, provide by reg. 10, para. (9):

"An emergency certificate shall remain in force for a period of six weeks or such longer period not exceeding three months as the local committee may allow . . ."

- A It is rightly conceded by counsel for the appellants that the effect of those words is to limit the period during which an emergency certificate can remain in force to a maximum period of three months—that is, three months from the date of its issue, subject only to the question whether there is any power in the court to extend that time. It follows that the emergency certificate issued on Nov. 7, 1950, must have expired not later than midnight on Feb. 6, 1951.
- B A definitive certificate was issued on or about Feb. 18—after the expiration of the period of three months. The definitive certificate states on its face:

"This certificate is issued to replace an emergency certificate issued on the date of this certificate . . ."

- C The date of the definitive certificate is, therefore, to be taken to be Nov. 7, 1950—an artificial date because it was not issued on that date. The back-dating is due to para. (10) of reg. (10), which provides:

"A certificate issued under para. (8) of this regulation shall bear the same date as the emergency certificate."

- D In the course of the argument I ventured to doubt whether that was an entirely fortunate disposition, because the actual date of issue is never made clear on the face of the document itself. I speak with diffidence, not being sufficiently familiar with the administrative problems which faced those whose duty it was to make the regulations, but, if there should be a question of the amendment or revision of these regulations, I suggest, at any rate for consideration, that it might be useful if the definitive certificates bore on the face of them the actual date of their issue. That would not prevent it being stated on the certificate that it was to take effect as from the date of issue of the emergency certificate.
- E

The sole question is whether, since the definitive certificate was not issued within the three months, the appellants are entitled to claim *quoad* these proceedings to have been "assisted persons." That depends on a consideration of these regulations and particularly of certain paragraphs of reg. 10 and reg. 12.

F Paragraph (6) of reg. 10 provides:

"A person by whom an emergency certificate has been issued shall, as soon as practicable thereafter, report the circumstances in which it was issued to the local committee of which he is a member . . ."

- G Paragraph (7) provides that a person to whom an emergency certificate has been issued shall furnish the local committee with such additional information, if any, as is required. Then come para. (8) and para. (9):

"(8) The report made under para. (6) of this regulation and any additional information furnished under para. (7) of this regulation shall be deemed to constitute an application for a certificate by the person to whom the emergency certificate has been issued. (9) An emergency certificate shall remain in force for a period of six weeks or such longer period not exceeding three months as the local committee may allow, and unless within that period a certificate is issued in respect of the proceedings to which the emergency certificate relates, it shall, at the end of that period, be deemed to have been revoked."

H

Paragraph (10) I have already read. Paragraph (11):

"If a local committee do not issue a certificate on an application made

under para. (8) of this regulation they shall revoke the emergency certificate."

Regulation 12 provides the effect of revocation, and para. (1) says:

"Subject to the provisions of this regulation, a person whose certificate is revoked shall be deemed never to have been an assisted person in the proceedings to which the certificate related . . ."

When I first read para. (10) of reg. 10 I thought that the reference to "para. (8)" was a misprint for "para. (9)," and it is possible that it is, but I think we must interpret para. (10) as it stands—*i.e.*, we must regard it as referring to a certificate issued under para. (8). Paragraph (8) does not, in fact, provide for the issue of a certificate. It provides that certain things are to be treated as an application for a certificate by the person to whom the emergency certificate has been issued. In my judgment, para. (10) must be read together with its context. Although, therefore, I am not willing to treat the figure "(8)" as a misprint for "(9)" and to substitute "(9)" for "(8)," still, when I read para. (10) in the light of the context provided by para. (8), para. (9), and para. (11) I feel compelled to the conclusion that the only certificate which can bear the same date as that in the emergency certificate is a certificate issued within the period specified in para. (9). Unless it is so, there is no emergency certificate alive the date of which can be, so to speak, translated to the definitive certificate. I have already referred to reg. 12 (1), and since the facts postulated there have occurred in the present case it is necessary to treat the emergency certificate as though it had never been made and as though the appellants had never been assisted persons. If that is so, the definitive certificate can have no validity, for it states on its face that "this certificate is issued to replace an emergency certificate . . ." and it is impossible to replace something which by the terms of reg. 12 has already been revoked and deemed not to have existed. I think that view is further supported by the terms of para. (11) of reg. 10—that, if a local committee do not issue a definitive certificate, they are bound to revoke the emergency certificate. In other words, reading these paragraphs in their context, I think that a definitive certificate which is to relate back to the date of issue of the emergency certificate must be issued within the period of the emergency certificate—*i.e.*, either six weeks or such longer period not exceeding three months as may have been given by way of extension. For those reasons I think it follows that, the necessary conditions being absent, the appellants at the relevant date were not assisted persons.

So far as concerns the power in this court to extend the period during which an emergency certificate is in force, as at present advised I am not satisfied that R.S.C., Ord. 64, r. 7, applies to this case. There is, however, no application before us to extend the time, and, therefore, it is unnecessary to come to a conclusion on this matter.

JENKINS, L.J.: I agree. It should be borne in mind that the emergency certificates issued under these regulations are designed to provide immediate temporary protection to the aided litigant, and owing to practical considerations are necessarily issued with little investigation as to the litigant's means or the merits of his case. When after due inquiry as to means and otherwise a definitive certificate is issued, it is made to relate back to the date of the emergency certificate. In the meantime and pending the issue of the definitive certificate, the emergency certificate, while it remains in force, gives to the litigant substantially similar protection to that accorded by a definitive certificate. In those circumstances it seems to me absolutely essential, to make the scheme envisaged by the regulations workable, that some time limit should be set at which an emergency certificate will cease to be operative unless it is in the meantime replaced by a definitive certificate issued after adequate inquiry into the relevant circumstances. For the reasons stated by my Lord I think

it is reasonably plain on the construction of these regulations that this has been done and the maximum life of an emergency certificate has been fixed by para. (9) of reg. 10 at three months. I also think that to enable a definitive certificate to be issued bearing the date of a previously issued emergency certificate it is essential under these regulations that the emergency certificate should be an existing emergency certificate at the date when it is so replaced. In other words, the replacement must be effected, if at all, within the maximum period of three months prescribed by para. (9) of reg. 10. Even if it could be said that the final paragraph of reg. 15 incorporates for this purpose the powers conferred in the Rules of the Supreme Court for extending time, this is not a case in which any extension should be granted, particularly in view of the fact that no notice of intention to make any such application has been given. Accordingly, I agree with the conclusion reached by my Lord.

HODSON, L.J.: I agree.

Provisional order that the appellants pay the costs of the appeal to stand and to date from March 6, 1951.

Solicitors: *Metcalfe, Copeman & Pettefar*, agents for *Oliver Wiles*, Holbeach (for the appellants); *Lee, Bolton & Lee*, agents for *Roythorne & Co.*, Spalding (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

THE SUSAN V. LUCKENBACH.

[COURT OF APPEAL (Somervell, Singleton and Birkett, L.JJ.), December 11, 20, 1950.]

Shipping—Salvage—Right to recover—Salving vessel and colliding vessel under control of different departments of Crown—Circuity of action.

In 1942 the *Susan V. Luckenbach* was in collision with the *Nea Hellas* which was under bare boat charter to the Crown and was manned by British officers and crew appointed on behalf of the Crown by the Ministry of War Transport. Salvage services were rendered to the *Susan V. Luckenbach* by H.M.S. *Arpha* and the *Confederate*, the latter being a salvage steamer under the control of the Admiralty. The *Susan V. Luckenbach* claimed against the *Nea Hellas* in respect of the collision and the *Nea Hellas* was found to be alone to blame for damage likely to amount to some £110,000. The statutory limit of the *Nea Hellas's* liability was £120,000. In a claim by the Admiralty for salvage an award of £25,000 was made.

HELD: (i) the fact that the colliding vessel and the salving vessels were in the same ownership, viz., that of the Crown, was not a reason why the salved vessel should not pay salvage.

Dictum of LORD WRIGHT in *The Kafiristan* ([1937] 3 All E.R. 753), applied.

(ii) since, in view of the limitation of the liability of the *Nea Hellas*, the amount of damages recoverable against the *Nea Hellas* was not the same as the amount recoverable by the Admiralty in respect of salvage and since the Admiralty was not a party to the collision action, there was no circuity of action and the Admiralty were entitled to salvage.

Dictum of BUCKNILL, J., in *The Kafiristan* ([1936] 3 All E.R. 568), approved.

AS TO DISQUALIFICATION FROM CLAIMING SALVAGE, see HALSBURY,

Hailsham Edn., Vol. 30, p. 890, para. 1193; and FOR CASES, see DIGEST, Vol. 41, pp. 843, 844, Nos. 7055-7068.

Cases referred to:

- (1) *The Kafiristan*, [1936] 3 All E.R. 563; 106 L.J.P. 11; *affd.* C.A., [1937] 1 All E.R. 40; [1937] P. 63; 106 L.J.P. 62; 156 L.T. 171; *reversd.* H.L., [1937] 3 All E.R. 747; 106 L.J.P. 91; 157 L.T. 439; *sub nom. The Beaverford v. Kafiristan*, [1938] A.C. 136; Digest Supp. A
- (2) *The Capella (Cargo Ex)*, (1867), L.R. 1 A. & E. 356; 16 L.T. 800; 41 Digest 850, 7133.
- (3) *The Glengaber*, (1872), L.R. 3 A. & E. 534; 41 L.J. Adm. 84; 27 L.T. 386; 41 Digest 843, 7059.
- (4) *Admiralty Comrs. v. Susquehanna (Owners)*, *The Susquehanna*, [1926] A.C. 655; 95 L.J.P. 128; 135 L.T. 456; 41 Digest 802, 6624. B

APPEAL by the defendants from an order of PILCHER, J., dated July 4, 1950, whereby he awarded £25,000 in respect of salvage services rendered by the plaintiffs to the defendants' steamship.

The defendants, the owners of S.S. Susan V. Luckenbach, contended that as at the time of the collision the Crown, through the Ministry of War Transport, were the owners of the Nea Hellas, the vessel held wholly to blame in a collision action, the plaintiffs, the Admiralty Commissioners, being also a department of the Crown, were not entitled to salvage remuneration rendered by their vessels, S.S. Confederate and H.M.S. Arpha. Alternatively, the defendants contended that no salvage award should be made since to do so would involve circuity of action. PILCHER, J., held that the case was covered by the decision of the House of Lords in *The Kafiristan* (1) and awarded £24,000 and £1,000 to the Confederate and Arpha respectively. C
D

Naisby, K.C., and *Porges* for the defendants.

Adams, K.C., and *J. U. Hunt* for the Admiralty.

Cur. adv. vult.

Dec. 20, 1950. SOMERVELL, L.J., read the following judgment of the court. In this case the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom (hereinafter referred to as the Admiralty) and the commanding officer and crew of H.M.S. Arpha claimed remuneration for salvage services rendered to the defendants' steamship Susan V. Luckenbach. The services were rendered by a Danish salvage steamer, the Confederate, operating under the control of the Admiralty, as well as by the Arpha. Apart from the special defences referred to later, it was not disputed that the Admiralty could sue in respect of salvage services rendered by the Confederate. The fact that she was a salvage steamer probably explains why there is no separate claim by her master and crew. PILCHER, J., awarded a sum of £24,000 in respect of the Confederate's services and £1,000 in respect of the Arpha's services, of which latter sum he apportioned £300 to the commanding officer and crew of the Arpha. The defendants appeal in respect of the award other than the last-mentioned £300. No question of *quantum* arises. E
F
G

In April, 1942, the Susan V. Luckenbach was in collision with the Nea Hellas. The Nea Hellas was under bare boat charter to the Crown, manned by British officers and crew appointed on behalf of the Crown by the Ministry of War Transport. Under the then procedure the owners of the Susan V. Luckenbach issued a writ against the captain of the Nea Hellas, Captain Smart, the Treasury Solicitor entering an appearance for him. The position at that time (that is, before the Crown Proceedings Act, 1947) was that the Crown, through the Treasury Solicitor, paid any sum for which the captain was held liable up to the limit to which under the Merchant Shipping Acts, 1894 to 1937, a private owner could restrict his liability. The case was heard before PILCHER, J., who found that the captain of the Nea Hellas was negligent and that the Nea H

Hellas was alone to blame. That decision was affirmed by this court. It is not disputed that the salvage services, remuneration for which is claimed in this case, were rendered necessary by the collision with the *Nea Hellas*. This is the basis of the defences with which we are concerned, which are set out in para. 4 and para. 5 of the defence, and are as follows:

A "4. At the time of the said collision, the Crown, through their department the Ministry of War Transport (now the Ministry of Transport) were the owners of the *Nea Hellas*. In the premises the defendants say that the said plaintiffs, being also a department of the Crown, are not entitled to salvage remuneration in respect of services rendered by their vessels Confederate and Arpha, or either of them, inasmuch as such services became necessary solely owing to the negligence of the Minister of War Transport or his servants or agents. 5. Further or alternatively the defendants say that, in order to avoid circuity of action, no salvage award should be made to the plaintiffs, the Commissioners for Executing the Office of Lord High Admiral of the United Kingdom, inasmuch as the said Minister of Transport (then the Minister of War Transport) would be liable to pay the amount of such award, if any, to the defendants as damages arising out of the said collision."

C PILCHER, J., held that the case was covered by the decision of the House of Lords in *The Kafiristan* (1) and he decided as we have stated.

Before coming to that case we will refer to two previous decisions referred to in LORD WRIGHT's speech in that case. In *The Capella (Cargo Ex)* (2) the court considered a case in which the vessel claiming salvage had been held in part to blame for a collision which rendered the salvage services necessary. D DR. LUSHINGTON held that the owners and master and crew of the vessel were disentitled to claim. He based himself on the principle that no man can take advantage of his own wrong. That decision has been followed, but in *The Kafiristan* (1) LORD WRIGHT ([1937] 3 All E.R. 754) expressed some doubt as to it. Its importance in the present case is that the principle has not been applied to cases where a salving ship not concerned in the collision was in the same ownership as a vessel to blame for the collision. E

In *The Glengaber* (3) SIR ROBERT PHILLIMORE had to consider claims for salvage services rendered by a number of tugs, with only three of which we are concerned. One of the tugs claiming salvage, the *Black Prince*, had been held partly to blame for the collision. SIR ROBERT PHILLIMORE held (27 L.T. 387) that she was not entitled to salvage "the necessity of which her own misconduct had occasioned." He applied the principle laid down by DR. LUSHINGTON. Counsel for the *Glengaber* submitted that another of the tugs, the *Warrior*, came under the same rule, as her owners were also owners of the *Black Prince*. They were not wholly in the same ownership, but they had common part-owners. SIR ROBERT PHILLIMORE did not accept the submission. F He said (*ibid.*): G

"But, on principle, I do not think the objection can stand; certainly, it could only stand with regard to those owners themselves, and could not in any way affect the claim of those who were not joint owners of the *Black Prince*, and could not affect the crew who assisted as salvors; but I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and there being no suggestion of any conspiracy . . .), such a vessel cannot recover salvage reward." H

He held that she could. Later, dealing with another tug which was said to be disentitled because she had been employed by the *Black Prince*, he said: "The *Black Prince*'s misconduct cannot extend beyond herself."

In *The Kafiristan* (1) remuneration was claimed for salvage services rendered to the *Kafiristan* by the *Beaverford* after a collision between the *Kafiristan*

and the Empress of Britain. The Beaverford and the Empress of Britain were both owned by the Canadian Pacific Railway. When the salvage arbitration started the question of liability for the collision had not been settled. The point was raised whether, if she were held or admitted to be to blame wholly or in part, this would disentitle the owners—not the master and crew—from claiming salvage remuneration. Between the arbitration and the appeal arbitration the collision case was settled on the basis that the Empress of Britain was three-quarters to blame. The matter came before the court on a Special Case stated by the appeal arbitrator. Both arbitrators had held that the Canadian Pacific Railway were not entitled to salvage. This was affirmed by BUCKNILL, J., and this court, but was reversed in the House of Lords. LORD WRIGHT, with whom the other noble and learned Lords agreed, referred to *The Glengaber* (3), and said ([1937] 3 All E.R. 757):

“Your Lordships were asked to say that the principles laid down by SIR ROBERT PHILLIMORE in *The Glengaber* (3) were bad law. On the contrary, they are, in my judgment, sound in reason, and supported by authority.”

Earlier in his speech he had said (*ibid.*, 753):

“There does not seem to be any reason in equity why the salved vessel (if I may adopt that sort of personification of the ship which, as LORD SUMNER said in *Admiralty Comrs. v. Susquehanna (Owners)*, *The Susquehanna* (4) ([1926] A.C. 664) is inveterate in Admiralty cases) should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as does the other colliding vessel. The fact seems to be irrelevant, so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame, in whole or in part, is taken into account.”

The argument under consideration was that, if the colliding vessel was to blame in whole or in part, no salvage could be recovered by the owners of the salving vessel if both are in the same ownership. This is emphatically negatived. We think the passages cited dispose of this part of the defence.

The question of avoiding circuitry of action raises a different issue. As LORD WRIGHT points out (*ibid.*), the fact that the owners recovering salvage are also owners of a vessel to blame for the collision will affect the ultimate destination of the salvage award. The amount that has to be paid for salvage is an item in the damage claim by the salved vessel against the vessel that is in whole or in part to blame for the collision. In *The Kafiristan* (1) the owners of the Kafiristan would be entitled to recover three-quarters of the salvage paid to the Canadian Pacific Railway as owners of the Beaverford in their claim against the Canadian Pacific Railway as owners of the Empress of Britain. In a case where the blame is only partial, as LORD WRIGHT says (*ibid.*, 754):

“... the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other, so as to ascertain the final balance of account.”

Here, however, at the time of the salvage proceedings it had been settled that the *Nea Hellas* was wholly to blame. We will disregard for the moment the fact that the proceedings in respect of the collision were not against the plaintiffs here, and that, in any event, different departments of the Crown were involved. LORD WRIGHT considered the position if the colliding vessel was wholly to blame. He said (*ibid.*, 753):

“If the other colliding vessel is solely to blame, the owner of the salved vessel, which is blameless, will bring into his account of damages the whole sum awarded to the salving vessel for salvage. It may be that,

in such a case, a salvage award in favour of the shipowners is superfluous, and need not be made, on the principle of circuity of action, but the responsibility for the collision is mostly ascertained after the salvage award is made, and, in any case, there may be questions of limitation of liability."

A In the present case we were told that questions of limitation of liability do, or may, arise. We were told that the limit in respect of the *Nea Hellas* was about £120,000. If the other heads of damage are, say, £110,000, the position would be as follows. The claim by the owners of the *Susan V. Luckenbach* would be for £110,000, plus £24,700. Of this only £120,000 would be paid. In other words, the owners of the *Susan V. Luckenbach* would be out of pocket £14,700. This is plainly what their position would have been if the salving and colliding vessels had been in different ownership. It is suggested that the result is unjust. It does not seem so to us, but, in any case, it seems to us to follow from the *ratio decidendi* of *The Kafiristan* (1). We have in mind, in particular, the passage cited in which LORD WRIGHT refers to the joint ownership as irrelevant to the usefulness and meritorious character of the services actually rendered.

C The expression "circuity of action" is not one which has been, so far as we know, precisely defined. In the present context we agree with what BUCKNILL, J., said ([1936] 3 All E.R. 568) in *The Kafiristan* (1):

"But circuity of action can only be pleaded when the rights of the litigants are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiffs sought to recover from the defendants."

D Where the amount of the salvage award takes the damage claim for the collision above the limit of liability, this is clearly not the case. In the present case counsel for the plaintiffs also relied on the fact that the plaintiffs were not the defendants on the record in the collision action. This seems to us a good point. In some "Crown" cases it might be a technical point, but it may be that, if different departments of the Crown are concerned, it would be right that they should not be treated as identical parties. It appears that, if the Crown could have been sued through its appropriate department in respect of the *Nea Hellas*, the Ministry of Transport, and not the Admiralty, would have been the defendants. We agree, therefore, with the learned judge that circuity of action does not arise here. He doubted whether it ever could arise. We think that in cases where the plaintiff owner of the ship claiming salvage is the defendant in the collision action and no question of limitation of liability arises, it may well be, as LORD WRIGHT said, that an award in favour of the shipowner would be superfluous in cases where the colliding vessel had been held wholly to blame. We were referred to the other cases which are dealt with in LORD WRIGHT's speech in *The Kafiristan* (1), but we have nothing we wish to add on them. In our opinion, the appeal must be dismissed, with costs.

G *Appeal dismissed with costs.*

Solicitors: *Ince & Co.* (for the defendants); *Treasury Solicitor* (for the plaintiffs).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

BROWNING v. BROWNING.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), March 19, 1951.]

Divorce—Practice—Notice of intention to proceed—Delay of more than one year in proceeding with petition—Delay in supplying particulars—R.S.C., Ord. 64, r. 13—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940/L.27), r. 79, r. 80.

On Sept. 12, 1949, the husband filed a petition for divorce on the ground that his wife had deserted him. On Sept. 26, 1949, the wife asked for particulars of the alleged desertion. On Feb. 16, 1951, the husband supplied the particulars, but, apart from that, he took no proceedings in the petition between September, 1949, and February, 1951. On Mar. 2, 1951, the wife took out a summons asking the court to order that proceedings under the petition should be stayed until the husband had given her a month's notice of his intention to proceed in accordance with R.S.C., Ord. 64, r. 13.

HELD: the provisions of R.S.C., Ord. 64, r. 13, were made applicable to matrimonial causes by r. 80 of the Matrimonial Causes Rules, 1950, and were not excluded by r. 79, and, therefore, the wife was entitled to the order claimed.

SUMMONS adjourned into court.

The husband appealed to the judge in chambers from an order of Mr. Registrar PEREIRA that his petition for divorce should be stayed until he had served, under R.S.C., Ord. 64, r. 13, a month's notice on his wife of his intention to proceed with the petition. The petition was filed on Sept. 12, 1949, and on Sept. 26, 1949, the wife asked for particulars which were not supplied until Feb. 16, 1951. The wife contended that, in view of the delay of more than a year in proceeding with the petition, under R.S.C., Ord. 64, r. 13, the husband was bound to give her a month's notice of his intention to proceed. The husband denied that Ord. 64, r. 13, applied to matrimonial causes.

J. Ritchie (with him *D. Henderson*) for the husband.
Baskerville for the wife.

Cur. adv. vult.

Mar. 19. PILCHER, J., read the following judgment. At the request of the parties I adjourned this summons for judgment in open court as it concerns a point which may be of some general interest. It is an appeal by a husband against an order made in his wife's favour by Mr. Registrar PEREIRA on Mar. 7, 1951. By summons dated Mar. 2, 1951, the wife asked the registrar to stay proceedings under her husband's petition until her husband served on her a notice giving her a month's warning of his intention to proceed with his petition.

Having been married in 1929, the husband and wife parted in 1938. On Sept. 12, 1949, the husband filed a petition against his wife founded on her desertion. On Sept. 26, 1949, the wife asked for particulars of the allegations on which the husband relied in support of his case. She did not receive those particulars until Feb. 16, 1951. After the particulars had been considered by the wife's solicitors the latter took out the present summons, the only material portion of which for my purpose was a request by the wife that the proceedings in the suit be stayed until her husband had given her a month's notice under R.S.C., Ord. 64, r. 13, of his intention to proceed with his suit.

The material portion of R.S.C., Ord. 64, r. 13, is in the following terms:

"In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed."

It is not in dispute that the husband had not taken any proceeding after he filed his petition until about sixteen months later when he delivered the par-

ticalars for which he had been asked in September, 1949. If, therefore, R.S.C., Ord. 64, r. 13, applies to a matrimonial suit, the wife is entitled to have any further proceeding in the husband's suit stayed until she has been given the month's notice provided for by the rule. The registrar decided that Ord. 64, r. 13, did apply to a matrimonial suit, and he adjourned the wife's summons in order that her husband might serve her with the notice of his intention to proceed provided for by the rule. Against this decision the husband appealed.

The only matter at issue between the parties was the question whether R.S.C., Ord. 64, r. 13, applies to matrimonial suits. Rule 80 and r. 81 of the Matrimonial Causes Rules, 1947, were in the following terms. By r. 80:

"The provisions of Ord. 64 of the Rules of the Supreme Court (which relate to time) except rr. 4, 4A, 5, 9, 10, 13, 14, 14A, and 15 shall apply to the computation of time under these rules."

Rule 81:

"Subject to the provisions of these rules and of any statute, the Rules of the Supreme Court, including rules made or to be made under the Exchange Control Act, 1947, shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any matrimonial cause or matter to which these rules relate."

The corresponding r. 79 and r. 80 of the Matrimonial Causes Rules, 1950, now in force, are in the following terms. By r. 79:

"The provisions of rr. 1, 2, 3, 6, 7, 8, 11 and 12 of Ord. 64 (which relates to time) of the Rules of the Supreme Court shall apply to the computation of time under these rules."

Rule 80:

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

It will thus be seen that, whereas r. 80 of the Matrimonial Causes Rules, 1947, dealt with the rules of R.S.C., Ord. 64, by exclusion, r. 79 of the Matrimonial Causes Rules, 1950, deals with the rules of R.S.C., Ord. 64, by specific inclusion. The Matrimonial Causes Rules, 1947, r. 80, and the Matrimonial Causes Rules, 1950, r. 79, only provide that certain rules in R.S.C., Ord. 64, shall not in the one case and shall in the other "apply to the computation of time under these rules." While certain of the rules in R.S.C., Ord. 64, are solely concerned with the computation of time, some of them, including r. 13, are not.

On behalf of the husband it was urged that, unless the specific inclusion of certain rules of R.S.C., Ord. 64, in the Matrimonial Causes Rules, 1950, r. 79, meant that the rules of R.S.C., Ord. 64, not specifically included were intended to be excluded, the whole of r. 79 was otiose and redundant by reason of the general words of inclusion in r. 80. It was also pointed out that the Matrimonial Causes Rules, 1947, r. 80, had specifically excluded r. 13 of R.S.C., Ord. 64, and that, no doubt, in consequence of this, no application to stay proceedings under this rule had, so far as was known, ever been made in a matrimonial suit. It is to be observed that r. 80 of 1947 and r. 79 of 1950 only provide that particular rules of R.S.C., Ord. 64, shall be excluded or included in the "computation of time" under the Matrimonial Causes Rules. In point of fact the only rule of B.S.C., Ord. 64, which has any reference to the computation of time and is specifically excluded by r. 80 of 1947 is r. 5 which provides that time is not generally to be reckoned as running in the Long Vacation in connection with the delivery of pleadings, etc. Of the other rules excluded r. 4 deals with the delivery of pleadings in the Long Vacation. Rule 9 and r. 10 deal with appointing

dates for trial and dispensing with delays in taking bail in Admiralty actions. Rule 14 and r. 14A deal with the time for applications to set aside awards and the enlarging of time for making awards, and r. 15 deals with a caveat in Admiralty actions in force for six months. It would, therefore, seem that under r. 80 of 1947, which was drafted to operate by exclusion, there was no real necessity, in so far as the computation of time was concerned, to do more than exclude r. 5 of R.S.C., Ord. 64, if all that was desired in the matter of computation of time was to preserve the practice which obtains in matrimonial matters whereby time continues to run in the Long Vacation. When r. 79 of 1950 is considered it will be seen that of the rules of R.S.C., Ord. 64, which it is specifically directed shall apply to the computation of time under the Matrimonial Causes Rules, rr. 1, 2, 3, 6, 11 and 12 are directly concerned with computation of time, whereas r. 8 deals with the enlargement of time by consent. Unless it was intended by the draftsman of the Matrimonial Causes Rules, 1950, that the inclusion in r. 79 of certain of the rules of R.S.C., Ord. 64, relating to the computation of time should by implication exclude any other rule in the Order dealing with the same subject-matter, such as r. 5, it is difficult to see why it should have been necessary to include r. 79 of 1950 at all. It is also difficult to see why it was necessary in r. 80 of 1947 to exclude any of the rules of R.S.C., Ord. 64, except r. 5.

However that may be, I am satisfied that r. 79 of 1950 refers, and refers only, to the computation of time. Rule 13 of R.S.C., Ord. 64, has no reference to the computation of time, and the argument that its operation is impliedly excluded by the specific inclusion in r. 79 of certain other rules of R.S.C., Ord. 64, which do deal with the computation of time is, in my view, ill-founded. Rule 79 of the Matrimonial Causes Rules, 1950, is solely concerned with the application to matrimonial causes of rules in R.S.C., Ord. 64, which deals with the computation of time. Rule 13 of that Order is not one of the rules which deals with the computation of time. Although r. 13 may never before have been invoked in matrimonial causes I very much doubt whether the wording of the old Matrimonial Causes Rules was apt to exclude its application to matrimonial causes. I should have been surprised to find any reference to r. 13, which has nothing to do with the computation of time, included in a matrimonial causes rule dealing with the computation of time and the purpose of which was clearly to provide that certain other rules in R.S.C., Ord. 64, which do deal with the computation of time, should be applicable to matrimonial causes. I am well satisfied, for the reasons I have given, that r. 13 of R.S.C., Ord. 64, is made applicable to matrimonial causes by r. 80 of the Matrimonial Causes Rules, 1950, and that the fact that no specific mention is made of r. 13 in r. 79 of those rules does not serve by implication to exclude its application to matrimonial causes. I am, accordingly, of opinion that the decision of the registrar was right, and the appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *A. D. Cledwyn & Co.* (for the husband); *Hatchett Jones & Co.* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

CHATTERTON v. MACLEAN.

[KING'S BENCH DIVISION (Parker, J.), February 5, 6, 1951.]

Guarantee—Hire-purchase agreement—Indemnity against loss sustained through default or breach by hirer—Repudiation of agreement by hirer—Motor car sold in breach of agreement—Acceptance of repudiation by owners—Effect on liability of guarantor.

Emergency Legislation—Courts emergency powers—Taking possession of property—Hire-purchase agreement—Car sold by hirer in breach of agreement—Car released by owners to purchaser on payment of amount due under agreement—Courts (Emergency Powers) Act, 1943 (c. 19), s. 1 (2) (a) (ii).

By a hire-purchase agreement, dated July 10, 1946, a finance company, as owners, hired a motor car to B. The agreement provided for the payment of a deposit and eighteen monthly instalments, and that, if those payments were duly made and the hirer did not commit any antecedent breach of the provisions of the agreement, he would then have the option of purchasing the car for the sum of ten shillings. In the event of the hirer failing to observe any of the conditions of the agreement, the company were entitled to re-take possession of the car. By a guarantee of the same date, the defendant guaranteed the due performance of the hire-purchase agreement, the guarantee being expressed to be binding notwithstanding any waiver by the company of a default made, or breach committed by, the hirer, or any indulgence granted to him. B., in breach of the hire-purchase agreement, purported to sell the car to a third party who re-sold it to the plaintiff. At that time a sum of £153 17s. 8d. was due and owing by B. to the company in respect of accrued hire, and, on receiving a demand from the company for the return of the car, the plaintiff offered to pay this sum. The company then released the car from the security of the agreement, declared that they had no further claims to the property in the car, and, by a deed of assignment, dated July 20, 1949, assigned to the plaintiff the amount due by B. under the hire-purchase agreement, together with the benefit of that agreement and of the guarantee. Notice of the assignment was duly given. The guarantor having disclaimed liability on the ground that the assignment was not effective since, by accepting the hirer's breach as a repudiation of the hire-purchase agreement, the company had released all their rights under that agreement and had also altered their rights against the principal debtor so that the guarantor was released,

HELD: (i) the hirer remained under any liability that had already accrued at the date of the acceptance of the repudiation (*Brooks v. Beirstein*, [1909] 1 K.B. 98, applied), and so the guarantor was liable under his guarantee unless he could show that he had been released therefrom; the fact that, by their acceptance of the repudiation by B. of the hire-purchase agreement, the company had lost all right as against B. to take possession of the car under the agreement did not affect the position of the guarantor since the right to take possession as against the hirer was personal to the company and not one to which the guarantor could succeed; and, therefore, the guarantor was not released from his obligations under the guarantee.

Re Davis & Co. Ex p. Rawlings (1888) (22 Q.B.D. 193), applied.

(ii) The transaction between the company and the plaintiff did not amount to a taking of possession of the car by the company within s. 1 (2) (a) (ii) of the Courts (Emergency Powers) Act, 1943, and, therefore, no leave of the court to effect the transaction was necessary.

AS TO VARIATION OF TERMS OF PRINCIPAL CONTRACT, see HALSBURY,

Hailsham Edn., Vol. 16, pp. 135-141, paras. 161-169; and FOR CASES, see DIGEST, Vol. 26, pp. 156-163, Nos. 1179-1224.

Cases referred to:

- (1) *Brooks v. Beirnsstein*, [1909] 1 K.B. 98; 78 L.J.K.B. 243; 99 L.T. 970; 3 Digest 96, 258.
- (2) *Bradley v. Newsom (H.), Sons & Co.*, [1919] A.C. 16; 88 L.J.K.B. 35; 119 L.T. 239; 12 Digest 344, 2866.
- (3) *Re Davis & Co. Ex p. Rawlings*, (1888), 22 Q.B.D. 193; 5 Digest 696, 6125.
- (4) *Brown v. Metropolitan Counties, etc., Society*, (1859), 1 E. & E. 832; 28 L.J.Q.B. 236; 33 L.T.O.S. 162; 120 E.R. 1123; 35 Digest 327, 714.
- (5) *Carr v. Broderick & Co., Ltd.*, [1942] 2 All E.R. 441; [1942] 2 K.B. 275; 111 L.J.K.B. 667; 167 L.T. 335; 2nd Digest Supp.

ACTION on a guarantee.

By a hire-purchase agreement, dated July 10, 1946, a finance company, as owners of a motor car, hired the car to one Butler. By a guarantee of the same date the defendant guaranteed due performance by Butler of the hire-purchase agreement. Under a deed of assignment, dated July 20, 1949, between the company and the plaintiff, the finance company assigned to the plaintiff the debt due to them under the hire-purchase agreement. The deed provided further that "the company as beneficial owner hereby assign to the assignee [the debt] together with the benefit of the [hire-purchase] agreement and guarantee and all rights of the company thereunder respectively to hold the same unto the assignee absolutely." The plaintiff claimed the amount of the debt so assigned from the guarantor. It was contended for the guarantor that the assignment was not effective since on the date on which it was made the company had released all their rights under the hire-purchase agreement by treating the contract as having been repudiated by the hirer. It was further contended that the rights of the company as against the hirer, the principal debtor, were altered and, therefore, the guarantor was released. The facts appear in the judgment.

R. M. A. C. Talbot for the plaintiff, the assignee.

H. J. A. Burt for the defendant, the guarantor.

PARKER, J.: By a contract in writing in the form of a hire-purchase agreement dated July 10, 1946, a company known as St. Margaret's Trust, Ltd., to whom I will refer as "the Trust", as owners hired a used nine horse-power Standard saloon motor car to one Charles Frederick George Butler. Under cl. 2 (a) of the agreement Butler, to whom I will refer as "the hirer," was to pay a first payment of £107 7s., and he did so pay the said sum, in consideration of the option to purchase the car which appears later in the hire-purchase agreement, and he was further to make eighteen monthly payments of £13 8s. 8d. By cl. 4 (a) it was provided:

"If the hirer shall make the said payments, and provided the hirer shall not have committed any antecedent breach of the provisions of this agreement, the hirer shall have the option of purchasing the vehicle for the sum of ten shillings."

Many of the clauses of this agreement are in a familiar form. By cl. 2 (b) the hirer agreed

"to pay punctually to the owners without previous demand the amount of the periodical payments set out in the schedule . . ."

By cl. 2 (c) he was to maintain the vehicle, and by cl. 2 (f) he was

"to reimburse to the owners on demand all expenses, costs or charges incurred in ascertaining the whereabouts of the hirer or the vehicle or in

recovering or endeavouring to recover possession thereof from the hirer or any other person, firm or company."

By cl. 10 it was provided:

A "During the continuance of this agreement the hirer shall not sell pledge charge assign sub-let lend or otherwise dispose of the vehicle nor the benefit of this agreement, nor be nor deemed to be nor purport nor be empowered to act as mercantile or other agent of the owners; nor suffer any other persons to obtain any lien or charge on the vehicle, whether for repairs or otherwise howsoever."

By cl. 5 it was provided that

B "Should the hirer make default for ten days in payment of any monthly instalment or other sum payable hereunder as agreed . . . or the hirer fail to observe or fulfil any agreement or condition herein contained . . . the owners shall have the right at any time to re-take possession of the said vehicle . . . and thereupon this agreement shall cease and determine and the rights and liabilities of the parties thereto shall be at an end . . ."

By cl. 7:

C "Unless and until the whole of the sums due under cl. 2 (a) and cl. 2 (b) hereof shall have been paid and purchase been made under cl. 4 (a) hereof the vehicle shall remain the absolute property of the owners, and the hirer shall not have any right or interest in the same other than that of hirer under this agreement."

D By a guarantee of the same date the defendant guaranteed due performance of that hire-purchase agreement. It is in this form:

E "In consideration of your entering at my request into a hire-purchase agreement with Mr. Charles Frederick George Butler (hereinafter called 'the hirer') I guarantee the due performance by the hirer of the terms embodied in the annexed hire-purchase agreement and if the hirer makes any default in payment of any instalments or any other sum of money due to you under the hire-purchase agreement I will forthwith pay the sum to you and I further agree that should the said hirer make default under or commit any breach of the hire-purchase agreement you are at liberty to waive default or breach or grant such indulgence to the hirer as you may think fit and that notwithstanding such waiver or indulgence

F I will continue to be bound by the guarantee."

At some time before May, 1947, the hirer, in flagrant breach of the hire-purchase agreement, purported to sell the car either to a Mr. Lewis or to somebody who in turn purported to sell to Mr. Lewis, and, again before that date, Mr. Lewis purported to re-sell the car to the plaintiff. By May 16, 1947, the Trust had discovered that the car was in the plaintiff's possession, and they G demanded its return, as they were entitled to do because the plaintiff could have obtained no valid title to the car. At that time, it is admitted, there was due and owing by the hirer to the Trust in respect of accrued hire a sum of £153 17s. 8d. [His LORDSHIP found that the plaintiff paid the Trust £159 17s. 8d., being £153 17s. 8d. outstanding under the hire-purchase agreement and £6 costs on a writ which the Trust had issued but not served, and H that on Aug. 14, 1947, the Trust, in consideration of the payment, released the car from the security of the agreement, declared that they had no further claims to the property in the car, and accepted the sum in discharge of all sums due and to become due under the agreement. He found also that on July 20, 1949, the Trust by deed validly assigned to the plaintiff the debt of £159 17s. 8d. due from the hirer to the Trust, the benefit of the hire-purchase agreement and guarantee, and all rights of the Trust thereunder, and that notice of the assignment was duly given. His LORDSHIP continued:] The defence to

the claim is set out, first, in an affidavit of Mr. Targett, of the defendant's solicitors, and also in a letter dated Oct. 5, 1950, from the defendant's solicitors to the plaintiff's solicitors. The first point made by counsel for the defendant is that there was no effective assignment, because by July 20, 1949, when the assignment was made, the Trust had released all their rights under the hire-purchase agreement. I think that really amounts to this, that on July 20, 1949, the plaintiff by that assignment could acquire no greater rights than the Trust had at that date against the guarantor, and at that date they had no such rights. Secondly, counsel says that the rights of the Trust as against the hirer, namely, the principal debtor, were altered, and, therefore, on ordinary principles, the guarantor was released.

I think the true position here was that the hirer had clearly been guilty of a breach of the hire-purchase agreement. He appears to have been about a year in arrear with his monthly payments, and he had, I should think fraudulently, sold this car. On ordinary principles of law the Trust had the right either to hold him to the agreement or to treat his conduct as a repudiation of the agreement. They also had the right, given them expressly by cl. 5 of the hire-purchase agreement, to re-take possession of the car against the hirer, whereupon the agreement was to cease and determine except as therein provided, but that was a right and in no way a remedy of which they were bound to avail themselves. I think the true effect of what happened was that they chose to treat the hirer's conduct as a repudiation of the hire-purchase agreement, because they, being the owners, parted with the property in the car to the plaintiff and thereby clearly put it out of their power to continue to hold the hirer to the agreement. What is the effect of that? The hirer remains under any liability that has already accrued at the date of the acceptance of the repudiation. That is put beyond all doubt by *Brooks v. Beirnsstein* (1). The hirer would also remain liable for any damages for breach of contract. If he remained liable for the accrued liability—and, of course, it was only right that he should remain liable, because he had had the benefit of the car for the period relating to it—*prima facie*, he being liable and the sum not having been paid, the guarantor is liable under his guarantee. It is rightly admitted by both sides that the endorsement on the hire-purchase agreement, reciting an agreement between the Trust and the plaintiff, cannot affect the hirer's liability for hire already accrued. Therefore, in May, 1947, and at all times after that date the position was that the Trust could have sued the hirer for hire due, and he would have had no answer whatsoever. *Prima facie*, therefore, the guarantor, the defendant in this action, would also be liable unless he could show that he had been released. There has clearly been delay in enforcing a claim for payment against the hirer, but under this guarantee mere delay or conduct amounting to waiver or indulgence does not release the guarantor. Under cl. 3 of the hire-purchase agreement it is said:

"If the owners shall think fit to grant to the hirer any extension of time or other forbearance or indulgence, the same shall not prejudice or affect the owners' status rights or remedies under this agreement, or under any guarantee thereof."

I do not know that that affects the position of the guarantor, who is not a party to that hire-purchase agreement, although it is annexed to, and forms part of, the guarantee and the guarantee refers to it, but the guarantee itself uses words to that effect.

The real point here is whether what has happened amounts to more than a waiver or indulgence, namely, a giving up of existing rights on which the guarantor can say that he had been released. Counsel for the defendant urges, first, that the very acceptance, the very treating of the hirer's conduct as a repudiation of the contract, amounts to a new contract. That leads to the rather startling conclusion that a guarantor of the performance of a contract

is always released where the creditor does what he is lawfully entitled to do, namely, to treat the principal debtor's breach as a repudiation. It would mean that whenever a creditor exercised his ordinary rights a guarantor was released, not merely in respect of future liabilities, but in respect of accrued liabilities. The basis of counsel's argument is to be found in the speech of LORD WRENBURY in *Bradley v. Newsom (H.), Sons & Co.* (2). LORD WRENBURY is showing the three ways in which a contract may be determined, and he says ([1919] A.C. 51):

"First, consensus created the contract, and consensus may determine it."

Secondly, he says that some contracts are determined by impossibility of performance. He goes on (*ibid.*):

"Thirdly, if the one party to the contract, by words or by conduct, expresses to the other party an intention not to perform his obligation under the contract when the time arrives for its performance, the latter may say, 'I take you at your word; I accept your repudiation of your promise, and will sue you for breach.' This is really no addition to, but a particular application of, the principle first above stated. The first party has, in fact, made an offer. This offer is: 'I am not going to perform the contract. I offer to end it here and now, and to accept the consequences of ending it, those consequences, as I know, being that you can sue me for damages for my refusal.' The other may accept or may decline that offer. If he accepts, then by consensus the contract is determined, but with a right to damages against the party who has refused to perform."

It is perfectly true that the determination in such a case is a consensual one, but I find it very difficult to think that those words can be used to support the proposition that by that consensual act a new contract is made which impinges on the rights of the guarantor. It seems to me that it is merely bringing the contract to an end—something which the creditor is lawfully entitled to do—and that the guarantor cannot complain of it.

It is worth considering a little further whether or not the effect of accepting the repudiation is to form a new contract and what rights it is said that the guarantor has lost. On May 16, 1947, when the sum of £153 17s. 8d. was due, a further sum of £107 7s., namely, the initial payment, was also due which, although paid, was not to be taken into account, whether by way of hire or by way of purchase price, unless the conditions of cl. 4 (a) were fulfilled, which they were not. Therefore, strictly, the Trust might have said at that date that the sum due in respect of hire was, not £153 odd, but £260 odd, and they have, so counsel for the defendant contends, by accepting the hirer's breach as a repudiation of the contract, altered their rights in that thereafter they had no right to claim more than £153 odd. I confess that I find it very difficult to understand how that could be said to affect in any way the rights of the guarantor. He is not being asked to pay any sum more than the £153. If he had been asked to pay not merely £153, but £260, it does not seem to me that his right to recover £260 from the principal debtor would have been impaired by anything which the Trust have done, but it is urged that by the express terms of the hire-purchase agreement the Trust had a right to take possession as against the hirer of this car, and a guarantor, called on for payment, is entitled to avail himself of this right, in the same way as he has been held entitled to avail himself of securities. Then it is said that in the light of what happened the Trust lost, as they clearly did, all right as against the hirer to take possession under the agreement, and, consequently, the guarantor's rights are affected and he is released.

I do not think that a surety under a hire-purchase agreement has any right in any circumstances to have possession of the property. It is not all the rights of the owner to which he succeeds by payment. I should have thought it was quite clear, for instance, that the right of purchase, the option to purchase,

is a right solely in the purchaser and not one of which the guarantor could avail himself. Similarly, it seems to me that the right to seize and take possession of the car as against the hirer which is provided by the hire-purchase agreement is one personal to the owner and not one to which the guarantor can succeed, as it were, by payment.

So far as I know, there is no authority on the matter, but I derive some assistance from *Re Davis & Co. Ex p. Rawlings* (3). In that case the owners under a hire-purchase agreement, having received advances by a lender, assigned to the lender all their rights and interests under the hire-purchase agreement until the balance due to him should have been repaid. LORD ESHER, M.R., points out (22 Q.B.D. 197):

"All that the instrument [of assignment] does is to assign the right of the lenders to sue under the hiring agreements. I can see no words which assign the property in the goods. The hiring agreements do not confer on the lenders any property in the goods; the property in the goods was theirs before the hiring agreements were made. The property in the goods does not pass by the hiring agreements to the hirer until all the instalments of the price have been paid. It is said that the assignment passes to Fuchsbalg the right which the hirers reserved to themselves in case of default being made in payment of the instalments, to enter into the hirer's house and seize the furniture. But *Brown v. Metropolitan Counties, etc., Society* (4) shows that such a personal licence as this cannot be assigned."

He must mean there hirers in the sense of owners, and the rights which the owners reserved to themselves. Here, of course, we are considering the position, not of an assignee, but of a guarantor, but, if a person cannot by assignment obtain the right to seize, then equally, I should have thought, a guarantor, who on no view could succeed to the property in the goods, also could not succeed to the bare right of seizure. I do not think that a guarantor could ever succeed to the owner's rights of seizure. It is perfectly true that contracts of guarantee must be strictly construed and that any alteration of the contract between the creditor and the principal debtor may release the guarantor, and, further, that the courts are not concerned to inquire whether the alteration had the effect of benefitting or prejudicing the rights of the guarantor, but it seems to me that the rights which are altered must be rights which, as it were, impinge on the rights of the guarantor. If, as I think, the guarantor could never have any right to avail himself of the provisions for seizure, then the alteration of the position between the creditor and the principal debtor in regard to that matter could not impinge on the rights of the guarantor.

Counsel for the defendant also put the case on the basis that there was a repudiation by the Trust by entering into the agreement which is endorsed on the hire-purchase agreement. I think that that is a very artificial way of looking at the matter. The common-sense way must be that the hirer was guilty of a flagrant breach of the hire-purchase agreement and that the Trust, as they were entitled to do, treated that as a repudiation of the whole contract and treated the contract as at an end. Counsel then points out, which is undoubtedly true, that if what happened amounted to a re-taking of possession of the car from the hirer, no leave was obtained from the court under the Courts (Emergency Powers) Act, 1943, and, accordingly, that the hirer on that basis would have a claim for damages which he could use as a shield when sued for arrears of hire, and he referred to *Carr v. Broderick & Co., Ltd.* (5). That, no doubt, is true, but it does not seem to me that on the facts of the present case it could be said that there was any taking of possession of this car as against the hirer at all or in circumstances in which leave of the court was necessary.

Finally, counsel for the defendant takes the point that, just as a guarantor is entitled on payment to the benefit of any securities, so in the present case the guarantor on payment would be entitled to the benefit of the sum paid

by the plaintiff to the Trust. Counsel agrees that the hirer, if sued, could not say to the Trust that he is not liable, because the Trust have received the sum of £159 from a third party, but it is suggested that the guarantor can make that answer on the basis that he is equitably entitled to the benefit of sums received by the Trust. I do not think that analogy holds good in the present case. The principle that the guarantor is entitled to avail himself of securities relates to cases where the security has been provided by the principal debtor. I do not think that the guarantor is entitled to avail himself of sums received by a complete stranger not paid with the authority, or on behalf, of the principal debtor. For these reasons, I think that the plaintiff must succeed, and, accordingly, there will be judgment for the plaintiff for £159 17s. 8d.

Judgment for the plaintiff with costs.

Solicitors: *Stollard & Limbrey* (for the plaintiff); *Yarde & Loader* (for the defendant).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

COMBE v. COMBE.

[COURT OF APPEAL (Asquith, Denning and Birkett, L.JJ.), March 6, 1951.]

Contract—Consideration—Undertaking by divorced husband to pay allowance to wife—No request that wife should abstain from applying for maintenance order.

Divorce—Maintenance—Undertaking by husband to pay yearly allowance—No application by wife to apply for order for maintenance—Enforcement of undertaking.

On Feb. 1, 1943, a wife obtained a decree *nisi* for divorce against her husband. On Feb. 9 her solicitors wrote to the husband's solicitors asking them to confirm that with regard to permanent maintenance the husband was prepared to make the wife an allowance of £100 a year free of income tax. On Feb. 19 the husband's solicitors replied that he had agreed to allow her that sum. On Aug. 11, 1943, the decree absolute was made. The husband did not make any of the agreed payments, and the wife did not apply to the court for an order for permanent maintenance. On July 28, 1950, the wife brought an action against the husband claiming the amount of the arrears on the ground that she was entitled to them under the husband's promise.

HELD: (i) in the absence of proof of any request, express or implied, by the husband that the wife should forbear from applying to the court for maintenance, there was no consideration for the husband's promise, and, therefore, it was not enforceable at the suit of the wife.

Central London Property Trust, Ltd. v. High Trees House, Ltd. ([1947] K.B. 130), explained and distinguished.

(ii) even if, in return for the husband's promise, the wife had promised to forbear from applying to the court for maintenance, there would have been no consideration for the husband's promise because the wife's promise would not be binding on her and would not preclude her from applying to the court.

Hyman v. Hyman ([1929] A.C. 601) and *Gaisberg v. Storr* ([1949] 2 All E.R. 411), applied.

Decision of BYRNE, J. ([1950] 2 All E.R. 1115), reversed.

AS TO A WIFE NOT APPLYING FOR MAINTENANCE, see HALSBURY, Hails-
ham Edn., Vol. 10, p. 793, para. 1257; and FOR CASES, see DIGEST, Vol. 27,
p. 326, No. 3044, and 2nd Digest Supp.

AS TO VALUABLE CONSIDERATION TO A CONTRACT, see HALSBURY, Hails-
ham Edn., Vol. 7, pp. 136-138, paras. 195-197.

Cases referred to:

- (1) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; [1950] 1 K.B. 107; 2nd Digest Supp. A
- (2) *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] K.B. 130; [1947] L.J.R. 77; 175 L.T. 332; 2nd Digest Supp.
- (3) *Robertson v. Minister of Pensions*, [1948] 2 All E.R. 767; [1949] 1 K.B. 227; [1949] L.J.R. 323; 2nd Digest Supp.
- (4) *Hughes v. Metropolitan Ry. Co.*, (1877), 2 App. Cas. 439; 46 L.J.Q.B. 583; 36 L.T. 932; 42 J.P. 421; 21 Digest 310, 1137. B
- (5) *Birmingham and District Land Co. v. London & North Western Ry. Co.*, (1888), 40 Ch.D. 268; 60 L.T. 527; 11 Digest 214, 990.
- (6) *Re Porter (William) & Co., Ltd.*, [1937] 2 All E.R. 361; Digest Supp.
- (7) *Buttery v. Pickard*, (1946), 174 L.T. 144; 2nd Digest Supp.
- (8) *Ledingham v. Bermejo Estancia Co., Ltd.*, *Agar v. Bermejo Estancia Co., Ltd.*, [1947] 1 All E.R. 749; 2nd Digest Supp. C
- (9) *Foster v. Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149.
- (10) *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 All E.R. 420; [1950] 1 K.B. 616.
- (11) *J. F. Perrott & Co., Ltd. v. Cohen*, [1950] 2 All E.R. 939.
- (12) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp. D
- (13) *Wigan v. English and Scottish Law Life Assurance Assn.*, [1909] 1 Ch. 291; 78 L.J.Ch. 120; 100 L.T. 34; 12 Digest 212, 1701.
- (14) *Oliver v. Davis*, [1949] 2 All E.R. 353; [1949] 2 K.B. 727; [1949] L.J.R. 1661; 2nd Digest Supp.
- (15) *Scott v. Scott*, [1921] P. 107; 90 L.J.P. 171; 124 L.T. 619; 27 Digest 510, 5486. E
- (16) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 2nd Digest Supp.
- (17) *Hasting v. Hasting*, [1947] 2 All E.R. 744; [1948] P. 68; [1948] L.J.R. 119; 2nd Digest Supp.
- (18) *Emanuel v. Emanuel*, [1945] 2 All E.R. 494; [1946] P. 115; 114 L.J.P. 60; 173 L.T. 118; 2nd Digest Supp. F

APPEAL by the husband from an order of BYRNE, J., dated Nov. 10, 1950, and reported [1950] 2 All E.R. 1115, whereby he held that the husband was liable to pay to the wife the sum of £600, being arrears of payments, which had accrued within six years before action brought, under an agreement whereby the husband undertook to make his wife by way of permanent maintenance an allowance of £100 a year free of income tax. The learned judge had found that, although the agreement was not supported by consideration, the husband's promise was enforceable because it was an unequivocal acceptance of liability, which was intended to be binding and to be acted on, and was, in fact, acted on by the wife. The facts are fully stated in the judgment of DENNING, L.J. H

Kee for the husband.

P. A. G. Rawlinson for the wife.

ASQUITH, L.J.: I will ask DENNING, L.J., to deliver the first judgment.

DENNING, L.J.: In this case a wife who has divorced her husband claims maintenance from him—not in the Divorce Court, but in the King's Bench on an agreement which is said to be embodied in letters. The parties

were married in 1915. They separated in 1939. On Feb. 1, 1943, on the wife's petition, a decree *nisi* of divorce was pronounced. Shortly afterwards letters passed between the solicitors with regard to maintenance. On Feb. 9, 1943 (eight days after the decree *nisi*), the solicitor for the wife wrote to the solicitor for the husband:

- A "With regard to permanent maintenance, we understand that your client is prepared to make [the wife] an allowance of £100 per year free of income tax."

In answer, on Feb. 19, 1943, the husband's solicitors wrote:

"The respondent has agreed to allow your client £100 per annum free of tax."

- B On Aug. 11, 1943, the decree was made absolute. On Aug. 26, 1943, the wife's solicitors wrote to the husband's solicitors, saying:

"Referring to your letter of Feb. 19 last, our client would like the £100 per annum agreed to be paid to her by your client to be remitted to us on her behalf quarterly. We shall be glad if you will kindly let us have a cheque for £25 for the first quarterly instalment and make arrangements for a similar remittance to us on Nov. 11, Feb. 11, May 11, and Aug. 11 in the future."

- C A reply did not come for nearly two months because the husband was away, and then he himself, on Oct. 18, 1943, wrote a letter which was passed on to the wife's solicitors:

- D "... regarding the sum of £25 claimed on behalf of Mrs. Combe . . . I would point out that whilst this is paid quarterly as from Aug. 11, 1943, the sum is not due till Nov. 11, 1943, as I can hardly be expected to pay this allowance in advance."

He never paid anything. The wife pressed him for payment, but she did not follow it up by an application to the divorce court. It is to be observed that she herself has an income of her own of between £700 and £800 a year, whereas her husband has only £650 a year. Eventually, after nearly seven years had passed since the decree absolute, she brought this action in the King's Bench Division

- E on July 28, 1950, claiming £675 being arrears for six years and three quarters at £100 a year. BYRNE, J., held that the first three quarterly instalments of £25 were barred by the Limitation Act, 1939, but he gave judgment for £600 in respect of the instalments which accrued within the six years before the action was brought. He held, on the authority of *Gaisberg v. Storr* (1), that there was no consideration for the husband's promise to pay his wife £100, but, nevertheless, he held that the promise was enforceable on the principle stated in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2) and *Robertson v. Minister of Pensions* (3), because it was an unequivocal acceptance of liability,
- G intended to be binding, intended to be acted on, and, in fact, acted on.

- Much as I am inclined to favour the principle of the *High Trees* case (2), it is important that it should not be stretched too far lest it should be endangered. It does not create new causes of action where none existed before. It only prevents a party from insisting on his strict legal rights when it would be unjust to allow him to do so, having regard to the dealings which have taken place between the parties. That is the way it was put in the case in the House of Lords which first stated the principle—*Hughes v. Metropolitan Ry. Co.* (4)—and in the case in the Court of Appeal which enlarged it—*Birmingham and District Land Co. v. London & North Western Ry. Co.* (5). It is also implicit in all the modern cases in which the principle has been developed. Sometimes it is a plaintiff who is not allowed to insist on his strict legal rights. Thus, a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in reliance on
- H

the waiver: *Re Porter (William) & Co., Ltd.* (6), *Buttery v. Pickard* (7), *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2), *Ledingham v. Bermejo Estancia Co., Ltd.*, *Agar v. Bermejo Estancia Co., Ltd.* (8). A landlord who has told his tenant that he can live in his cottage rent free for the rest of his life is not allowed to go back on it if the tenant stays in the house on that footing: *Foster v. Robinson* (9). Sometimes it is a defendant who is not allowed to insist on his strict legal rights. His conduct may be such as to debar him from relying on some condition, denying some allegation, or taking some other point in answer to the claim. Thus, a government department, who had accepted a disease as due to war service, were not allowed afterwards to say it was not, when the soldier, in reliance on the assurance, had abstained from getting further evidence about it: *Robertson v. Minister of Pensions* (3). A buyer who had waived the contract date for delivery was not allowed afterwards to set up the stipulated time as an answer to the seller: *Charles Rickards, Ltd. v. Oppenheim* (10). A tenant who had encroached on an adjoining building, asserting that it was comprised in the lease, was not allowed afterwards to say that it was not included in the lease: *J. F. Perrott & Co., Ltd. v. Cohen* (11). A tenant who had lived in a house rent free by permission of his landlord, thereby asserting that his original tenancy had ended, was not afterwards allowed to say that his original tenancy continued: *Foster v. Robinson* (9). In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself. He was sued for some other cause, for example, a pension or a breach of contract, or possession, and the promise, assurance, or assertion only played a supplementary role, though, no doubt, an important one. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself. The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, although not of its modification or discharge. I fear that it was my failure to make this clear in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2) which misled BYRNE, J., in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce the promise if there was consideration for it. That is, therefore, the real question in the case: Was there sufficient consideration to support the promise?

If it were suggested that, in return for the husband's promise, the wife expressly or impliedly promised to forbear from applying to the court for maintenance—that is, a promise in return for a promise—there would clearly be no consideration because the wife's promise would not be binding on her and, therefore, would be worth nothing. Notwithstanding her promise, she could always apply to the divorce court for maintenance—perhaps, only with leave—but nevertheless she could apply. No agreement by her could take away that right: *Hyman v. Hyman* (12), as interpreted by this court in *Gaisberg v. Storr* (1). There was, however, clearly no promise by the wife, express or

implied, to forbear from applying to the court. All that happened was that she did, in fact, forbear—that is, she did an act in return for a promise. Is that sufficient consideration? Unilateral promises of this kind have long been enforced so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises *ex post facto*, as PARKER, J., pointed out in *Wigan v. English and Scottish Life Assurance Assn.* (13) ([1909] 1 Ch. 298). If the findings of BYRNE, J., are accepted, they are sufficient to bring this principle into play. His finding that the husband's promise was intended to be binding, intended to be acted on, and was, in fact, acted on—although expressed to be a finding on the principle of the *High Trees House* case—is equivalent to a finding that there was consideration within this long-settled rule, because it comes to the same thing expressed in different words: see *Oliver v. Davis* (14). My difficulty, however, is to accept the findings of BYRNE, J., that the promise was “intended to be acted on.” I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance, or, in other words, any request by the husband, express or implied, that the wife should so forbear.

C He left her to apply, if she wished to do so. She did not do so, and I am not surprised, because it is very unlikely that the divorce court would have made any order in her favour, since she had a bigger income than her husband. Her forbearance was not intended by him, nor was it done at his request. It was, therefore, no consideration.

It may be that the wife has suffered some detriment because, after forbearing

D to apply to the court for seven years, she might not now get leave to apply: *Scott v. Scott* (15). The court, however, is, nowadays much more ready to give leave than it used to be: *Fisher v. Fisher* (16); *Hasting v. Hasting* (17); and I should have thought that, if the wife fell on hard times, she would still get leave. Assuming, however, that she has suffered some detriment by her forbearance, nevertheless, as the forbearance was not at the husband's request,

E it is no consideration. In *Scott v. Scott* (15), where a maintenance agreement was made during divorce proceedings, SCRUTTON, L.J., said ([1921] P. 127) that he had no doubt about there being consideration for it, but this must now be taken to be erroneous, having regard to *Hyman v. Hyman* (12) and *Gaisberg v. Storr* (1).

The doctrine of consideration is sometimes said to work injustice, but I see

F none in this case, nor was there any in *Oliver v. Davis* (14) or *Gaisberg v. Storr* (1). I do not think it would be right for this wife, who is better off than her husband, to take no action for six or seven years and then demand from him the whole £600. The truth is that in these maintenance cases the real remedy of the wife is, not by action in the King's Bench Division, but by application in the Divorce Court. I have always understood that no agreement for main-

G tenance, which is made in the course of divorce proceedings prior to decree absolute, is valid unless it is sanctioned by the court—indeed, I said so in *Emanuel v. Emanuel* (18) ([1945] 2 All E.R. 496). I know that such agreements are often made, but their only valid purpose is to serve as a basis for a consent application to the court. The reason why such agreements are invalid, unless approved, is because they are so apt to be collusive. Some wives are tempted

H to stipulate for extortionate maintenance as the price of giving their husbands their freedom. It is to remove this temptation that the sanction of the court is required. It would be a great pity if this salutary requirement could be evaded by taking action in the King's Bench Division. The Divorce Court can order the husband to pay whatever maintenance is just. Moreover, if justice so requires, it can make the order retrospective to decree absolute. That is the proper remedy of the wife here, and I do not think she has a right to any other. For these reasons I think the appeal should be allowed.

BIRKETT, L.J.: I agree. There were two points before the learned judge, both clearly stated and both clearly argued. The first one, namely, whether there was consideration for the agreement to pay £100 a year free of tax, was disposed of by the learned judge almost in a sentence. He said ([1950] 2 All E.R. 1117) that on the authority of *Gaisberg v. Storr* (1) there could be no doubt that the decision in that case applied to the facts of the case before him, and that there it was held that the only consideration moving from the wife for the husband's undertaking which could be deduced by inference from the circumstances was an undertaking by the wife not to apply to the court for alimony *pendente lite* or for permanent maintenance, but that any promise by the wife to refrain from so applying was void and unenforceable. The learned judge continued (*ibid.*):

"At first sight that would appear to be conclusive, but counsel for the wife pointed out that the whole matter to which the court was directing its attention in *Gaisberg v. Storr* (1) was whether forbearance to apply for permanent maintenance was good consideration . . . In the present case, however, counsel for the wife says that it is not suggested that there was an implied term that the wife would not apply for permanent maintenance in consideration of the husband's making her an allowance of £100 a year."

I have been looking at the evidence which was given in the court below. The agreement was made in February, 1943, and the decree absolute was not made until Aug. 11. There does not appear any evidence of a request by the husband that the wife should refrain from going to the court, or a promise by the wife that she would not go to the court, or any matter of that kind. It appears simply to have been that after some talk in February, 1943, an agreement was arrived at that the husband would pay £100 a year free of tax. It seems on the first point, therefore, that there was no consideration for this agreement. I will quote the words of **ASQUITH, L.J.**, in *Gaisberg v. Storr* (1) ([1949] 2 All E.R. 415):

"The only consideration which can be deduced by inference from the circumstances would be an undertaking by the wife, in exchange for the husband's undertaking, not to apply to the court for alimony *pendente lite* or permanent maintenance, but any promise given by her to refrain from so applying would have been void and unenforceable on the principle laid down in *Hyman v. Hyman* (12). In those circumstances I think that there is no evidence of any consideration moving from the wife to the husband and that the agreement in the document is not a binding contract."

The learned judge in the court below dismissed this matter in a sentence by saying that the law was so clear that it was not possible for the case to be argued on that ground.

With regard to the second point, we have had the great advantage of hearing **DENNING, L.J.**, deal with *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2) and *Robertson v. Minister of Pensions* (3) which formed such a prominent part of the judgment of the court below. I am bound to say that reading them for myself I think the description which was given by counsel for the husband in this court, namely, that the doctrine there enunciated was, so to speak, a doctrine which would enable a person to use it as a shield and not as a sword, is a very vivid way of stating what, I think, is the principle underlying both those cases. **DENNING, J.**, in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2) concluded his judgment with these words ([1947] K.B. 136):

"I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply."

If a husband who had entered into an agreement of this kind was to try to take advantage of it, I think the doctrine would then apply, but, so far as the wife is concerned, her right to apply to the court for maintenance is still, theoretically, in full force, because I see that in *Fisher v. Fisher* (16) LORD GREENE, M.R., dealing with *Scott v. Scott* (15), which had formed such a prominent part in the argument, said ([1942] 1 All E.R. 441):

- A " . . . SCRUTTON, L.J., expressed his conclusion ([1921] P. 126): ' With-
out going through the other cases, seven or eight of which I have referred
to while counsel have been arguing this case, I think in this particular case
the application ought to have been made within a reasonable time after the
decree for dissolution; and I see nothing whatever in the circumstances of
this case to justify an application being made seven years after the decree.'
B He carefully refrained from saying that in any circumstances seven years
would have been too long. WARRINGTON, L.J., is equally cautious in the
language which he used. In my view that authority does not in any way
preclude us from saying that, on the facts of any particular case, a reasonable
time may be as much as seven years, or even more."

- C It was said in the course of the argument of counsel for the husband that, if
an application was made to the court at this date for maintenance, it would
be necessary to explain the long delay in the making of the application. As
one of the material circumstances for the court to consider, I cannot conceive
of a better ground to be put forward by the wife than that mistakenly she had
relied on an agreement which was to fulfil for her all that she could ever hope
to acquire by making an application for maintenance, but, much to her sur-
prise, when that agreement came before the court, it was held to be invalid.
D In those circumstances I agree with the judgment which has been given and
I agree with its conclusion. The learned judge was certainly right in saying
that there was no consideration for the agreement, and I think he misunder-
stood and misapplied the principles in *Central London Property Trust, Ltd. v.*
High Trees House, Ltd. (2) and *Robertson v. Minister of Pensions* (3). For those
reasons I think the appeal ought to be allowed.

- E ASQUITH, L.J.: I agree. The learned judge decided that while the
husband's promise was unsupported by any valid consideration, yet the prin-
ciple in *Central London Property Trust, Ltd. v. High Trees House, Ltd.* (2)
entitled the wife to succeed. It is unnecessary to express any view as to the
correctness of the decision in the *High Trees* case (2), although I certainly
F must not be taken to be questioning it. I would, however, remark in passing
that it seems to me a complete misconception to suppose that it struck at the
roots of the doctrine of consideration. Assuming, without deciding, that it is
good law, I do not think it helps the wife at all. What that case decides is that
when a promise is given which (i) is intended to create legal relations, (ii) is
intended to be acted on by the promisee, and (iii) is, in fact, so acted on, the
G promisor cannot bring an action against the promisee which involves the
repudiation of his promise or is inconsistent with it. It does not, as I read it,
decide that a promisee can sue on the promise. DENNING, J., expressly states
the contrary. Neither in the *High Trees* case (2) nor in *Robertson v. Minister*
of Pensions (3) (another decision of my Lord which is relied on by the plaintiff)
was an action brought by the promisee on the promise. In the first of those two
H cases the plaintiff was, in effect, the promisor or a person standing in the shoes
of the promisor, while in the second the action, although brought by the pro-
misee, was brought on a cause of action which was not the promise, but was an
alleged statutory right.

It is said for the wife that the husband's agreement to pay £100 a year was supported by good consideration, which consisted either of an implied under-
taking by the wife not to apply to the court for an order for permanent main-
tenance or of an actual forbearance so to apply. As to the first of these, if

the agreement was made before the decree absolute, *Hyman v. Hyman* (12), beyond question, decided that such an agreement to abstain from resorting to the court is not valid consideration. It is said, however, first, that the material agreement was not made before the decree absolute, but was made after, and that such an agreement made after the decree absolute is not open to objection and is made for valid consideration. Alternatively, it is argued that, even if such an agreement is not good consideration, an actual forbearance to apply to the court is good consideration. A

As to the first of these points, the material agreement was made shortly after the decree *nisi* and long before the decree absolute, by the letters of Feb. 9 and 19, 1943. The correspondence after the decree absolute is merely a request by the wife that an agreement, assumed to have been validly made in the previous February, shall be carried out by means of quarterly payments, followed by a consent by the husband to pay quarterly with a suggestion of different quarter days. This cannot, in my view, constitute a contract made after the decree absolute, but, if it were so, I consider on the whole that *Hyman v. Hyman* (12) (a decision of the House of Lords) is not to be construed as applying only to agreements made before decree absolute. I think its application is general. It contains no such limitation in time as has been suggested. B
C
I am of opinion, further, that *Hyman v. Hyman* (12) is incidentally inconsistent with the *dicta* of SCRUTTON, L.J., in *Scott v. Scott* (15). Finally, I do not think an actual forbearance, as opposed to an agreement to forbear to approach the court, is a good consideration unless it proceeds from a request, express or implied, on the part of the promisor. If not moved by such a request, the forbearance is not in respect of the promise. For these reasons and the others given by my Lords, I agree that the appeal should be allowed. D

Appeal allowed with costs.

Solicitors: *Braikenridge & Edwards* (for the husband); *Lee & Pemberton* (for the wife).

[Reported by C. N. BEATTIE, Esq., Barrister-at-Law.] E

Re COULTHURST'S WILL TRUSTS.

COUTTS AND CO. *v.* COULTHURST AND ANOTHER.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 7, 1951.] F

Charity—Relief of poverty—Gift for the benefit of widows and orphaned children of deceased officers and deceased ex-officers of a bank. G

By his will, dated Apr. 28, 1948, a testator, who died in 1949, gave to his trustees a fund of £20,000 to be called the Coulthurst fund and provided: "At the expiration of every six months calculated from the date of my death [Messrs. Coutts' bank] shall pay or apply the income earned by the Coulthurst fund during such period of six months to or for the benefit of such one or more exclusively of the others or other of the widows and orphaned children of deceased officers and deceased ex-officers [of the bank] living at the expiration of such half-yearly period as the bank shall in its absolute discretion consider by reason of his her or their financial circumstances to be most deserving of such assistance." The terms "deceased officer" and "deceased ex-officer" were defined as meaning any officer (other than a director or auditor) or clerk who was, or had H

before his retirement been, in the service of Messrs. Coutts' bank at a salary calculated on a monthly or longer periodic basis, and the term "orphaned child" was defined as meaning the child of any deceased officer or deceased ex-officer who was under the age of seventeen years and had lost both father and mother. On the question whether the gift was valid or was void for perpetuity or otherwise,

A HELD: having regard to all the terms of the gift, it constituted a valid charitable trust for the relief of poverty.

Gibson v. South American Stores (Gath & Chaves), Ltd. ([1949] 2 All E.R. 985) and *dicta* of STIRLING, J., in *Re Dudgeon* (1896) (74 L.T. 613) and SIR JOHN LEACH, V.-C., in *A.-G. v. Comber* (1824) (2 Sim. & St. 93), *applied*.

B *Per* SIR RAYMOND EVERSLED, M.R.: Poverty does not mean destitution. It is a word of wide and somewhat indefinite import, and, perhaps, it is not unfairly paraphrased for present purposes as meaning persons who have to "go short" in the ordinary acceptance of that term, due regard being had to their status in life and so forth.

C AS TO RELIEF OF AGED, IMPOTENT AND POOR, see HALSBURY, Hailsham Edn., Vol. 4, pp. 111-115, paras. 147-152; and FOR CASES, see DIGEST, Vol. 8, pp. 242-245, Nos. 7-50.

Cases referred to:

(1) *Re Lucas*, [1922] 2 Ch. 52; 91 L.J.Ch. 480; 127 L.T. 272; Digest Supp.

(2) *Re Dudgeon*, (1896), 74 L.T. 613; 8 Digest 243, 22.

(3) *A.-G. v. Comber*, (1824), 2 Sim. & St. 93; 57 E.R. 281; 8 Digest 244, 33.

D (4) *Thompson v. Corby*, (1860), 27 Beav. 649; 3 L.T. 73; 24 J.P. 581; 54 E.R. 257; 8 Digest 244, 34.

(5) *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 985; [1950] Ch. 177; 2nd Digest Supp.

E APPEAL by the residuary legatee under the will of John William Coulthurst, deceased, against an order of VAISEY, J., dated Nov. 10, 1950, made on an originating summons by which was asked, *inter alia*, the question whether a certain legacy bequeathed by the testator "for the benefit . . . of the widows and orphaned children of deceased officers and deceased ex-officers . . ." of Messrs. Coutts' bank was a good charitable gift, or was void for uncertainty, perpetuity, or for any other reason. VAISEY, J., held that the gift was valid.

Gray, K.C., and *Rawlence* for the first defendant, the residuary legatee.

F *Denys B. Buckley* for the Attorney-General.

Wilfrid Hunt for the trustees of the will.

G SIR RAYMOND EVERSLED, M.R.: By his will, dated Apr. 28, 1948, the testator, Mr. John William Coulthurst, who died in 1949, gave to his trustees a legacy of £20,000 free of duty to be held by them on the trusts set out in cl. 7 of the will. He described the trust at the beginning of the clause as being a permanent fund "which will be known and hereinafter referred to as the Coulthurst fund." He then set out the operative trusts in sub-para. (iii) (after provisions as to investment) as follows:

H "At the expiration of every six months calculated from the date of my death the bank shall pay or apply the income earned by the Coulthurst fund during such period of six months to or for the benefit of such one or more exclusively of the others or other of the widows and orphaned children of deceased officers and deceased ex-officers living at the expiration of such half-yearly period as the bank shall in its absolute discretion consider by reason of his her or their financial circumstances to be most deserving of such assistance."

It appears from the definition paragraph that "deceased officer" or "deceased ex-officer" meant any officer (other than a director or auditor) or clerk who

was or had before his retirement been in the service of Messrs. Coutts' bank at a salary calculated on a monthly or longer periodic basis. It further defines an orphaned child as meaning the child of any deceased officer or deceased ex-officer who was under the age of seventeen years and had lost both mother and father. The problem has arisen whether the trusts to which I have referred constitute a valid charitable disposition. If they do not, the Coulthurst fund will go to residue. Counsel for the residuary legatee mentioned, though he did not make a great point of it, that it is provided that, if the bank should go into liquidation or the trusts of the Coulthurst fund should otherwise fail, the fund would sink into residue. In the events which happened, the residuary legatee under the will is the first defendant, Mrs. Coulthurst, the widow of the testator. Battle is, therefore, joined between the widow, who claims that the trusts were ineffective as a charitable disposition, and, therefore, by offending the rule against perpetuities, are invalid, and the Attorney-General arguing for the validity of the disposition as a charity.

These charitable questions are always vexing and difficult. It has been recently said in the House of Lords that the law in regard to them is in many respects artificial. When VAISEY, J., considered this matter he came to a conclusion in favour of validity as a charity. I am of the same opinion. If this gift is valid as a charity, it must clearly be so on the ground that it is intended for the relief of poverty. It is not suggested that under any other head can the case be brought within the intendment of the statute of Elizabeth (43 Eliz. c. 4). There is, of course, no use of the word "poverty" in the language to which I have alluded, but, as was pointed out by RUSSELL, J., in *Re Lucas* (1) ([1922] 2 Ch. 58), (quoting from the judgment of STIRLING, J., in *Re Dudgeon* (2)):

"... it appears to me that the cases cited on behalf of the charity do show this, that it is not absolutely necessary to find poverty expressed in so many words, but that the court will look at the whole gift, and, if it comes to the conclusion that the relief of poverty was meant, will give effect to it although the word 'poverty' is not to be found in it."

That very learned judge, singularly experienced in this type of case, then referred to two other decisions which have been quoted to us—*A.-G. v. Comber* (3), a decision of SIR JOHN LEACH, V.-C., and *Thompson v. Corby* (4), a decision of LORD ROMILLY, M.R.

Taking the passage I have quoted as my guide in approaching the problem, the question is really this: When one has regard to the whole context as well as to the precise language in cl. 7, is it right to infer, as the learned judge inferred, that the relief of poverty was meant? The alternative claim is that what was meant was that a class of widows and orphans should be benefited, not by virtue of possessing the objective standard or quality of poverty, but as being, at the end of each six-monthly period, the least well endowed in that class, whether or not they were in truth poor. Poverty, of course, does not mean destitution. It is a word of wide and somewhat indefinite import, and, perhaps, it is not unfairly paraphrased for present purposes as meaning persons who have to "go short" in the ordinary acceptance of that term, due regard being had to their status in life and so forth. VAISEY, J., approached (and, if I may venture to say so, rightly approached) the problem by considering what were the right inferences to draw from the language that the testator used. First of all, he drew attention to the class—widows and orphaned children—and said:

"... I rely on the fact that the will is dealing with widows and orphaned children, classes which may, and, in my view must, include, if the class is sufficiently wide, many proper objects of charity in the legal sense. Even today the status of 'widows and orphaned children' suggests the possibility, or, perhaps, even the probability, of impecuniosity."

I agree that the class of widows and orphaned children is, at any rate, a class which has the effect of directing one's mind to the idea of the relief of want

or poverty. They have been from century to century the object of charitable benefactions. In this connection it is right to mention a point to which counsel for the residuary legatee referred us. According to the evidence of Mr. Laycock, manager of the trustee department of Messrs. Coutts & Co., the bank at the moment has 439 employees excluding directors and auditors. He goes on to say:

A "It would be difficult to say how many deceased officers or deceased ex-officers (within the definitions in the will) there are at present who have widows or orphaned children, but there must be a considerable number, and we are aware of some who are—and, indeed, many of these widows and orphaned children may well, both now and in the future, be—in real need of assistance."

B As regards that, counsel pointed out that the learned judge may, perhaps, have a little overstated the matter in that he indicates, on the evidence, that there were, or might be, "considerable numbers" of cases in real need of assistance, but I do not think that that can fairly be said to have influenced wrongly his conclusion on the question of construction. The point has a bearing on another aspect of the matter, *viz.*, the provision for six-monthly distributions to which

C I will presently refer.

Before leaving the inference to be drawn from the collocation of "widows" and "orphaned children," I would like to refer to *A.-G. v. Comber* (3), which seems to me to bear out what I have said. That was a case of a gift of one-fourth of certain property or its proceeds to "the widows and orphans of the parish of Lindfield, Sussex . . ." I agree that the reference to the parish may, perhaps, be more naturally an indication of the relief of poverty than a reference to former employees at monthly salaries of a bank, and I do not forget that the sum represented by this one-fourth share was a very small one. Still, the *ratio decidendi* of *SIR JOHN LEACH, V.-C.*, was, I think, in reference to a different point. He said (2 Sim. & St. 94):

E "A gift to the widows and orphans of the parish of Lindfield could not in its nature have proceeded from motives of personal bounty to particular individuals; it must have proceeded from general benevolence towards two classes of persons who were suffering under a common circumstance of destitution or privation, and is necessarily to be confined to such of those two classes who are within the scope of general benevolence."

F In other words, the clause was read as though the adjective "poor" were inserted in it. So *RUSSELL, J.*, said ([1922] 2 Ch. 58):

"I do not see how otherwise the decision of *SIR JOHN LEACH* in *A.-G. v. Comber* (3) and of *LORD ROMILLY* in *Thompson v. Corby* (4) can be explained."

G I think that citation does lend some support to the view which *VAISEY, J.*, formed and stated—that a reference to the class of orphans and widows is, by its nature, one which you would say, *prima facie*, proceeded from "general benevolence towards classes of persons suffering under circumstances of privation" rather than "from motives of personal bounty to particular individuals." I am inclined, therefore, to think that a strong argument could have been put forward for the validity as a charity of this gift if the relevant paragraph had

H said no more than that the objects were to be widows and orphaned children of deceased officers and deceased ex-officers, but there is the added qualification that the persons to benefit are those chosen by the bank as being "by reason of his her or their financial circumstances . . . most deserving of such assistance."

VAISEY, J., dealt separately with the formulæ "by reason of his her or their financial circumstances" and "most deserving of such assistance." I will state my view on the whole sentence. It seems to me essentially to mean that the

persons selected are persons whose financial circumstances are such that they are not only deserving of assistance, *i.e.*, wanting help, but of all such are those who most want it. I, therefore, think that this sentence, so far from reversing the tendency which I should have thought emerged from the earlier words, rather emphasises it. The point was made that the use of the phrase "most deserving" had, in fact, the contrary result. If the persons to benefit were persons who, by reason of their financial circumstances, were deserving of assistance, then it might be said that the standard imposed was an objective standard, namely, that they were persons whose financial circumstances left them in want. Can it be said that by using the superlative "most" you must discard the objective standard and that those to benefit are the people whom the bank will regard as being (of the whole class) the most deserving, that is, the least undeserving? For my part, I think that view is too subtle an interpretation of these words, and I think, reading the clause as a whole, it would defeat the intention in the mind of the testator. I, therefore, take the indications as VAISEY, J., took them—as pointing much more strongly in favour of than away from a charitable intention. He said:

" . . . putting together the implications of all those expressions, 'widows and orphaned children,' 'financial circumstances,' and 'most deserving of such assistance,' I conclude that a valid and effectual trust is indicated."

There remains one point, and I think it is the most significant of the points which counsel for the residuary legatee advanced. It is of the essence of this direction that there should be six-monthly distribution. So, says counsel, it follows that the testator must have meant that, in any case, every six months the money was to be distributed, and that necessarily carries with it the result, supposing there were no persons properly described as poor, that still there must be distribution. Again, I do not myself think that that is a strong enough countervailing circumstance. I think that the provision for six-monthly distribution is an administrative provision. The people to take must plainly be persons then living and persons who at the time satisfy the qualification. As regards, for example, a child, it must be less than seventeen years old. I think, therefore, that mention of the six-monthly distribution was to make simple the ascertainment of the persons to take by having each six months a study of those who might be selected for benefit.

The point being short and being a question as to the interpretation of a few lines in the English language, I confine myself to saying that I read the relevant words as being an expression of an intention on the testator's part that this money should go to those who had the quality of poverty within the meaning of the statute of Elizabeth. Since the decision in *Gibson v. South American Stores (Gath & Chaves), Ltd.* (5), it is clear that in this court this is a good qualification of a charity though the class is chosen by reference to employment in a particular business. I, therefore, hold that this was a valid and effectual charitable trust, and the appeal fails.

JENKINS, L.J.: For the reasons given by the learned judge and by my Lord, to which I cannot usefully add anything, I agree that the trust here in question, on its true construction, is a valid charitable trust for the relief of poverty. Accordingly, I agree that the appeal should be dismissed.

HODSON, L.J.: I agree.

Appeal dismissed. Costs of all parties to be taxed as between solicitor and client, and paid out of the residue of the estate.

Solicitors: *Farrer & Co.* (for the first defendant and the plaintiffs); *Treasury Solicitor.*

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOVELLO AND CO., LTD. v. HINRICHSSEN EDITION, LTD.
AND ANOTHER.

[CHANCERY DIVISION (Wynn-Parry, J.), December 12, 13, 14, 15, 18, 19, 20, 1950, January 16, 17, 18, 19, 23, 24, 25, 26, 30, 31, February 1, 2, 21, 1951.]

A *Conflict of Laws—Confiscatory law of foreign country—Not enforceable in England—Sale in Germany of Jewish property by trustee appointed under confiscatory decree—Not effective to pass copyright in United Kingdom.*

Alien—Trading with enemy—Transfer of chose in action by enemy—English copyright owned by enemy—Contract for sale of business executed in Germany on July 22, 1939, subject to consent of German government—Consent given on Sept. 25, 1939—Trading with the Enemy Act, 1939 (c. 89), s. 4 (1).

B *Copyright—Emergency legislation—Power of comptroller to grant to non-enemy subject licence to exercise copyright owned by enemy—Right of owner, after shedding enemy character, to exercise copyright subject to rights of statutory licensee—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (c. 107), s. 2 (1).*

C H.H., a Jew residing in Leipzig, was the owner of C. F. Peters of Leipzig, a music publishing firm. In 1933 he took his eldest son, M.H., into partnership, but in 1937 M.H., anticipating the persecution of the Jews by the Nazi party which was then in power in Germany, left the partnership and emigrated to England, whereupon H.H. took into partnership another son, Hans. By an agreement, dated Sept. 1, 1937, the firm of C. F. Peters appointed N. & Co., Ltd., an English music publishing company, as agents for the United Kingdom for the sale of the firm's publications, but the agreement contained no assignment of the English copyright in any of the works published by the firm. In 1938 the German government passed a number of decrees to further its policy of depriving the Jews of their property and rights, and, under a decree made on Dec. 3, 1938, and entitled

D "Decree regarding the utilisation of Jewish property," a trustee of the firm of C. F. Peters was appointed by the German government, and H.H. and Hans H., who was already in a concentration camp, were forbidden to exercise any further rights as partners of the firm. By an agreement, dated July 22, 1939, the trustee, purporting to act under the decree of Dec. 3, 1938, sold the business of C. F. Peters to two other Germans, the greater part of the purchase price being taken by the German government, ostensibly as taxes and emigration expenses of the H. family who were compelled to emigrate. By cl. 6 of the agreement the validity of the contract was dependent on the consent of two German Ministries, and the final consent was given on Sept. 25, 1939. Neither H.H. nor Hans H. were parties to the agreement, but they were compelled to sign a further agreement of the same date (July 22, 1939), called an accession agreement, whereby they were expressed to accede to the contract of sale in its entirety. On Sept. 30, 1942, H.H. died in Belgium, Hans H. and the executor named in his will having pre-deceased him. In 1949 M.H., who was not at any material time an "enemy" or an "enemy subject" within the meaning of the Trading with the Enemy Act, 1939, and the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, was granted letters of administration with the will annexed of his father's estate. On Feb. 19, 1940, and June 1, 1948, licences were obtained by N. & Co., Ltd., from the Comptroller-General of Patents, Designs and Trade Marks, under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2, in respect of the copyright of certain musical works published by the firm of C. F. Peters. In an action by N. & Co., Ltd. against M.H. and H. Edition, Ltd., alleging infringement of copyright in respect of these

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works, the defendants denied infringement and contended that the copyright in the works was now vested in M.H., who had authorised the acts done by H. Edition, Ltd.

HELD: (i) the doctrine that the courts of this country would not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which was confiscatory in policy extended not merely to an act such as the appointment of a so-called trustee under a confiscatory decree where the effect of the appointment was to deprive the owner of the management of his business, but also to a sale by a trustee so appointed; the German decree of Dec. 3, 1938, under which the trustee in the present case was appointed, was a confiscatory measure and the sale agreement constituted the performance of his confiscatory function; therefore, the agreement was ineffective in English law to effect any transfer of the English copyright owned by H.H. and Hans H. as owners of the business of C. F. Peters; and, in the events which had happened, that copyright was now vested in M.H.

Frankfurter v. W. L. Exner, Ltd. ([1947] Ch. 629), *applied*.

(ii) although the element of duress might affect the validity or enforceability of an agreement, it could not affect its scope; the scope of the sale agreement was determined at the moment of its execution, and, as it did not extend, so far as the English courts were concerned, to transfer any interest in the English copyright because of the confiscatory nature of the decree under which it was effected, no question of its affirmation or ratification could arise, and, therefore, it was immaterial to consider whether or not the accession agreement of the same date was voidable as being entered into by H.H. and Hans H. under duress.

(iii) on the construction of the sale agreement, as the consents of the German Ministries thereto were not given until Sept. 25, 1939, the agreement did not become valid until that date, and though, under German law, the Ministries' consents gave the agreement retroactive effect, the agreement was not effective to pass any property until the consents were given; therefore, the agreement was one by which a chose in action was assigned by an enemy after the passing of the Trading with the Enemy Act, 1939, on Sept. 5, 1939; and under s. 4 (1) of the Act, it was ineffective to transfer to the purchasers under the agreement any English copyright owned by H.H. and Hans H. as owners of the firm of C. F. Peters.

(iv) the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2 (1), required that at the time of an application to the comptroller for a licence under the section there was an enemy or enemy subject who had at some time after Sept. 3, 1939, been the owner of a copyright; the language of the sub-section afforded no ground for saying that the comptroller could exercise his jurisdiction under the section if the person who owned the copyright had been an enemy or enemy subject at any time between Sept. 3, 1939, and the date of the application for the licence and notwithstanding that he had shed his enemy character by the date of the application; and, therefore, the comptroller had no jurisdiction to grant the licence of June 1, 1948.

(v) there was nothing in the language of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, or in the public policy which required its enactment for the proposition that, if the owner of a copyright who had shed his character of an enemy wished to exercise his copyright, he should not be entitled to do so, subject to any licences which might have been granted by the comptroller; s. 2 (4) of the Act clearly implied that, while the sub-section was designed to protect the statutory licensee, the residual rights of the owner were preserved; and, therefore, as the licence of Feb. 19, 1940, was non-exclusive, M.H., who was properly to be regarded as the present owner of the copyright of the works in question,

was entitled to permit the exercise of that copyright by H. Edition, Ltd., provided that the statutory licence of Feb. 19, 1940, granted to N. & Co., Ltd., was not prejudiced so long as it continued to exist.

FOR THE TRADING WITH THE ENEMY ACT, 1939, s. 4 (1), see HALSBURY'S STATUTES, Vol. 32, p. 1096.

A FOR THE PATENTS, DESIGNS, COPYRIGHT AND TRADE MARKS (EMERGENCY) ACT, 1939, s. 2, see HALSBURY'S STATUTES, Vol. 32, p. 1171.

Cases referred to:

(1) *Frankfurter v. W. L. Exner, Ltd.*, [1947] Ch. 629; [1948] L.J.R. 553; 177 L.T. 257; 2nd Digest Supp.

(2) *Falmouth Boat Construction, Ltd. v. Howell*, [1950] 1 All E.R. 538; [1950] 2 K.B. 16.

B ACTION for alleged infringement of copyright.

The plaintiffs, who were music publishers, claimed *inter alia* an injunction to restrain the defendants, Hinrichsen Edition, Ltd. and Max Hinrichsen, from producing, or re-producing, or selling, or offering for sale by way of trade, or distributing for the purposes of trade, certain musical works in respect of which the plaintiffs held licences dated Feb. 19, 1940, and June 1, 1948, granted to them by the Comptroller-General of Patents, Designs and Trade Marks, under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2. The defendants admitted the acts which were alleged to constitute infringement, but denied infringement, contending that the copyright in the works in the United Kingdom was vested in the second defendant as administrator of the will annexed of his father, Henri Hinrichsen, and that the defendant company had done the acts complained of on the authority of the second defendant.

The works in question were the property of a German music publishing firm, C. F. Peters of Leipzig, which was formerly owned by Henri Hinrichsen. Under anti-Jewish decrees made by the German government in 1938, Henri Hinrichsen and his son, Hans, whom he had taken into partnership, were removed from control of the business and a trustee, one Noatzke, was appointed in December, 1938. By an agreement, dated July 22, 1939, to which neither Henri Hinrichsen nor his son was a party, the trustee sold the business to two Germans, Dr. Hermann and Dr. Petschull, who were members of the Nazi party. Henri Hinrichsen, who was compelled by the German authorities to emigrate, died in Belgium in 1942, his son Hans, having pre-deceased him. On Mar. 2, 1949, letters of administration to Henri Hinrichsen's estate with the will, dated Nov. 5, 1941, annexed were granted out of the Principal Probate Registry in England to Max Hinrichsen, who had emigrated to England in 1937. In 1936 Walter Hinrichsen, another son of Henri Hinrichsen, emigrated to the United States and later became a national of that country. The defendants contended *inter alia* that the sale of the business on July 22, 1939, being made under decrees which were penal and confiscatory, could not affect rights subsisting outside Germany, and, therefore, the copyright in the United Kingdom of C. F. Peters remained vested in Henri and Hans Hinrichsen, and, in the events which had happened, on the appointment of Max Hinrichsen as administrator of his father's estate, the copyright in the United Kingdom of C. F. Peters vested in Max Hinrichsen as from the date of Henri's death.

H *Shelley, K.C.*, and *Aldous* for the plaintiffs.

S. Pascoe Hayward, K.C., and *F. E. S. James* for the defendants.

Cur. adv. vult.

Feb. 21. WYNN-PARRY, J., read a judgment in which he stated in full the facts which have been summarised above, and continued: On that review of the facts I come unhesitatingly to the conclusion that the sale agreement was ineffective to pass any interest in any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as the owners of the business of

C. F. Peters. This case appears to me to be covered by the decision of ROMER, J., in *Frankfurter v. W. L. Exner, Ltd.* (1), and, indeed, to be an *a fortiori* case. The facts in that case as stated in the headnote were as follows:

"The plaintiff, a Jew, formerly resided in Vienna where he carried on a leather business. The defendants, an English company, dealt in leather and leather goods. In 1933 the defendants appointed the plaintiff as their agent in Austria. Pursuant to this agreement the defendants were accustomed to consign goods to the plaintiff in Vienna. These goods remained the property of the defendants, the plaintiff sending the purchase price to the defendants on a sale being effected. When things got difficult for Jews in Austria, the plaintiff started to remit funds to the defendants on account of the goods which had been consigned to him before any sale had been made. On Mar. 10, 1938, German forces invaded Austria and Austria was incorporated in the German Reich, such incorporation being recognised by our Foreign Office. Jewish businesses were shortly afterwards placed in the hands of German state officials known as commissars. These commissars were appointed pursuant to the Austrian Decree 80 of Apr. 13, 1938, which was entitled 'Law as to the appointment of official administrators and control officers.' That decree provided by s. 1: 'For the protection of important public interests the Reichsstatthalter is empowered to appoint official administrators . . . for undertakings having their head office in the province of Austria.' Section 2: 'The official administrator shall have full legal powers to act on behalf of the undertaking. During the period of administration the authority of the proprietor of the undertaking . . . to act on behalf of the undertaking shall be in abeyance.' One S. was appointed commissar of the plaintiff's business and took complete control, the plaintiff in May, 1938, being arrested and imprisoned. On May 6, 1938, the plaintiff wrote a letter to the defendants informing them that his firm had been placed under the control of a commissar and stating that 'No dealing with my credit balance with you without the consent of S. will be legally binding.' That letter was signed by the plaintiff and S. On May 10, 1938, the plaintiff had a credit balance with the defendants of £2,258 19s. 11d. Goods of the defendants of considerable value were on consignment with the plaintiff. S. got in touch with the defendants, who asked him to sell their goods then in Austria. S. from time to time sold the defendants goods on consignment in Austria, but he did not remit the proceeds to the defendants. They on receipt of notices of sales debited the plaintiff's credit balance with the purchase price. In this action the plaintiff claimed payment of £2,258 19s. 11d."

On these facts ROMER, J., held:

"First, that, on its true construction, the Austrian Decree 80 was confiscatory in character and operation. Though not strictly penal, it was to be regarded in this country in the same way as a penal law. Secondly, that as between the commissar and the plaintiff our courts would not recognise the claim of S. to property in this country."

In his judgment ROMER, J., said ([1947] Ch. 635):

"On the face of it the decree bears a semblance of innocence, but when one sees vague phrases such as 'for the protection of important public interests,' and 'carrying on the businesses administered in a manner consonant with the public interest,' one is entitled to inquire what manner of legislation it really was, and, for this purpose, to see what was done under it. We know what happened to the plaintiff. He told me about it in his evidence. Jail, deprivation of any voice in the conduct of his business, and appropriation of its assets without compensation, followed ultimately by

A permission to leave the country with nothing left to him but his life, his clothing and some furniture. Dr. Bretsch said that by Austrian law the commissar could not, in any possible sense, be regarded as an agent for the plaintiff. He said that Schober was the statutory agent appointed by the state to act on his behalf. 'The important public interests' in the decree were regarded by the executive as being the elimination of the Jews, and the 'public interests' referred to in s. 3 were interpreted as being the Nazi interests. Now, it is quite true that the Nazis did not openly and unashamedly steal the property of the Jews by decrees clearly and unambiguously worded, until later on, and from November, 1938, onwards a series of laws was passed for the purpose; but, if the expulsion by the state of a man both from the direction and the beneficial ownership of his business without compensation, coupled with the transfer of control to the state, for the benefit of the state, is not confiscation within the ordinary usage of that word, it is difficult to know what is."

- B In my view, every word of that reasoning applies in this case. The decree of Dec. 3, 1938 [which removed Henri Hinrichsen and his son from the control of the business], was plainly of a penal and confiscatory character.
- C Noatzke was appointed for the avowed object of giving effect to its confiscatory purpose, and the sale agreement represents no more than the discharge by him of that function. The decree, the appointment of Noatzke, and the sale are indissolubly linked together, and the resulting position is no different than it would have been if the decree itself had directly effected the transfer of the business of C. F. Peters from Henri Hinrichsen and Hans Hinrichsen to Dr. Hermann and Dr. Petschull on the terms of the sale agreement. Henri Hinrichsen and Hans Hinrichsen were deprived of their property by confiscatory measures. It is established by the authorities (many of which were reviewed by ROMER, J., in his judgment in the *Frankfurter* case (1), and which I do not intend to review again) that the courts of this country will not give effect, so far as regards assets situate within their jurisdiction, to the law of a foreign country which is confiscatory in policy.
- E ROMER, J., in *Frankfurter v. W. L. Ezner, Ltd.* (1), has held that this doctrine extends to an act such as the appointment of a so-called trustee pursuant to such a decree, the effect of which is to take out of the control of the owner the management of his business. In my view, I am not extending this doctrine by applying it to a sale by a trustee so appointed; but if, indeed, I am extending it, I do so without hesitation, finding as I do that
- F the law was confiscatory in nature, the trustee was appointed to carry it out, and the sale agreement represented no more than the performance of his function. It follows, therefore, that, assuming that the sale agreement is otherwise valid under English and German law, it was ineffective in the eye of English law to effect any transfer of the English copyright owed by Henri Hinrichsen and Hans Hinrichsen as owners of the business of C. F. Peters.
- G It was argued by counsel for the plaintiffs that the present case is distinguishable from that of *Frankfurter v. W. L. Ezner, Ltd.* (1) because of the presence of the sale agreement. The burden of the argument of counsel for the plaintiffs, as I understood it, was that the *ratio decidendi* of the cases on which ROMER, J., founded his conclusion does not apply when the act said to amount to confiscation is the result of a consensual document and not the direct result
- H of legislation. I cannot accept this argument. It involves concentrating on the form of the matter and shutting one's eyes to any inquiry as to the substance. For the reasons which I have given, I regard the deprivation of Henri Hinrichsen and Hans Hinrichsen of their property at a gross under-valuation as the inevitable consequence of the decree. It was somewhat curious to listen to the attempt on behalf of the plaintiffs to justify the sale in face of the view expressed by one of their directors, a Dr. Aber, both at the time and in the witness box, that it was robbery, a view with which I find myself in entire agreement.

Counsel for the plaintiffs then sought comfort in another contention, to appreciate which it is necessary to refer to a further agreement which has been described as the accession agreement. That is a document dated July 22, 1939, the same day as the sale agreement. The parties are Dr. Hermann and Dr. Petschull, on the one hand, and Henri Hinrichsen and Hans Hinrichsen, on the other. It recites that Dr. Hermann and Dr. Petschull have concluded the sale agreement with "the trustee appointed in accordance with [s. 2] of the regulation concerning the utilisation of Jewish property dated Dec. 3, 1939." A By para. 1 Henri Hinrichsen and Hans Hinrichsen were expressed to accede to the contract of sale in its entirety. The agreement contains a number of other provisions to which for my present purpose I need not refer. It is perfectly true that Henri Hinrichsen and Hans Hinrichsen signed this agreement, but it is essential to have in mind the circumstances in which they did so. B Their signatures to this agreement were required as a formality, and, in my view, they were required for no other purpose. However, they were compelled to go to Berlin to sign. They took no part in the execution of the sale agreement and were not present when it was signed, being kept in an adjoining room. After the sale agreement was signed, the accession agreement was put before them in the presence of the notary and the other parties. In his evidence Dr. Petschull told me that Henri Hinrichsen and Hans Hinrichsen looked shocked. It is C clear that they were not willing parties. The whole ceremony lasted only a few minutes and was nothing but a tragic farce.

Counsel for the plaintiffs prays in aid this accession agreement by contending that, in effect, it incorporates into it the whole of the terms of the sale agreement which it purports to ratify; that, therefore, the validity of the sale purported to be effected by the sale agreement must depend on the validity of the accession D agreement; that the accession agreement was at the worst a voidable contract as having been executed by Henri Hinrichsen and Hans Hinrichsen while under duress, but that it was capable of ratification after the duress had ceased to operate; that ratification in fact took place; and, therefore, that the sale was effective. I do not accept this argument. In my view, neither the character nor the operation and effect of the sale agreement can be changed E by anything appearing in the accession agreement. The element of duress may affect the validity or enforceability of an agreement, but it can never affect its scope. The scope of the sale agreement was determined once and for all at the moment of its execution. For the reasons which I have given, the sale agreement (so far as the courts of this country are concerned) did not extend to transfer any interest in the English copyright. The courts of this country F are bound not to recognise the extra-territorial effect of the sale agreement on that copyright because of the confiscatory nature of the measures in question. This is the application of a rule of public policy which involves a limitation of jurisdiction. No question of affirmation or ratification can, therefore, arise so far as the sale agreement is concerned. Unless, however, the accession agree- G ment can operate to affect the scope of the sale agreement (and I hold that it cannot), it is immaterial to consider whether or not the accession agreement was voidable on the ground that it was entered into by Henri Hinrichsen and Hans Hinrichsen under duress and, assuming that it was, whether or not it was subsequently affirmed. In my judgment, either the accession agreement is linked with the sale agreement and suffers from the same vice as that document, or, if it is not to be regarded as so linked with it, it is just a worthless piece of H paper.

The next point with which I propose to deal is a point taken by the defendants under the Trading with the Enemy Act, 1939. For the purpose of appreciating this point, it is necessary to turn again to the sale agreement, to postulate that it was a valid document according to German law at the time of its execution, that it was not limited in scope as I have held it to be, and, therefore, apart from the point under examination, that it was effective to transfer the English

copyright. On this basis the defendants contend that the operation of the Trading with the Enemy Act, 1939, was to prevent any effective transfer of the English copyright. The rules of construction under German law are different from the English rules of construction, at any rate, in this respect, that a German court will take into account many matters which an English court cannot do. In the present case, for instance, the language of the accession agreement could be prayed in aid for the purposes of construing the sale agreement. Subject to this, however, I am satisfied, after considering the expert evidence of Dr. Cohn for the plaintiffs and Dr. Mann for the defendants, that the rules of construction under the two systems do not differ materially. It was argued on behalf of the plaintiffs that the sale agreement was not executory. In support of this, reliance was placed on the use of the present tense. By cl. 6 of the sale agreement it is provided:

"The parties are in agreement that the validity of the above contract is dependent on the consent of [two Ministries which are there specified] as the former partners of the firm are Jews."

The experts on German law, Dr. Cohn and Dr. Mann, were agreed that the effect of that clause was to render the agreement inchoate until consent was given or refused. If consent should be given, the agreement would become fully valid, and, further, would be treated as being effective from its date. If, on the other hand, consent should be refused, the agreement would be a nullity.

The Trading with the Enemy Act, 1939, received the Royal Assent on Sept. 5, 1939, but the final consent to the sale agreement—that of the Ministry of Economics—was given on Sept. 25, 1939, by a letter significantly headed: "*Re de-Jewing of the music publishing house of C. F. Peters, Leipzig.*" The Trading with the Enemy Act, 1939, s. 4 (1), provides:

"No assignment of a chose in action made by or on behalf of an enemy shall, except with the sanction of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action . . ."

It is true that the effect of the Ministry's consent was to make the contract effective as from its date, but, as I have pointed out, until that consent was given, the contract was wholly ineffective to pass any property. It only became valid on Sept. 25, 1939, and only then did it operate on property. It was, therefore, a contract by which a chose in action was effectively assigned by an enemy only after the coming into force of the Trading with the Enemy Act, 1939. The assignment is, therefore, within the mischief of the Act, and is not cured by being given retroactive effect under German law. For this reason also the sale agreement must be treated as having been ineffective to transfer any English copyright owned by Henri Hinrichsen and Hans Hinrichsen as owners of the firm C. F. Peters.

It is then said, however, that, even if the scope of the sale agreement is limited, as I hold it to be, or, alternatively, even if the scope of the agreement is not so limited, but the point taken under the Trading with the Enemy Act, 1939, is good, nevertheless the defendants cannot succeed in their defence because of the operation of the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939. I say at once that I am unable to accept (indeed, I found myself hardly able to follow) the argument which was addressed to me on this point. The Act is one which was passed in an emergency for the public benefit during that emergency, and from its nature it is one which should not be given a wider interpretation than is necessary to achieve the main purpose for which it was enacted. The jurisdiction of the comptroller to grant licences is conferred, and, therefore, limited, by s. 2. Section 2 (1) sets out the conditions which must exist before the jurisdiction of the comptroller arises. There must be an application to the comptroller, and it must be shown at the date of that application (i) that there is an enemy or enemy subject who is, or has at any time

since Sept. 3, 1939, been, the owner of a copyright; (ii) that it is in the public interest that that copyright should be exercised; and (iii) that a qualified person is ready and able to exercise the copyright. It was contended by counsel for the plaintiffs, as regards the first condition, that it need not be shown that the owner of the copyright is an enemy at the date of the application, but that it would be sufficient to show that he had had that character for however short a time between Sept. 3, 1939, and the date of the application. In my view, the section cannot possibly bear that meaning. The postulate is the existence of an enemy or enemy subject with this qualification, that he is, or has at any time since Sept. 3, 1939, been, the owner of a copyright. That qualification limits the class of persons brought within the scope of the section by reference to the answer to the question: Do they own, or have they owned at any time since Sept. 3, 1939, a copyright? It in no way points to the time at which they are to be considered enemies or enemy subjects for the purpose of the section. The language of the section, therefore, affords no ground for saying that, if it can be postulated of a person that he was for a time between Sept. 3, 1939, and the date of application an enemy, then, even though he has shed that character before the date of the application, nevertheless the comptroller can exercise the jurisdiction given to him by the later sub-sections of s. 2 of the Act. Henri Hinrichsen died on Sept. 30, 1942, in Belgium. His wife, his son Hans, and the executor named in the will had pre-deceased him. His personal property in this country, which, on the basis of my judgment, included the copyrights in question, thereupon vested in the President of the Probate, Divorce and Admiralty Division of this court, or, if not in him, then in the Crown, but was liable to be divested on an administrator of his estate being appointed. It is, I think, immaterial to consider where the beneficial interests under his will lay, but, even if it were material, it appears from the evidence that before June, 1948, all the beneficiaries were free of enemy character. On this reasoning and the earlier reasoning in this judgment, the granting of the second of the two licences under which the plaintiffs sue, *viz.*, that dated June 1, 1948, was *ultra vires* the comptroller. In saying this I wish to make it clear beyond doubt that I am in no degree criticising the comptroller or his officials. So far as I am aware, the scope of the sale agreement has for the first time been exhaustively canvassed and pronounced on in this action. Henri Hinrichsen and Hans Hinrichsen were enemy subjects when the earlier licence was granted, and it is only because of the view which I take of the scope of the sale agreement, and the fact that the plaintiffs do not dispute the title of the second defendant, Max Hinrichsen, as the administrator of Henri Hinrichsen's will, that the jurisdiction of the comptroller to grant the second licence has come into question.

It remains, however, to consider the other relevant provisions of the Act in regard to the earlier licence. The power given to the comptroller by s. 2 (1), so far as relevant to the present matter, is to grant an interest in the copyright for the whole of the residue of the term of the copyright or for such less period as he thinks fit. Section 2 (2) opens with the words:

“The power of the comptroller under this section to make an order granting a licence shall include the power . . .”

In fact, apart from his power under sub-s. (3), which is co-extensive with his power under sub-s. (2), his power to give directions under sub-s. (6), and his powers to vary and revoke under sub-s. (7) and sub-s. (8), the scope of his power is defined in sub-s. (2). It is contended by counsel for the plaintiffs that the true effect of that sub-section is that, provided the jurisdiction of the comptroller has once arisen under sub-s. (1), then, so long as the Act remains in force, no one can exercise the copyright in question without the licence of the comptroller. I cannot accept this contention. The Act does not say this. It does no more than say that the comptroller may grant licences within the

ambit of the section. I can find no support either in the language of the Act or in the public policy which required its enactment for the proposition that, if the owner of a copyright who has shed his character of an enemy wishes to exercise his copyright, he should not be entitled to do so subject, of course, to any licences which may have been granted by the comptroller.

- A Let me test the matter in this way. Suppose a man to own a copyright and to become an enemy so that the jurisdiction of the comptroller arises under s. 2 (1). Suppose, however, that no application for a licence is made under that sub-section by anyone. Suppose, then, that the owner of the copyright sheds his character of enemy, and desires to exercise his copyright. On what show of reasoning is it to be said that in those circumstances he must obtain a licence from the comptroller before he proceeds to exercise his own copyright? In my view, the argument to that effect makes nonsense. In this case the licences B in question were non-exclusive. Under s. 2 (4) their limited effect is to take away from the owner of the copyright

“ . . . any right in relation thereto the exercise whereof would be inconsistent with the exercise of the licence in accordance with and subject to the terms on which it is granted.”

- C While this sub-section is designed to protect the statutory licensee, its clear implication is that the residual rights of the owner of the copyright are preserved.

For the reasons which I have given, the second defendant is properly to be regarded as the owner of the copyright in the two works in question.

- D As such, he is entitled to permit the exercise of that copyright by the defendant company, provided that the statutory licences of the plaintiffs are not prejudiced so long as they continue to exist. If my judgment stands, then, no doubt, on application by the defendants the comptroller will revoke the later licence on the ground that, as now appears, he had no jurisdiction to grant it. As regards the licence of Feb. 19, 1940, no doubt an application will be made to the comptroller for its revocation. I have no jurisdiction over the comptroller and it is not for me to direct him what to do. I will only say this. E I observe that under s. 2 (8) (d) of the Act the comptroller may revoke the licence if he is of opinion that circumstances have arisen which make it just and equitable to do so. I have had the advantage which, perhaps, he cannot have. I have listened to an exhaustive canvassing of this case for nineteen days, and, on the facts and evidence before me I am quite certain of one thing, F namely, that the plaintiffs have no merits whatsoever. They have designed to cling—the verb is that used by their own counsel—to their statutory licences at all costs. With this end in view, they have involved the defendants in protracted and costly litigation in which every possible point, however technical, has been put forward and persisted in, although by their reply they assert that their only object is and has been to be satisfied as to the title of the second G defendant, Max Hinrichsen, to the English copyrights before dealing with them. In these circumstances their reiterated protests that they have had, and still have, at heart the best interests of the Hinrichsen family ring hollow in the ear.

- [HIS LORDSHIP then dealt with other points which had been raised and held (a) that the sale agreement could not be regarded as void in German law, nor could it be regarded as voidable on the grounds of duress, as neither Henri H nor Hans Hinrichsen were parties to it, and, therefore, their consent was not necessary, and (b) that neither Henri nor Hans Hinrichsen effectively affirmed the sale agreement. HIS LORDSHIP dealt with events which occurred in 1945 in Leipzig, which was then in the occupation of the United States Army, and with certain proceedings which were taken before the restitution office of Greater Berlin in March, 1950. He held that certain documents executed in Leipzig in 1945 were valid under German law to effect a transfer of the whole business and assets of C. F. Peters from Dr. Petschull and Dr. Hermann to Walter

Hinrichsen (acting on behalf of the family of Henri Hinrichsen), and that an agreement of settlement, dated Mar. 18, 1950, and made on behalf of Walter Hinrichsen, Dr. Petschull and Dr. Hermann, was a valid agreement binding on the parties to it under German law. In regard to the validity of the documents executed in 1945 (which was contested by the plaintiffs on the ground, *inter alia*, that certain legal formalities were not complied with), HIS LORDSHIP cited *Falmouth Boat Construction, Ltd. v. Howell* (2), and held that, in the circumstances in which the documents had been executed, the rule *omnia praesumuntur rite esse acta* applied, and that this rule applied, not only as between parties to the documents (who had acted on them), but equally to third parties such as the plaintiffs who did not claim under any of the parties to the documents. HIS LORDSHIP continued:] It remains to consider a point taken by counsel for the plaintiffs under the Trading with the Enemy Act, 1939, s. 4 (1). The point is that at the time of the 1945 transfers and the proceedings before the restitution agency in Berlin, both Dr. Petschull and Dr. Hermann were—and, indeed, they still are—enemy subjects, and, therefore, those transfers and that agreement were ineffective to transfer the English copyright because the sanction of the Treasury was not obtained. On the basis that I am wrong in my decision that the sale agreement was not effective to pass the English copyright for the reasons given earlier in my judgment, then this would be a live point, and on that basis, in my view, so far as it goes it would be a good point. However, had that point been a live point, I would have given the defendants an opportunity to obtain the necessary licence *ex post facto*. It is difficult to doubt that it would be given, and I have no doubt that, if given, it would be effective *ex post facto*, having regard to the language of the section. At any rate, I would have given the defendants that opportunity because I would have been quite unwilling in the interests of justice to allow the plaintiffs, who are wholly without merits in this matter, to succeed in depriving the Hinrichsen family, who have already suffered enough, of their inheritance because of the intervention of such a technical point. In the result, this action fails and must be dismissed with costs.

Action dismissed with costs.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiffs); *Kaufman & Seigal* (for the defendants).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

HINCKLEY URBAN DISTRICT COUNCIL v. WEST MIDLANDS GAS BOARD.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), March 8, 9, 12, 1951.]

Gas—Nationalisation—Financial adjustment—Power of local authority to apply surplus revenue in aid of general rate—Unappropriated profit of working period up to vesting date—Liability of area gas board to remit—Hinckley Local Board Gas Act, 1880 (c. clvii), s. 43, as amended by Hinckley Gas Order, 1922 (S.R. & O., 1922, No. 608)—Interpretation Act, 1889 (c. 63), s. 38 (2) (c)—Gas Act, 1948 (c. 67), s. 56 (2).

Under the Hinckley Local Board Gas Act, 1880 (as amended by the Hinckley Gas Order, 1922, and the Hinckley Gas Order, 1928), a local authority supplied gas to a certain area. On the vesting day (May 1, 1949), under s. 17 (1) and s. 18 (1) of the Gas Act, 1948, all the property, rights,

liabilities and obligations of the local authority as gas undertakers vested in the defendant board. Under s. 43 of the Act of 1880 (as amended by the Order of 1922) the local authority had the option, if there was surplus revenue not required to be retained as a working balance, to apply the surplus to price reduction or in aid of the general rates of their area. During the period from Apr. 1, 1948, to Apr. 30, 1949, the local authority made a profit of £30,178 12s. 7d., the amount not being ascertained until some months after the vesting date. The local authority claimed that this sum should be paid over to them by the defendant board so that they could carry it to the credit of their general rate fund, that being, in the events which had happened, the only remaining method set out in s. 43 of the Act of 1880 (as amended) of applying surplus revenue.

HELD: (i) on the true construction of the Gas Act, 1948, (a) the provisions in s. 43 of the Act of 1880 (as amended) were inconsistent with the provisions of the Act of 1948 as they were appropriate only to the gas undertaking while it was carried on by the local authority, and they were also redundant, within the meaning of the proviso to s. 56 (2) of the Act of 1948, and (b) the provision in s. 43 of the Act of 1880 (as amended), in regard to carrying the residual surplus revenue to the general rate fund was merely a provision under which the ratepayers might from time to time benefit and was not a special provision "for the protection of any person or class of persons" within the meaning of the exception to the proviso to s. 56 (2) of the Act of 1948, and, therefore, under the proviso, s. 43 of the Act of 1880 ceased to have effect as from the vesting date and there was no obligation on the defendant board to pay the unappropriated surplus of £30,178 12s. 7d. to the local authority for the benefit of the ratepayers.

(ii) the interest of the ratepayers under s. 43 of the Act of 1880 (as amended), gave them, at most, an expectation before May 1, 1949, that part or the whole of the residual surplus revenue might be applied to their relief and did not constitute a liability or obligation "accrued or incurred" under the Act of 1880 before the vesting date within the meaning of the Interpretation Act, 1889, s. 38 (2) (c), so as to bind the defendant board notwithstanding the repeal of s. 43 of the Act of 1880.

Decision of LLOYD-JACOB, J. (ante p. 160), affirmed.

FOR THE GAS ACT, 1948, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 860.

APPEAL by the plaintiff council from an order of LLOYD-JACOB, J., dated Dec. 13, 1950, and reported *ante*, p. 160.

The plaintiff council, who until May 1, 1949, had been gas undertakers for their area, claimed from the defendant board, the present gas undertakers for the area, a sum representing unappropriated profits for a period of thirteen months up to May 1, 1949, on the ground (*inter alia*) that, on the true construction of the Gas Act, 1948, certain provisions of the Hinckley Local Board Gas Act, 1880 (as amended) survived so as to impose on the defendant board an obligation to pay this sum to the plaintiff council in relief of their rates. LLOYD-JACOB, J., held that the plaintiff council were not entitled to the sum claimed and dismissed the action. The facts appear in the judgment of Sir RAYMOND EVERSLED, M.R.

Capewell, K.C., and Keen for the plaintiff council.

Heald, K.C., and J. P. Ashworth for the defendant board.

SIR RAYMOND EVERSLED, M.R.: The plaintiffs, Hinckley Urban District Council, are claiming a sum which has now been ascertained and quantified and agreed at the figure of £30,178 12s. 7d. That figure represents the profit made by them in respect of their undertaking as a gas authority

for the period from Apr. 1, 1948, to Apr. 30, 1949, a period of thirteen months. The reason that the problem has now arisen is the coming into effect of the Gas Act, 1948, which, putting it for the moment in the broadest terms, had the effect of transferring to a series of area boards, and, at the top of the edifice, a Gas Council, the whole of the gas undertakings in the country; both those operated by private companies and those operated by local authorities.

I shall have to refer presently to certain sections of the Gas Act, 1948, but, when the matter is reduced to its final form for the purposes of this case, it turns really on one question, *viz.*, whether certain provisions of the legislation which affected the plaintiff council as gas undertakers survive so as to impose on the defendants, the West Midlands Area Gas Board, an obligation to pay the equivalent of this figure of surplus revenue (the £30,000 odd) to the council in relief of their rates. I think, therefore, that it will be convenient to start with the local legislation to see how the claim is formulated, and I turn to the Hinckley Local Board Gas Act, 1880 (43 & 44 Vic. c. clvii), s. 43 and s. 44. Section 43 of the Act of 1880, which is the vital section for present purposes, was amended by the Hinckley Gas Order, 1922 (S.R. & O., 1922, No. 608), made by the Board of Trade pursuant to its powers under the Gas Regulation Act, 1920, s. 10. Section 43, as amended by art. 32 of the Order of 1922, deals with the accounts of what was then called the local board and is now the council *quoad* their gas undertaking. It is, of course, obvious, but perhaps worth stating, that the local authority (the council, as they now are), though they may have several functions and many emanations in their impact on those the subject of their jurisdiction, are a single entity, and, so far as they perform any function, they do so exclusively by statutory powers given to them for that purpose. Section 43 of the Act of 1880 is, in its conception, referring to the transfer from a previously existing company to the then local board, the predecessor of the council, and it provides that, from the time of the transfer to the council—I am deliberately substituting “council” for “local board”—the council

“ . . . shall keep accounts in respect of their receipts and expenditure on capital account under this Act [*i.e.*, as a gas undertaking] and accounts in respect of their receipts and expenditure on revenue account under this Act separate from each other, and from all their other accounts, and shall, save as hereinafter otherwise expressly provided, apply all moneys from time to time received by them in respect of the undertaking [with certain immaterial exceptions] as follows . . . ”

There are then set out a list of methods of application of the money received. As a result of amendment, the list contains ten methods: (i) in payment of the working and establishment expenses and costs of the maintenance of their gasworks and the gas undertaking; (ii) in payment of their costs, charges and expenses of the collection and recovery of gas rents and rates, and of the borrowing of money under the Act; (iii) in payment of the interest on the loans of the company (if any) which should be outstanding at the time of the transfer (“the company” being the company which was taken over). Then there are a series of headings (four in number) providing for payment of interest, charges, or other annual sums in respect of particular obligations, *e.g.*, the Hinckley Local Board gas debenture stock which was issued in pursuance of the Act.

Those matters taking priority, there remained still three more methods of application, and it is to these in particular that the court has to direct its attention:

“ 8thly. In setting apart if the council think fit a yearly sum not exceeding £10 per centum of the said moneys from time to time received by them as aforesaid for the purpose of forming a reserve fund to provide for any extraordinary expenditure in connection with the gas undertaking; 9thly. In improving and extending the gasworks and mains, and in payment of

any charges and expenses for the time being paid out of the general district rate in respect thereof; And they may if they think fit carry forward to the credit of the revenue account of their gas undertaking for the next succeeding year for the purpose of providing a working balance any sum not exceeding £5,000."

A I pause to point out that that is, as I follow it, a provision enabling them to set up an additional reserve of that sum for the limited purposes mentioned. Now one comes, if I may borrow the language frequently found in the Division with which I am most familiar, to the residuary legatees:

" . . . and subject thereto shall either carry to the district fund any surplus or balance remaining in any year or apply the same in reduction of the price charged by them for the supply of gas."

B Adhering for the moment to my analogy, the class of residuary legatees between whom the council may choose is (i) the ratepayers, and (ii) the gas consumers. Some persons, of course, may be in both classes, but many may be in one and not in the other.

C Section 44 of the Act of 1880 was amended by the Hinckley Gas Order, 1928 (S.R. & O., 1928, No. 512), made under the Act of 1920. Article 25 of that Order substitutes, for what was originally s. 44, this provision, which deals with the opposite result to that adumbrated in s. 43 of the Act of 1880, namely, the existence of a deficit on the working of the gas business at the end of the year. Section 44, as amended, reads:

D "Any deficiency in the revenues and receipts of the council on account of the undertaking to make any of the payments or provide any of the funds to which the moneys received by them in respect of the undertaking are applicable under the provisions of s. 43 . . . of the Act of 1880 as amended . . . shall be from time to time made good out of the general rate, in such manner as the council may from time to time determine."

E Again, putting it briefly, if there was not enough to pay for the maintenance of the gas undertaking and so on, or for meeting the other obligations on the council in respect of the undertaking, then the council must raise the funds required by a general district rate.

F That is sufficient to indicate for present purposes the financial arrangements which, by statute, were imposed on and applied to the council at the time when the change-over under the Act of 1948 occurred. We are told that the financial year for the purposes of their undertaking had been from Apr. 1 to March 31 following, and a point has been made that, in any event, this figure of £30,000 odd represented the surplus profit, not for the year, but for a longer period of thirteen months. In the view which I have formed, I do not think that that aspect of it really adds very much to the case, and I shall not find it necessary to refer further to it. The date, Apr. 30, 1949, is significant for the reason that the vesting date nominated by ministerial power under the Gas Act, 1948, was May 1, 1949. On that date the undertaking supplying the gas to the citizens of Hinckley and district passed from the plaintiff council and became the peculiar province of the defendant board, and, undoubtedly, all the various paraphernalia, large or small, from the gas-holders to the smallest part of the installations, then ceased to be the property of the council and became the property of the defendant board. At that time, or immediately before the vesting occurred, the surplus revenue, since quantified at £30,000 odd, was appreciated but not known or ascertained or certain. That is natural enough, as a number of gas consumers consume their gas through meters into which are inserted coins of the realm, and, until those meters have been emptied, it is not known for certain how much will be actually received, though it is presumably known how much gas altogether has been burned. Of the £30,000 odd, £11,000 represented what was

ultimately received in respect of the "unbilled gas," as it is called, *i.e.*, gas consumed, the charges for which had yet to be collected from the consumers.

So far, therefore, the matter is, on the facts, thus. The plaintiff council had not closed their accounts on Mar. 31, 1949, as they would, no doubt, have done in the ordinary way, but had carried on until the vesting date, May 1, and, when that date arrived, in addition to the other assets pertaining to the gas undertaking which was formerly theirs, there was known to be an unrealised and then unascertained profit in respect of working during the preceding thirteen months. When I say "unrealised," some part of it was in hand, but the exact total of it was not known. Obviously, the sums standing to the credit of the undertaking in their bank accounts represented part of this profit which eventually was quantified at the figure mentioned. I now turn to the Gas Act, 1948. This measure, passed, as is made clear from s. 1 (1) thereof, for the purpose of securing through the various area boards the object of developing and maintaining "an efficient, co-ordinated and economical system of gas supply" for the various areas, made provision in s. 17 and s. 18 for the transfer to the area boards of the assets to be acquired. Section 17 (1) provides:

"Subject to the provisions of this Part of this Act, all property, rights, liabilities and obligations which, immediately before [the vesting date] were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister."

Section 18 (1) provides:

"In a case where an undertaker to whom this Part of this Act applies (a) is a local authority . . . the provisions of the last preceding section shall only apply to property held or used by the undertaker wholly or mainly for the purposes of his gas undertaking or wholly or mainly in his capacity as a gas undertaker, and to rights, liabilities and obligations acquired or incurred . . . in that capacity . . ."

That makes it clear that, as regards the plaintiff council, only the property, rights, liabilities and obligations properly belonging to their gas operations and gas undertaking were affected by and passed to the area board under the provisions of the Act. Section 19 is, I think, of some significance, and it was so thought by the learned judge. It provides that, where a local authority before the vesting date had made arrangements of a financial character for transferring sums of money or adjusting accounts between the gas undertaking of the local authority and any other account of the local authority, effect should be given to the adjustments, so far as necessary, after the Gas Act comes into force. Thus, s. 19 (1) says that, where the local authority have made arrangements for making financial adjustments of the kind I have mentioned and those arrangements would, but for the Act, have fallen on or after the vesting date, then the area board shall, subject as is provided by the section, pay the necessary amount to the local authority to enable the adjustments to be effected. Sections 25 to 27 inclusive deal with "Compensation to holders of securities." In the case of a company gas undertaking the method adopted was for the holders of the securities of the company to be paid out at a certain price. I believe that it was a controversial matter at the time, and I need not make any further reference to it now, but provision was made to the effect that up to the transfer date stock-holders would get the benefit of any further earnings, and final accounting was provided for which would enable the benefit of those further earnings to be received by the stock-holders. Section 28 deals with the compensation in the case of local authorities, and it is based on quite different methods and different principles. Section 28 (1) says that an area board in whom the property and rights of a local authority are vested shall, by

way of compensation and in lieu of any other compensation, make payments to the authority as provided in that section and in the following section. There are provisions, for example, about what is to be done with regard to loans which are outstanding. Finally, s. 29 provides:

"There shall be paid to local authorities, by way of compensation in respect of the severance of their gas undertakings from their other activities, the sum of £2,500,000 . . ."

- A which was to be divided as therein specified. The point is that, on the face of the sections, there is no corresponding provision to enable the local authority, like the private stock-holder, to get the benefit of any profits made up to the date of the final vesting. It is that which, in part, has underlaid the argument of counsel for the plaintiff council, for he says that it is natural, B fair and proper to read these later sections so as to obtain, as near as may be, a comparative treatment for the privately owned undertaking, on the one hand, and for a local authority undertaking, on the other hand.

Section 37 (1), which, again, may be of some significance, provides:

- C "Where at any time after Feb. 10, 1948, a local authority have, without the approval of the Minister of Health, debited any amount in the accounts of the gas undertaking of the authority and credited that amount in any other account of the authority, the local authority shall be liable to pay that amount to the appropriate board . . ."

- except to the extent mentioned. February 10, 1948, was the date of the second reading of this Act as a Bill, when the Minister of Fuel and Power announced D his intention to introduce this section. Assuming that the plaintiff council had chosen to debit their undertaking with £x thousand and credit some other of their accounts with a similar sum after Feb. 10, 1948, and before May 1, 1949, and had done so without the authority of the Minister of Health, then, under s. 37 (1), save as thereby provided, they would have been liable to repay that amount (which *ex concessis* would have been taken out of the assets of the gas E undertaking) to the area board in question. The significance of the matter is that, if this section has the wide meaning that I have suggested, and if the question were asked: "Did the council's own legislation apply up to the vesting date?", the answer would have to be: "Only save as qualified by s. 37 of the Act of 1948." I shall, however, have presently to return to this matter also. Section 47, which was referred to by counsel for the defendant board, is in Part F III of the Act, which deals with the financial provisions, and the section makes provision for reserve funds of area boards and also of the Gas Council. Section 47 (1) provides:

"Each area board and . . . the Gas Council shall establish and maintain a general reserve fund for the purposes of the area board or the Gas Council as the case may be."

- G Then, as regards tariffs or what the new area boards are to charge their constituents, provision is made in s. 53, the substance of which, so far as relevant, is that the area boards start by maintaining the existing charges, and power is then given to them to make their own charges, the idea being that, taking one year with another, the boards shall, so to speak, make ends meet as gas undertakings.

- H Section 56 provides for the continued application, to the extent of, and subject to, the provisions therein stated, of existing local enactments. I think that the matter really turns in the last resort on the one point whether, on the true construction of s. 56 (in the light of its context, *i.e.*, having regard to the other matters which I have mentioned), any part, and, if so, what part, of the powers or obligations in s. 43 of the Act of 1880, as amended, survive. It is conceded by the plaintiff council that a great deal of them cannot survive, on any view. It is, for example, obviously inconsistent with the other provisions of the Act

of 1948, to which I have briefly referred, that there should remain a power to utilise this surplus of £30,000 immediately by way of reduction in the gas charges for the Hinckley area, because s. 53 of the Act of 1948 provides how tariffs are to be charged. Equally, it seems plain enough that the provisions in s. 43 of the Act of 1880 relating to payment of the various stocks and other charges, which take priority over the provisions in regard to the reduction of rates, cannot survive in the hands of the board, because other provisions are contained in the Act for the meeting of those charges. Indeed, counsel for the plaintiff council, from the first, has contended that, since none of the earlier powers or provisions of s. 43 of the Act of 1880, as amended, can be regarded as translated, so to speak, into the hands of the area board, the only thing which can remain, and, in fact, does remain, is the power which becomes, by force of the elimination of all other obligations, the obligation to utilise the whole of the £30,000 by way of reduction of rates, which means, in effect, an obligation to pay it over to the rating authority, *viz.*, the plaintiff council. I confess from the start that that strikes me as a surprising result, because, as JENKINS, L.J., pointed out, if that is right, the result would be that the Gas Act, 1948, must be taken as providing that there should be excepted from the assets transferred any surplus revenue accrued, even though not ascertained, at the vesting date, and, if that was the intention, it would be difficult to contrive a more oblique method of producing the result than the one which is suggested, *viz.*, the difficult, and, in some respects, gymnastic, performance of treating s. 43 of the Act of 1880 as preserved to that limited extent in accordance with s. 56 of the Act of 1948. On the other hand, counsel for the plaintiff council contends that, if there had been a deficiency, then it would have been the obligation of the council to make good to the area board that deficiency out of their rates, by virtue of the preserved effect of s. 44 of the Act of 1880. No doubt, if that were true, it would be natural to expect the arrangements to be reciprocal. I do not myself think that it is true, but it will be necessary to examine both s. 43 and s. 44 of the Act of 1880, as amended, in relation to s. 56 of the Act of 1948 to test the validity of that argument.

I think that it is now convenient to deal with s. 56 of the Act of 1948 more in detail. The earlier sections to which I have referred are the necessary background and may, indeed, add support one way or the other, but the conclusion which I reach, I reach on the proper interpretation of s. 56. In those circumstances, arguments on the other sections become more or less ancillary. The opening words of s. 56 (2) are:

“All local enactments in force at the vesting date and applicable to any statutory undertakers . . . shall as from the vesting date have effect . . .”

It is pointed out by counsel for the plaintiff council that, by the definition section, s. 74 (1), an “enactment” may equally mean a part of a section of an Act or the whole of an Act, and, therefore (said counsel), if, on a fair and sensible reading of s. 43 of the Act of 1880 and s. 56 of the Act of 1948 together, one part of s. 43 of the Act of 1880 was found to be appropriately preserved, then it was immaterial that others would not be preserved. Next, it is to be observed that the local enactments are to have effect from the vesting date (*i.e.*, from and after May 1, 1949) and not, let me add, for any limited term. To return to the provisions of s. 56 (2), as from the vesting date the local enactments are to have effect:

“ . . . (a) as if for references to the undertaker [in this case, the Hinckley council] there were substituted references to the area board . . .”

which is appropriate. In other words, in reading s. 43 and s. 44 of the Act of 1880, as respectively amended, “the West Midland Area Board” is to be substituted for references to “the Hinckley Council.” By s. 56 (2) (b) the local enactments are to have effect, as from the vesting date,

“ . . . as if for any references (however worded and whether expressed

or implied) to the gas undertaking or any part thereof or to the limits of supply of the undertaker [*i.e.*, the council] . . . there were substituted a reference to so much of the business carried on by the area board as corresponds to that undertaking . . .”

In other words, “that part of the new board’s undertaking which today corresponds with the gas undertaking of the Hinckley Council” is to be substituted for all references to “the gas undertaking of the Hinckley Council,” and, as I said before, it is for no limited or specified period of time, but, on the face of it, for all time. The proviso to s. 56 (2) says:

“Provided that any such local enactment which provides for the regulation of charges made by the undertaker and any other such local enactment which is inconsistent with or rendered redundant by the provisions of this Act shall cease to have effect, as from the vesting date, so, however, that this proviso shall not be taken as affecting any local enactment which contains special provisions for the protection of any person or class of persons and is not rendered redundant by the provisions of this Act.”

At first sight, it is not a particularly simple piece of legislation. As counsel for the defendant board pointed out, it first enacts that these local statutes remain in force, but making very important substitutional references therein. Then, by way of proviso, it says that certain parts, *viz.*, those parts providing for the regulation of charges and also any part of any such local enactment as is inconsistent with or is rendered redundant by the provisions of the Act of 1948 do not survive. Whether with or without substituting references, they disappear. To that exception, however, there is, again, a further exception, *viz.*, that the exempting proviso does not affect local enactments which are described as containing special provisions for the protection of any person or class of persons. Section 56 (4) provides:

“For the purpose of securing . . . a uniform statutory code applicable throughout the area of each area board, the Minister may by order provide for the repeal or amendment of any such local enactment as has effect under sub-s. (2) of this section . . .”

That may, of course, provide an answer to the difficulty of the absence of any limit of time in s. 56 (2) of the Act of 1948, because the Minister could always by order put an end to any surviving Act so as to secure uniformity.

We have had the exercise of doing the necessary translations of substituting in s. 43 and s. 44 of the Act of 1880, as amended, references to “the West Midland Area Board” for references to “the Hinckley Council,” and references to “that part of the new board’s undertaking which corresponds with the gas undertaking of the Hinckley Council” for references to “the Hinckley Council’s gas undertaking.” It has been not without intellectual effort, and I say at once that the conclusion which is formed in my mind is that s. 43 and s. 44 of the Act of 1880 are defeated, *prima facie*, by the exempting provisions of the proviso to s. 56 (2) of the Act of 1948, because it seems to me on examination that they are either inconsistent with the Act of 1948 or made redundant by the provisions of that Act, or both. As I have already pointed out, the various headings in s. 43 of the Act of 1880, as amended, for directing the surplus revenues to be used in paying the charges, the cost of maintenance, and in keeping down the charges on the debenture stocks, and so on, are redundant, if not inconsistent, and the proviso to s. 56 (2) of the Act of 1948 leads one inevitably to one of what I have called the residuary legatees, and counsel for the plaintiff council concedes that it is only the disposition or obligation in favour of the relief of rates that can, in the circumstances, survive. If, however, it does survive, it survives in a form so different from the original that I confess it seems to me to be outside the scope and purpose of the section. All that might have been applied in relief of rates, under s. 43 of the Act of 1880, as amended,

was so much of any surplus left over, after meeting a number of priorities and after the discretion to set aside certain reserves, as (at the option of the authority) might be applied in this way and not applied in reducing the rates charged to the consumers of gas. It is contended by counsel for the plaintiff council that this part of s. 43 of the Act of 1880, as amended, survives not in its original form, but as laying down, in the circumstances, an absolute obligation to apply the whole sum of £30,000 in the relief of the ratepayers. That would be, in my opinion, not a survival, but an entire transmutation, and, therefore, without taking time in illustrating further the effect which this translation imposes on the language, I conclude, as I have said, that *prima facie* the proviso to s. 56 (2) of the Act of 1948 applies. What I have said on s. 43 of the Act of 1880, as amended, applies no less, in my judgment, to s. 44 of the Act of 1880, as amended by art. 25 of the Order of 1928. Indeed, the language of s. 44, as amended, supplies the answer, as the opening words are:

"Any deficiency in the revenues . . . to make . . . the payments . . . to which the moneys received . . . in respect of the undertaking are applicable under . . . s. 43 . . . of the Act of 1880 as amended . . . shall . . ."

Once, therefore, one has arrived at the conclusion that the obligations of s. 43 of the Act of 1880 have gone, s. 44 of the Act of 1880 (or what takes its place) seems to be left without sense or meaning.

I, therefore, reach the conclusion which I have indicated, unless it can be said that the exception to the exemption in the proviso to s. 56 (2) of the Act of 1948 can save the day for the plaintiff council. That depends on the view which is taken of the formula:

" . . . so, however, that this proviso shall not be taken as affecting any local enactment which contains special provisions for the protection of any person or class of persons . . ."

LLOYD-JACOB, J., treated that as being a reference to what is commonly found in all legislation, public and private, namely, provision for the protection of any particular person or class of persons, the short purport and effect of which is to say that "nothing in this Act shall affect the rights of so and so or of any such class of persons, either by the general law or by particular legislation." For my part, I agree with the learned judge that that is what is intended by the formula, but, even if a somewhat wider or looser meaning is to be given to this phrase "special provisions for the protection of any person or class of persons," according to my sense of the English tongue, a power in a local authority to say that any particular residual surplus might go in relief of rates, as it might alternatively go in the reduction of gas charges, is not a special provision for the protection of ratepayers. As counsel for the defendant board said, it does not protect them from anything. Under s. 43 of the Act of 1880, as amended, as it stood before the Act of 1948, the council might think fit to relieve the ratepayers by utilising their surplus, but to pick out this final power, to take half the ultimate option, so to speak, and say that that is a provision for the protection of the ratepayers seems to me to offend against the proper usage of the language. I, therefore, hold that there is nothing in the final words of the proviso to s. 56 (2) of the Act of 1948 which preserves this obligation.

I think that the conclusion to which I have come answers the case, but the matter has been put alternatively by counsel for the plaintiff council. The alternative method of approach which he invited us to adopt was to say that in any case the surplus revenue, though its quantity was not discovered, was an existing thing, a right or a chose in action, which had belonged to the council right up to the vesting date. He says further that, if, accordingly, there was up to the vesting date, as he says that there was, an obligation on the part of the plaintiff council to apply this surplus as the statute enjoined them to do,

then that residuary interest of the ratepayers was a liability of, or an obligation on, the council, which had "accrued", or was "incurred" within the meaning of the Interpretation Act, 1889, s. 38 (2) (c), and which survived so as to bind the defendant board, notwithstanding any repeal of the local legislation. I do not think that it was. I think that all that the ratepayers had up to May 1, 1949, was the hope that the council might, when they came to make their final decision and when they had discharged their various prior obligations as gas suppliers, think fit to devote the balance, in part or wholly, in relief of rates, but I can put it no higher than that. No method could have been adopted on their behalf on any date before May 1 of enforcing such an obligation, *e.g.*, by applying for an order of *mandamus* or otherwise. Therefore, in the absence of any obligation in any proper sense of the term, I do not think that that alternative contention assists counsel for the plaintiff council. Other private gas Acts may take quite different forms and may contain provisions which, in circumstances otherwise corresponding to these, might impose an obligation, final and enforceable before the vesting date, on a local authority to apply surplus profits when ascertained in a particular way, but this is not that case. If such a case comes before the courts, they may have to say whether in such circumstances that obligation attached in some way to the transferee, the area board. I emphasise that in this case the claim of the ratepayers could never be, or have been prior to May 1, 1949, higher, in my view, than an expectation that, when other things were paid or discharged, they might get part or the whole of the surplus applied to their relief. Nor do I think that counsel for the plaintiff council can support his argument by saying that in some way the obligation of s. 43 and s. 44 (particularly s. 43) of the Act of 1880, as amended, must survive so as to impose on the area board an accounting duty such as was previously (*i.e.*, up to May 1, 1949) imposed on the plaintiff council by s. 43. I think that the effect of the Gas Act, 1948, is not as involved as that. By the Act of 1948, on the vesting date all the property, rights and obligations relative to the gas undertaking of the plaintiff council passed to the new area board. In order that they might perform their statutory obligation of vesting the property, rights and obligations, the local authority would have to satisfy the transferee, if called on, that they had properly transferred them, but beyond that I think that it is unnecessary to keep alive in the area board any of the accounting provisions of s. 43 of the Act of 1880.

On the other hand, I think, on the whole, that the earlier provisions in the Act of 1948, to which I have referred, support the view that, in the case of a local authority (whatever the treatment meted out to other gas undertakers), it would be contrary to the conception of the Act to treat the transfer as being subject to the sort of reservation which the argument of counsel for the plaintiff council would, as I think, necessarily impose on it. I think that counsel for the defendant board are entitled to say that the terms of s. 19 and s. 37 of the Act of 1948, for example, support the view that no such accounting back, so to speak, as counsel for the plaintiff council has suggested could have been contemplated by the Act. It may be that it is right to say that the powers which, undoubtedly, the plaintiff council had under s. 43 of their Act until the moment of transfer were liable to be qualified to some extent by s. 37 of the Act of 1948, but, so far as these powers were concerned, they clearly remained (and they could be exercised) until the date when the council lost them on the vesting of the undertaking. I think that, if any such adjustment as the plaintiff council demand was contemplated, s. 19 and s. 37 of the Act of 1948 could hardly have taken the form which they did. Though the matter becomes ancillary, I think it supports the conclusion which I reach. I cannot, on the other hand, according to my reading of the Act, find any compulsion in attempting to get unity of treatment between private company undertakers and local authority undertakers which would lead me to a different conclusion. In the last resort, it seems to me that the case must turn on the view which one takes

of the effect of s. 56 (2) of the Act of 1948 in preserving any part of s. 43 of the Act of 1880, as amended, and, for the reasons which I have given, I cannot think that the effect for which counsel for the plaintiff council contended can have been intended. As it seems to me, it can only be achieved by a very elaborate mental exercise and a very strained and artificial use of language. I think that it is too elaborate and too strained to be justified. I, therefore, would dismiss this appeal.

JENKINS, L.J.: I agree. The sum of £30,178 claimed by the plaintiff council represents a surplus earned during the thirteen months immediately preceding the vesting date appointed under the Gas Act, 1948. It was earned during that period, but, owing to the ordinary exigencies of accounting, it was not ascertained until some months afterwards, and, needless to say, as it had not been ascertained, no appropriation of it had been made to any of the particular purposes to which it would have been applicable under s. 43 of the Act of 1880, as amended by the Order of 1922. The plaintiff council claim that that sum of £30,178 should be paid over to them. One has a certain sympathy for the contention that a profit earned by a local authority in carrying on a gas undertaking should, when that gas undertaking is transferred to another body, inure for the benefit of the local authority's ratepayers, but the terms of the transfers effected under the Gas Act, 1948, were, no doubt, settled in a way which was considered to be fairest and best from the point of view of the area of each transferee board as a whole.

However that may be, the only question for this court is whether, on the true construction of the Gas Act, 1948, in its application to the plaintiff council and their own relevant local Act, the claim of the plaintiff council can be maintained. I do not wish to go into this matter at length or to repeat what SIR RAYMOND EVERSLED, M.R., has already said, and I will give my reasons for agreeing with him as shortly as I can. One starts with the fact that under s. 17 (1) of the Gas Act, 1948, as applied to, amongst other bodies, a local authority such as the plaintiff council by s. 18 (1) of the Act, all the property, rights, liabilities and obligations of the plaintiff council, limited, to put it shortly, to property held or used by the plaintiff council wholly or mainly for the purposes of their gas undertaking or wholly or mainly in their capacity as gas undertakers, and to rights, liabilities and obligations acquired or incurred by the plaintiff council wholly or mainly for those purposes or in that capacity, were on the vesting date transferred to and vested in the defendant board. That transfer and vesting included every single asset that the plaintiff council possessed in connection with their gas undertaking. It follows that the assets transferred included the sum representing the surplus earned by the council down to the vesting date. That surplus was somewhere embedded in those assets and with those assets it passed over to the defendant board. There was no provision, as there might have been if it had been so intended, to the effect that a final account should be made up, down to the appointed day, and that any surplus shown on such account, or perhaps such part of any such surplus as the Minister might agree, should be applied in the relief of rates in like manner as it could have been applied if the Act of 1948 had not been passed. There is no provision for any apportionment of that kind, as I think there almost inevitably must have been had it been intended that such an apportionment should take place.

Nevertheless, counsel for the plaintiff council contends that a similar result can be produced by implication, and he puts the matter, if I may summarise it very briefly, in two ways. First, he says that under s. 18 (1) of the Act of 1948 the assets were transferred subject to liabilities and obligations incurred by the plaintiff council wholly or mainly for the purposes of their gas undertaking or in their capacity as gas undertakers. He says that those liabilities and obligations included the liability or obligation which the plaintiff council

was under, by virtue of s. 43 of the Act of 1880 and the amending Order of 1922, either to carry to the district fund (now the general rate fund) any surplus or balance remaining in any year or to apply the same in reduction of the price charged by the plaintiff council for the supply of gas, and, therefore, this was a liability or obligation which passed to the defendant board under s. 18 (1) of the Act of 1948. Although the payment of any surplus to the general rate fund is put in the alternative form, counsel for the plaintiff council says that, having regard to the provisions of the Gas Act, 1948, this was the only possible mode of application of the surplus remaining out of those prescribed by s. 43 of the Act of 1880, as amended by the Order of 1922. He says that the repeal of the Act of 1880 cannot affect the matter, because, under the Interpretation Act, 1889, s. 38 (2), where any Act passed after the commencement of that Act repeals any other enactment,

“ . . . then, unless the contrary intention appears, the repeal shall not . . . (b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed . . . ”

He says that this was a liability or obligation “ accrued or incurred ” under the Act of 1880 prior to the vesting date appointed under the Act of 1948, and, accordingly, it is preserved even if s. 43 of the Act of 1880 has been repealed. In other words, s. 43 of the Act of 1880, as amended, had, prior to the vesting date, already operated to make this surplus applicable by carrying it to the general rate fund.

I find myself unable to accept that argument. First, while I wish to say nothing which might prejudice other cases in which the enactments to be considered may have a different form, I find great difficulty in seeing how the obligation of the plaintiff council under s. 43 of the Act of 1880 to carry any surplus to the general rate fund can properly be called a “ liability ” or “ obligation ” in the sense in which those expressions are used in s. 18 (1) of the Act of 1948. I should have thought that the provisions of s. 43 of the Act of 1880, so far as they enjoin payment of a profit into the general rate fund, are really in the nature of statutory provisions as to the manner in which any profit not required for the purposes of the gas undertaking is to be dealt with in the accounts of the plaintiff council. Those provisions pre-supposed a profit which became the property of the plaintiff council and,

inasmuch as the plaintiff council was a local authority trading in the matter of gas at the risk, and it may be at the expense, of the ratepayers, the application of any profit derived by the plaintiff council from this source had to be regulated to ensure that it was dealt with in a proper way. I find, however, great difficulty, in the context afforded by s. 18 of the Act of 1948, in holding that s. 43 of the Act of 1880 did, within the meaning of s. 18 (1) of the Act of 1948, impose an obligation or liability on the council, owed, as it were, from themselves in their capacity as gas undertakers to themselves in the capacity of a local authority in the ordinary sense of the word, so as to place the defendant board, on the transfer to them of the plaintiff council's undertaking, under an obligation to repay to the plaintiff council the surplus in question. Be that as it may, I cannot see that on Apr. 30, 1949 (to be precise, at midnight on that date), there was any accrued liability or obligation under s. 43 of the Act of 1880, as amended, in respect of this surplus. The most that can be said, so far as I can see, is that, if the plaintiff council had continued to carry on their gas undertaking and the Gas Act, 1948, had not been passed, then this surplus, when ascertained, could either have been applied in reduction of the price of gas or carried to the general rate fund. I think that is the furthest one can go, and I cannot see that this constituted at the relevant date a liability or obligation to adopt the latter alternative.

The other way in which the case is put turns on s. 56 (2) of the Act of 1948. It is said that, on the true construction of s. 56 (2), s. 43 of the Act of 1880, as amended, must be considered as remaining in force with the substitution of references to "the board" for references to "the plaintiff council," and with the construction, to put it very shortly, of references to the plaintiff council's undertaking as if they were references to the corresponding part of the defendant board's undertaking. The validity of that contention depends on the effect in relation to s. 43 of the Act of 1880, as amended, of the proviso to s. 56 (2) of the Act of 1948, which says:

"Provided that any such local enactment which provides for the regulation of charges made by the undertaker and any other such local enactment which is inconsistent with or rendered redundant by the provisions of this Act shall cease to have effect, as from the vesting date, so, however, that this proviso shall not be taken as affecting any local enactment which contains special provisions for the protection of any person or class of persons and is not rendered redundant by the provisions of this Act."

Under that proviso, if s. 43 of the Act of 1880, as amended by the Order of 1922, provides for the regulation of charges made by the undertaker, it is to cease to have effect. The learned judge regarded s. 43 as being such a section. It is true that in one of its aspects, *viz.*, in so far as in certain circumstances it enables a surplus to be applied in reduction of the price of gas, it does in a sense involve a regulation of charges, but, speaking for myself, I do not think that it can be described as a section providing for the regulation of charges made by the plaintiff council within the meaning of the proviso. The learned judge, however, went on to hold (*ante*, p. 165) that s. 43 of the Act of 1880 was inconsistent with the provisions of the Act of 1948. I agree with him and with SIR RAYMOND EVERSLED, M.R., that its provisions are palpably so inconsistent. I need not go through them again. It seems to me that from beginning to end they are appropriate, and appropriate only, to the gas undertaking while carried on by the plaintiff council and no amount of ingenuity can translate them into provisions which would be appropriate to the undertaking to be carried on by the defendant board. I think that they are also, to a great extent, fairly within the expression "redundant." For example, the provisions as to the payment of loans, so far as I can see, are completely redundant under the new dispensation.

It is contended, however, by counsel for the plaintiff council that s. 43 of the Act of 1880, as amended, falls within the description of a local enactment containing "special provisions for the protection of any person or class of persons and . . . not rendered redundant by the provisions of this Act," within the meaning of the proviso. The provision in s. 43 of the Act of 1880 about carrying the surplus to the general rate fund is said to be a special provision for the protection of a person or class of persons. I agree with SIR RAYMOND EVERSLED, M.R., that it cannot reasonably be brought within that description at all. In my view, it is not a special provision, nor is it for the protection of any person or class of persons. It is a provision under which the ratepayers of Hinckley as a body might benefit from time to time through a reduction in rates due to a contribution made from the gas undertaking, but, in my judgment, it is not a protective provision in the sense in which that expression is used in the proviso to s. 56 (2) of the Act of 1948.

I have only to add that I think that there are two sections in particular which support the conclusion to which I have come. The first is s. 19 (1) of the Act of 1948, which relates to arrangements made by a local authority before the vesting date for the making of financial adjustments as between the accounts of the gas undertaking of the local authority and any other account of the local authority. It provides that the appropriate credits or debits can be made in respect of those transactions. As it seems to me, that sub-section shows that

transactions as between different departments of a local authority are to be considered in a somewhat special light. They are not regarded as falling within the general description of liabilities or obligations of the local authority, but, where arrangements have in fact been made for financial adjustments between different accounts of the local authority, effect may be given to those arrangements as if, so to speak, they were arrangements between two distinct persons.

A If it had been intended to treat the provisions of s. 43 of the Act of 1880 as to the application of surpluses as being, for the purposes of the Act of 1948, a liability of the plaintiff council, in their capacity as gas undertakers, to themselves, in their ordinary capacity as a local authority, it seems to me that inevitably some express provision to that effect would have been made. The other

B section of the Act of 1948, to which I will refer, is s. 37. Counsel for the plaintiff council endeavoured to persuade us that s. 37 (1) could not apply to a transfer of a surplus from the accounts of the gas undertaking to the general rate fund, because (he said) that was a type of transfer which was expressly authorised

C —nay, in certain circumstances enjoined—by the provisions of s. 43 of the Act of 1880, as amended. For my part, I cannot accept that argument. I think that s. 37 (1) of the Act of 1948 must include within its purview payments of a kind which would be perfectly lawful and valid payments apart from the special provisions of this sub-section. I think that s. 37 (1) makes it reasonably plain that, as from the date mentioned, Feb. 10, 1948 (which was the date of the second reading of the Gas Act, 1948), the taking out of the gas undertaking, if I may describe it by that expression, of, for example, surpluses and crediting

D them to another account was to be made a matter requiring the approval of the Minister of Health. To my mind, that strongly supports the view that in the case of the local authorities it was not intended that a surplus made during any period of operation preceding the vesting date should, after Feb. 10, 1948, be considered as available for transfer to the general rate account of a local authority. I think that that supports the view that in this case no apportionment so as to give the plaintiff council the benefit of a surplus earned down to the appointed day, but not yet ascertained or appropriated, was intended.

E Accordingly, I agree with SIR RAYMOND EVERSLED, M.R., that the learned judge came to a right conclusion, and that the appeal fails and should be dismissed.

HODSON, L.J.: The result of this appeal depends on the construction of the Gas Act, 1948, and, in particular, of s. 17, s. 18 and s. 56 (2). So far as

F s. 56 (2) is concerned, I have nothing to add to what has fallen from SIR RAYMOND EVERSLED, M.R., and JENKINS, L.J., with which I wholly agree. So far as the argument founded on s. 17 and s. 18 is concerned (*viz.*, the argument put forward on the basis that the local enactment of 1880 has ceased to have effect), I would prefer to base my judgment, not on any doubt whether there can be an enforceable obligation between one part of the council and another, but rather on the

G other ground which has been expressed, *viz.*, that what survives here, or could possibly have survived at the vesting date, was, not a liability at all, but option to dispose of the surplus in certain specified ways, and it is in that respect that the defendant board stand in the shoes of the plaintiff council and not as persons who have taken over a liability. I agree that this appeal fails and should be dismissed.

H *Appeal dismissed.*

Solicitors: *Lees & Co.*, agents for *J. G. S. Tompkins*, Hinckley (for the plaintiff council); *Sherwood & Co.*, agents for *A. C. Croasdel*, Birmingham (for the defendant board).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

JONES v. MAYNARD.

Approved. RIMMER v. RIMMER
[1952] 2 All E.R. 863.

[CHANCERY DIVISION (Vaisey, J.), March 15, 16, 1951.]

Husband and Wife—Title to property—Investments made of moneys from common fund.

In May, 1941, a husband and wife each had a banking account, but, as the husband was to go abroad on war service, it was decided that their joint incomes should be paid into the husband's account on which the wife was given power to draw. From time to time money was withdrawn from the account by both parties for their own purposes, and, in particular, for investments which were made in the name of the husband. In July, 1948, the marriage was dissolved.

HELD: on the evidence the intention of the parties was to constitute a pool of their resources in the form of a joint account; it was not consistent with that intention to divide the moneys in the account and the investments made with moneys withdrawn therefrom by reference to the amounts respectively contributed to the account by each of them; and, therefore, the husband must be regarded as trustee for the wife of one-half of the investments and of the balance of the account.

AS TO DISPOSITIONS BETWEEN HUSBAND AND WIFE, see HALSBURY, Hailsham Edn., Vol. 16, pp. 660-669, paras. 1052-1064; and FOR CASES, see DIGEST, Vol. 27, pp. 161-165, 173, 174, Nos. 1302-1343, 1410-1424.

Case referred to:

(1) *Re Rogers' Question*, [1948] 1 All E.R. 328; 2nd Digest Supp.

ACTION for a declaration that the defendant was a trustee of certain investments and moneys as to one equal moiety thereof for the plaintiff, and for an inquiry as to what investments represented moneys withdrawn from a banking account in which the parties' resources had been pooled.

Lindner for the plaintiff, formerly the wife of the defendant.

Laskey for the defendant.

VAISEY, J.: The plaintiff, Mrs. Paton Jones, and the defendant, Mr. Michael Martin Maynard, were formerly husband and wife. They were married on Jan. 1, 1939, and their marriage was dissolved by a decree absolute on July 26, 1948, in proceedings in which the defendant was the petitioner. In May, 1941, the plaintiff and the defendant each had a banking account, but at that time the defendant had to go to Canada on war service and it was arranged that there should be but one account in England for the future and an existing account of the defendant's at the National Provincial Bank at Bexhill-on-Sea was converted into a joint banking account. Strictly speaking, I think, it was not a joint banking account, but, though it continued to be in the defendant's sole name, it was to all intents and purposes a joint banking account as both he and the plaintiff had power to draw on it. Into that account was paid a variety of sums of money which it is not necessary to particularise. There were dividends on investments belonging to the wife; there were dividends on somewhat smaller investments belonging to the husband; there was his remuneration; and there was the rent of a house which was owned by the parties jointly. The parties lived in Canada for several years after the arrangement with regard to the account had been made.

The question which arises is: What is the position between the parties in the circumstances which have arisen and which it is clear they can never have envisaged when this joint banking account was opened? Questions of this kind are matters of inference, and the court has to apply its mind to the situation as it finds it in regard to the known facts, but with grave uncertainty how far the arrangement which was made really has any relevance to the events which have happened. I have no reason to suspect that in 1941 the husband and wife

thought that their marriage would be broken up. The marriage having been broken up, I have to ascertain what legal consequences flow from that fact in regard to the dealings with what remains of this joint banking account.

In *Re Rogers' Question* (1) the Court of Appeal gives guidance, which, though not very helpful, is the best, so far as I know, available to me. The headnote reads thus:

A "In a question between husband and wife, under s. 17 of the Married Women's Property Act, 1882, as to the title to the matrimonial home the judge, after seeing and hearing the witnesses, should try to conclude what was in their minds at the time of the purchase and then make an order which, in the changed conditions, fairly gives effect in law to what the parties must be taken to have intended at the time of the transaction."

B The present case does not come before me under s. 17 of the Act of 1882, but the issue is similar.

The matters on which this action depends are these. Certain investments were made from time to time in the name of the husband with and by means of moneys taken out of the joint account. Both the husband and the wife drew from the account for their own purposes—housekeeping expenses and other matters. The problem I have to solve is: In so far as money was drawn out of this account and turned into investments, to whom do those investments belong? Both parties have given evidence before me, and, although there was a good deal of difference between them, on one thing they both seemed to be more or less agreed. The wife said: "We could not take the money to Canada, and before my husband knew that I could accompany him he put this money D there and allowed me to draw on this account so that I could always have money at hand. The money was also to be a pool of our resources. It was to accumulate, and when there was a sufficient accumulation it should or might be invested, and that was to be our savings."

The husband also referred to the moneys as being "our joint savings," but, in what I have ventured to call an antediluvian conception of the relationship E of a husband with regard to his wife, he seems to have thought that some sort of account ought to be taken crediting him with all the money which was paid in from his salary as a schoolmaster, and that any moneys which came from his side should be set against the comparatively small amount of moneys which were contributed by the wife, amounting to not more than some £50 a year.

I am told that there is no real authority with regard to this point, and I, F therefore, act on such guidance as is afforded to me by the Court of Appeal's observations in *Re Rogers' Question* (1). In my judgment, where there is a joint purse between husband and wife—a common pool into which they put all their resources—it is not consistent with that conception that the joint account should thereafter (in this case in the event of a divorce) be divided up with reference to the respective contributions of husband and wife, crediting the G husband with the whole of his earnings and the wife with the whole of her dividends. I do not believe that when once the joint pool has been formed it ought to be, and can be, dissected in any such manner. I take the view that when spouses have a common purse and a pool of their resources, the husband's remuneration is earned on behalf of them both, and the idea that years afterwards one can dissect the contents of the pool by taking an elaborate account H as to how much was paid in by the husband and how much was paid in by the wife is not consistent with the original fundamental idea of a joint purse or a common pool. When the money goes into the pool it is there as joint property.

Counsel for the husband tried to persuade me that from December, 1945, when troubles began, to July, 1946, when the wife finally left the husband, there was some different intention to be inferred on the part of the parties from that which existed before. I do not agree. Certain investments were made during those

months, and to conclude the story, on the day, or very shortly after the day, when the wife left the husband he went to the bank, drew out the small balance which was there, and closed the account. On this the parties differ on every conceivable point. The husband said that he told the wife at a time and place unspecified that he had closed the account or was about to close the account. The wife denied that and said that she went to the bank to see if she could draw a cheque and was astonished to find that the account had been closed. If and so far as I ought to credit one of the parties rather than the other, I believe the wife. ✓ A

That being the position, I take the view that investments made out of the joint account, although in the name of the husband, were made by him in his own name as a trustee as to a moiety for his wife. If the investments out of the joint account had been made in the name of the wife alone, there is no doubt that the ordinary presumption of law would have applied and she would have been entitled to the investments, but, as they were made in the name of the husband, it seems to me that the assumption of half and half is the one which I ought to apply. Plato said that equality was a sort of justice, that is to say, if in such a matter as this one cannot find any other basis, equality is the proper basis. I think that is a principle which applies here. When moneys were taken out of the joint account for the purpose of making an investment the intention which I attribute to the parties is equality and not some proportion to be ascertained by an inquiry as to the amounts which were respectively contributed by the husband and the wife to the common purse. B

Order accordingly. Defendant to pay the costs. C

Solicitors: *Wontner & Sons* (for the plaintiff); *Burn & Berridge* (for the defendant). D

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.] D

R. v. LOVEGROVE.

[COURT OF CRIMINAL APPEAL (Lord Goddard, C.J., Cassels and Lynskey, JJ.), March 20, 1951.] E

Criminal Law—Appeal—Trial judge sitting as member of the court. F

On an application or appeal to the Court of Criminal Appeal there is, as a general rule, no objection to the trial judge sitting as a member of the court to hear the application or appeal.

Cases referred to:

- (1) *R. v. Sharman (alias Sutherland)*, (1913), 9 Cr. App. Rep. 130; 14 Digest 506, 5589. G
- (2) *R. v. Bennett*, *R. v. Newton*, (1913), 9 Cr. App. Rep. 146; 14 Digest 506, 5590.

APPLICATION for leave to appeal against conviction.

The applicant was convicted at Bedford Assizes on two charges of receiving property knowing it to be stolen and was sentenced to five years' imprisonment. The trial judge was LYNSEY, J., who was now a member of the Court of Criminal Appeal, and the point was discussed whether in the circumstances he should sit while the application was being heard. H

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. The applicant was convicted before LYNSEY, J., at Bedford Assizes, and his

application for leave to appeal, which has been refused by the single judge, now comes before this court of which LYNSEY, J., is a member. It has undoubtedly been the practice recently, if the trial judge happens to be sitting in the Court of Criminal Appeal, to adjourn the case, but the question is whether that practice need be followed in all cases in future.

A This matter was considered many years ago, and it was pointed out that in civil cases before the Supreme Court of Judicature Act, 1873, when there was no Court of Appeal and appeals were heard by judges of the three common law courts in banc, it was quite a common practice for the judge before whom the trial had taken place, and whose ruling, indeed, might be impugned, to sit as a member of the court, even, in some cases, where he had sealed the bill of exceptions. This matter was considered in *R. v. Sharman (alias Sutherland)* (1), where an application for an adjournment was made on behalf of the appellant on the ground that RIDLEY, J., who had tried the case, was presiding in the Court of Criminal Appeal. DARLING, J., giving the judgment of the court, said (9 Cr. App. Rep. 130):

C “I think this application ought not to be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the judges who shall hear their appeals, the business of the court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen’s Bench, Common Pleas and Exchequer sat in court to hear appeals (of course, not criminal appeals), it was the usual practice for the judge who tried the case to be present.”

D The matter was considered again the same year in *R. v. Bennett*, *R. v. Newton* (2). The report states that, on an application that the sentence might run from the date of conviction, DARLING, J., said that (9 Cr. App. Rep. 157):

E “. . . the case was in the list, but defendants wished it to be postponed because the trial judge was then a member of the court. There was, of course, no statutory objection to the judge sitting, and it would almost be impracticable to prohibit this unless there were more judges in that Division. There was always an investigation by a single judge before a case came into that court, and there must be at least two other judges with the trial judge. It was a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren or ‘to fight for his own hand.’ The trial judge in this case at once assented to the adjournment. LORD ALVERSTONE had always strongly objected to such applications being granted as matters of course.”

G There are cases in which, no doubt, it would be desirable that the trial judge should not sit, but where the ground of appeal is nothing but an argument by the appellant that the verdict was wrong there is no reason whatever why the trial judge should not sit. In fact, it might be very useful sometimes that he should. In the present case the applicant was convicted before LYNSEY, J., on two charges of receiving stolen property and was sentenced to five years’ imprisonment. He was found in possession of stolen property. He gave no explanation which could be accepted by the jury and he was convicted. It was purely a matter for the jury and he only argues in his notice of appeal that the jury ought not to have convicted him. That is not a ground which this court ever entertains and the application is dismissed.

Application dismissed.

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

R. v. SOUTH WALES TRAFFIC LICENSING AUTHORITY.
Ex parte EBBW VALE URBAN DISTRICT COUNCIL.

[COURT OF APPEAL (Cohen, Asquith and Birkett, L.JJ.), March 16, 1951.]

Street Traffic—Omnibus service—"Service provided by commission or agent of commission"—Share capital of company actually providing service acquired by British Transport Commission—Transport Act, 1947 (c. 49), s. 65 (1).

Before the coming into force of the Transport Act, 1947, a private company provided a passenger road transport service under a road service licence which contained a condition prescribing the limits of fares to be charged. On the coming into operation of the Act of 1947 the British Transport Commission, under powers conferred by the Act, acquired all the shares, save two, of the company, which continued to maintain the service in question. The company applied under s. 72 (4) of the Road Traffic Act, 1930, to the licensing authority for a variation of the conditions attached to their road service licence to enable them to charge increased fares. By s. 65 (1) of the Transport Act, 1947, s. 72 to s. 76 of the Act of 1930 are not to apply "to any passenger road transport service provided . . . by the commission or by any person acting as agent for the commission . . ."

HELD: although the shares of the company were owned by the commission and control of the company was vested in the commission, the commission and the company were distinct legal entities, and, in the absence of a contract of agency, the company could not be said to be the agent of the commission; the commission did not itself provide the service, but secured or promoted its provision by the company, nor was the service provided by any person acting as agent for the commission; and, therefore, s. 65 (1) of the Act of 1947 did not apply to exclude s. 72 of the Act of 1930, and the licensing authority had jurisdiction to entertain the company's application.

FOR THE TRANSPORT ACT, 1947, s. 65, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 785.

Cases referred to:

- (1) *Salomon v. Salomon & Co., Salomon & Co. v. Salomon*, [1897] A.C. 22; 66 L.J.Ch. 35; 75 L.T. 426; 42 Digest 622, 225.
- (2) *British Thomson-Houston Co. v. Sterling Accessories, Ltd., British Thomson-Houston Co. v. Crowther & Osborn, Ltd.*, [1924] 2 Ch. 33; 93 L.J.Ch. 335; 131 L.T. 535; Digest Supp.
- (3) *Smith v. London Transport Executive*, [1949] 2 All E.R. 295; [1949] Ch. 685; 2nd Digest Supp. *affd.*, H.L., *ante*, p. 667.

APPEAL by the British Transport Commission and Red & White Services, Ltd., from an order of the Divisional Court of the King's Bench Division, made on Mar. 5, 1951.

Red & White Services, Ltd., an omnibus company, the shares of which had been acquired by the British Transport Commission under the Transport Act, 1947, applied to the licensing authority for the South Wales traffic area under s. 72 (4) of the Road Traffic Act, 1930, for a modification of the conditions attached to their road service licence so as to enable them to increase their scale of fares. The Ebbw Vale Urban District Council applied to the Divisional Court for an order of prohibition prohibiting the licensing authority from hearing and determining the application of Red & White Services, Ltd., on the ground that, as the services provided by the company were services provided by the British Transport Commission, the jurisdiction of the licensing authority was excluded by virtue of s. 65 (1) of the Act of 1947. The Divisional Court found

that the commission were providing the road service in question, or that it was provided by an agent of the commission, and granted an order of prohibition.

Heald, K.C., and *R. J. Parker* for the British Transport Commission.

Fox-Andrews, K.C., and *King-Hamilton* for Red & White Services, Ltd.

Cyril Morgan for Ebbw Vale Urban District Council.

A **COHEN, L.J.:** This appeal raises a question as to the jurisdiction of the licensing authority under s. 72 of the Road Traffic Act, 1930, to hear an application by Red & White Services, Ltd., for the modification of the conditions of their licence in such a way as to enable them to increase the fares which they are entitled to charge for the services that they supply in a district in South Wales.

B Section 72 (1) provides:

“Subject to the provisions of this section the commissioners may grant to any person applying therefor a licence (in this Act referred to as a ‘road service licence’) to provide such a road service as may be specified therein, and a vehicle shall not be used as a stage carriage or an express carriage except under such a licence.”

C Under sub-s. (6) power is given to the commissioners, subject to the provisions of the section, to fix fares and make it a condition of the licence that fares shall not be charged under or in excess of the minimum or maximum. Under sub-s. (4) the commissioners may from time to time vary, in such manner as they think fit, the conditions attached to a road service licence. It is pursuant to that last provision that Red & White Services, Ltd., made the application
D which gives rise to the present proceedings. When the application came before the authority, the suggestion was made, and it has since been decided by the Divisional Court, that the jurisdiction of the authority had been taken away, so far as the point then under discussion was concerned, by s. 65 of the Transport Act, 1947. That section provides:

E “(1) Sections 72 to 76 of the Road Traffic Act, 1930 (which relate to road service licences) shall not apply to any passenger road transport service provided, whether under a scheme under the preceding provisions of this Part of this Act or otherwise, by the commission or by any person acting as agent for the commission, but neither the commission nor any such person as aforesaid shall use any public service vehicle for the conveyance of passengers for hire or reward at separate fares except—(a) on a route approved, as respects so much thereof as falls within any traffic area, by the licensing authority for public service vehicles for that area; and
F (b) in accordance with such restrictions as may be imposed by that authority as to the class or description of vehicles which may be used on the route and as to the portions of the route on which, and the points at
G which, passengers may be taken up or set down.”

The Divisional Court decided that s. 72 of the Road Traffic Act, 1930, had ceased to apply on the facts of the present case, because the services in question were services provided “by the commission or by any person acting as agent for the commission.”

H Red & White Services, Ltd., were previously a subsidiary of another company, and were, undoubtedly, a private enterprise down to the time of the coming into force of the Transport Act, 1947. Under a power, to which I shall refer in due course, the British Transport Commission had acquired all the shares of Red & White Services, Ltd., and they had power to appoint all the directors. There is no doubt that Red & White Services, Ltd., were, if I may so put it, a hundred per cent. subsidiary of the British Transport Commission. Those being the facts, it was said that the services provided by Red & White Services, Ltd., were services provided by the British Transport Commission,

and that argument was accepted by LORD GODDARD, C.J. It will be sufficient if I refer to two passages in his judgment to explain his *ratio decidendi*. He said:

"It seems to me, when one gives s. 65 the ordinary meaning of the English language, that the Transport Commission, having acquired the whole of the undertaking and shareholding of this company and running the omnibuses of the company for the purpose of providing a passenger service through the Ebbw Vale, are providing a road transport service. The vehicles are not their own. They still belong to the legal entity which is the company, but it seems to me that the commission are, in effect, providing the road passenger transport, though I am rather inclined to think that the Red & White Services in the circumstances are acting as agents for the commission."

In the last paragraph of his judgment, he said:

"Counsel for the commission has relied on the well-known case of *Salomon v. Salomon & Co.* (1) which decided that where there is what is commonly called a one-man company, the company was a different entity from the man who held the whole of the shares, and I have no doubt here that the Red & White Services are a different entity from the British Transport Commission, but it seems to me that [the commission] are providing this road passenger transport service, because Red & White Services, Ltd., are put there by the commission to do that which otherwise it is the privilege of the commission to do. For these reasons I think that the order of prohibition must go."

Colloquially speaking, it may be true to say that the British Transport Commission is running the omnibuses of Red & White Services, Ltd., but, with all respect to the Divisional Court, I am unable to agree that so broad a construction can properly be placed on the material phrase in s. 65, namely, "provided . . . by the commission or by any person acting as agent for the commission."

Under the ordinary rules of law a parent company and a subsidiary company, even a hundred per cent. subsidiary company, are distinct legal entities, and in the absence of a contract of agency between the two companies one cannot be said to be the agent of the other. That seems to me to be clearly established by *Salomon v. Salomon & Co.* (1), and by the observations of TOMLIN, J., in *British Thomson-Houston Co. v. Sterling Accessories, Ltd.* (2). I will read the two passages to which we were referred by counsel for the commission and counsel for Red & White Services, Ltd. ([1924] 2 Ch. 38):

"I do not think that [an inference of agency between the directors and the company] can be or ought to be drawn. It has been made plain by the House of Lords that for the purpose of establishing contractual liability it is not possible, even in the case of the so-called one man companies, to go behind the legal corporate entity of the company and treat the creator and controller of the company as the real contractor, merely because he is the creator and controller. If he is to be fixed with liability as principal, the agency of the company must be established substantively and cannot be inferred from the holding of director's office and the control of the shares alone: see *Salomon v. Salomon & Co.* (1). Any other conclusion would have nullified the purpose for which the creation of limited companies was authorised by the legislature. Nor does the matter stand otherwise in regard to liability for tortious acts . . . There is no evidence from which it ought or can be inferred that the defendant directors have authorised the wrongful acts. To draw that inference from the fact that they are sole directors and shareholders of the defendant company would be manifestly wrong and contrary to the principles enunciated by the House of Lords

in the cases already referred to, and there is no evidence of any other facts at all in relation to the matter."

I think it can clearly be said here that there is no evidence to justify the inference which, apparently, LORD GODDARD, C.J., was inclined to draw—that Red & White Services, Ltd., in the circumstances of the case are acting as agents for the British Transport Commission. I think that I ought to add, in fairness
A to counsel for Ebbw Vale Urban District Council that he did not seek to support the order on the ground of agency. He did, however, strongly urge that on a business view of the matter the services which were provided in South Wales by Red & White Services, Ltd., were services provided by the British Transport Commission.

I can find nothing in the Act to negative or exclude the ordinary rules of law so far as this question is concerned. I think that the proper approach to the
B question is to construe s. 65 of the Act of 1947 in the light of the other relevant provisions of the Act. As counsel for Red & White Services, Ltd., said, the proper starting place is s. 3, which lays down the general duty of the commission and states the object, as distinct from the powers, which the commission was incorporated to perform. Section 3 (1) is in these terms:

"It shall be the general duty of the commission so to exercise their
C powers under this Act as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard to safety of operation . . ."

I would emphasise the distinction that is plainly drawn there between providing,
D on the one hand, and securing or promoting the provision of an efficient system of transport, on the other. It seems to me that that clearly visualises that the commission may either provide the system themselves or may secure or promote the provision thereof by others. With that in mind I turn back to s. 2, which deals with the power which the commission is to have to enable it to fulfil its
E object. Section 2 (1) provides:

"Subject to the provisions of this Act, the commission shall have power
—(a) to carry goods and passengers by rail, road and inland waterway, within Great Britain . . ."

Sub-section (2) provides:

"Subject to the provisions of this Act, the powers conferred by sub-s. (1)
F of this section include power . . . (f) to acquire by agreement (whether absolutely or for any period) the whole or any part of any undertaking of any other person, being an undertaking, or a part of an undertaking, the activities whereof are wholly or mainly such activities as are specified
G in the said sub-s. (1); (g) to enter into and carry out agreements with any person for the carrying on by that person, whether as agent for the commission or otherwise, of any of the activities specified in the said sub-s. (1), or for the provision by that person, whether as agent for the commission or otherwise, of clearing house facilities in connection with the transport of goods; . . . (i) to lend money to, or give guarantees for the benefit of,
H any person carrying on or about to carry on any of the activities specified in the said sub-s. (1) . . . and to acquire by agreement any securities of any body corporate which is carrying on or about to carry on . . . or which directly or indirectly controls another body corporate which is carrying on or about to carry on any such activities."

I pause here to observe that it is quite plain as regards Red & White Services, Ltd., that it is under this latter power to acquire the securities of a body corporate which is carrying on transport activities that the acquisition was made.

I pause also to observe that both sub-s. (1) and sub-s. (2) are subject to provisos prohibiting the commission from doing certain things which might otherwise be within the wide words of the enabling power.

Sub-section (3) provides:

"Where, whether by agreement or otherwise, the commission acquire the whole or any part of any undertaking of any other person, they may, subject to the provisions of this Act, carry on any activities, whether mentioned in sub-s. (1) of this section or not, which were theretofore carried on for the purposes of that undertaking or part of an undertaking or were authorised by any statutory provision to be carried on for the purposes thereof . . ."

There, again, that is followed by a proviso restricting the generality of the foregoing. Sub-section (4) also contains certain restrictive powers.

I think it is clear from that section, and I think that it also appears clear from s. 63 and s. 64, which deal with the setting up of an area road transport scheme, that the Act contemplates that the commission may either provide services itself or secure the provision of those services by or through other bodies, and not only by or through agents of the commission. That being so, *prima facie* it would seem to me that one has to see whether what is being done in any particular case is an act done to provide transport facilities or is an act done to secure the provision of transport facilities. Where a service is provided through a subsidiary company of the commission, it seems to me that *prima facie*, having regard to the general rule of law, what the commission is doing is securing the provision of road transport facilities, and not providing them. That the commission can act by providing the facilities itself is made clear from the decision of this court in *Smith v. London Transport Executive* (3) which was approved by the House of Lords. That the commission can act through an agent is also clear under the express provisions of sub-s. (2) (g); but, as I have said, there is no question of agency here. It seems to me plain that the commission can also arrange with independent concerns to provide a service, in which case it will be performing its functions of securing or promoting the provision of an efficient, adequate, economical and properly integrated system of public transport. In the present case I think the commission was securing the provision of an efficient, adequate, economical and properly integrated system through Red & White Services, Ltd., not an independent concern, but a separate legal entity.

That conclusion is rendered more certain by the provisions of s. 2 (6) of the Act, which provides:

"For the purposes of sub-s. (4) and of the provisos to sub-s. (2) and sub-s. (3) of this section, where a body corporate is directly or indirectly controlled by the commission, anything done by that body shall be deemed to be done by the commission and the undertaking of the body shall be deemed to form part of the undertaking of the commission."

The importance of that provision seems to me to be that it is plain that when Parliament passed this Act it had in mind the general rule of law to which I have referred as laid down in *Salomon v. Salomon & Co.* (1), and many other cases—that a subsidiary company is not the agent of the parent company, but is an entirely separate entity. Its acts are not the acts of the parent company, and the parent company is not responsible for its acts or defaults in the absence of special provisions in some contract between the parties. Parliament, with that in mind, has gone out of its way to prescribe that for certain limited purposes the acts of the subsidiary company shall be deemed to be the acts of the commission. It seems to me an inevitable inference from that provision that except to that extent the intention was that the ordinary rule of law should prevail and that the acts of the subsidiary company should be its own

acts and not the acts of the commission. Counsel for the urban district council was compelled to admit that, if there were a road accident, the victim would have a remedy, if he had a remedy at all, not against the commission, but only against Red & White Services, Ltd. That seems to me to lead to the conclusion, or to support the conclusion, that the services were provided, not by the commission, but by Red & White Services, Ltd.

A There is one other argument of counsel to which I ought to refer. He laid some stress on the words in s. 65, "provided, whether under a scheme under the preceding provisions of this Part of this Act or otherwise." He relied on those words as in some way enlarging the meaning to be given to the word "provided." I am unable to follow him in this part of his argument. It seems to me that in the context in which the words appear, "or otherwise" is merely a contrast to "under a scheme", and means no more than "provided, whether B or not under a scheme under the preceding provisions of this Part of this Act." It does not assist us in determining whether or not as a matter of fact any particular service is provided by the commission. It was also said that it would lead to an artificial situation if there were to be two bodies dealing with the same subject-matter. Section 76 of the Transport Act, 1947, contains the provisions under which C

"The commission shall from time to time prepare, and submit to the transport tribunal for confirmation, drafts of schemes (hereafter in this Act referred to as 'charges schemes') for determining, as respects the services and facilities provided by the commission to which the schemes respectively relate—(a) the charges which are to be made by the commission . . ."

D It is clear, counsel said, that in one case not the licensing authority, but the transport tribunal will have to determine the fares and charges which are to be made by the commission. Is it not, he said, most unlikely that the legislature intended that, as regards other cases, where in substance the service was provided by the commission, the reference should be to the licensing authority? E It does not seem to me that that objection has any substance. In a sense it begs the question, because it is only where the services are provided by the commission that the obligation to set up a charging scheme arises. It seems to me that Parliament, having clearly in mind the prospect that the commission might discharge its obligations either by providing or by securing provision of the requisite services, visualised a different method of settling the charges F according to whether the commission provided the services themselves or secured the provision thereof. It seems to me natural that the charging scheme should only apply where the commission was providing the services itself, leaving the matter to be dealt with under the Road Traffic Act, 1930, in cases where the part played by the commission was merely to secure the provision of the services. G For these reasons, I think that the proper inference from the facts proved before the Divisional Court was that in the present case the services were not provided by the commission, but the commission merely secured the provision thereof. I, therefore, think that it is not a case where the prohibition should be issued, and I would allow the appeal.

ASQUITH, L.J.: I agree. The case originally raised two distinct issues: H Did the commission within s. 65 "provide" these services? Short of that, did the Red & White Services, Ltd., provide them as agents for the commission? Counsel for the urban district council has not pressed the second point on the appeal, but, as the Divisional Court based its judgment partly on an affirmative answer to it, it is desirable to glance at it briefly. The only relevant fact before the court is that the commission owns substantially all the shares in Red & White Services, Ltd. The two bodies are admittedly separate legal *personae*. Admittedly a subsidiary is not necessarily, as such, an agent for the controlling

corporation. There is, of course, nothing to prevent a controlling body from constituting a controlled body its agent, if it chooses to do so, but there is no evidence of any such thing having happened here. I turn, therefore, to the other question: Did the commission provide these services itself? The Divisional Court took the broad, common-sense view of the meaning of the word "provide," but, in my view, it has to be construed in the light of its context, and the general structure of the Act. The other sections of the Act draw a firm and sharp distinction between services "provided by" the commission itself and services of which it "secures the provision," presumably by other people. My Lord has read out the first two or three lines of s. 3 (1) in support of that proposition, and I will not repeat them, but the same distinction re-appears in a salient form in s. 63 and s. 64, which deal with schemes. Section 63 provides:

"(1) The commission may, at any time, prepare and submit to the Minister a scheme . . ."

Section 64 provides:

"(1) A scheme under the last preceding section may provide for all or any of the following matters, that is to say—(a) for constituting or specifying the body or bodies who are to provide passenger road transport services operating within or partly within the area . . .; (2) The commission may be the body specified, or one of the bodies specified, in a provision included in a scheme by virtue of para. (a) of sub-s. (1) of this section . . ."

It is, therefore, not to be assumed that the distinction between services provided by the commission itself and services which it causes other bodies to provide—a distinction which is so clearly present in the draftsman's mind when drafting s. 63 and s. 64—has entirely escaped his mind when he passes on to draft s. 65. It would appear to me that the commission has not itself provided passenger road services up to this time, but it is quite clear that it could, if it wished to do so, purchase a fleet of omnibuses tomorrow and run them itself under powers given by s. 2 (1) (a) and (2): see *Smith v. London Transport Executive* (3). If the commission in the present case had bought, not shares in Red & White Services, Ltd., but its physical assets and engaged its staff to run the undertaking, in that case it would have been "providing" the services itself. In my view, however, it is only if and to the extent that the commission does provide such services by itself (or by an "agent" within s. 65) that the jurisdiction as to fares of the licensing authority is displaced, and as neither of these conditions is fulfilled in the present case I agree with my Lord that the appeal ought to be allowed.

BIRKETT, L.J.: I agree with both the judgments which have just been delivered. The point in the present case was described by LORD GODDARD, C.J., in the Divisional Court as being a short one, and so it assuredly is. It depends in the last resort on the true construction of certain words in certain statutes, and those matters have been clearly and fully dealt with in the two judgments. In the Divisional Court, LORD GODDARD, C.J., in an additional passage to the two passages read by my Lord, said:

"I think, therefore, for the reasons which I have endeavoured to express that this is a road transport service provided by the commission, or by persons acting as agents for the commission, and that, accordingly, the Road Traffic Act, 1930, no longer applies."

In the Divisional Court the grounds on which this order for prohibition was asked were these:

"The relief sought is an order of prohibition that the licensing authority

for public service vehicles for the South Wales traffic area be prohibited from hearing and determining an application by Red & White Services, Ltd., to vary the conditions attached to road service licences now held by the Red & White Services, Ltd., that is to say, to increase their present scale of fares. The grounds on which relief is sought are that the said licensing authority has no jurisdiction to hear and determine the said application."

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The short point, therefore, is: Is it shown on the true construction of the statutes and on the facts which have been proved that the British Transport Commission is providing these road services in South Wales so that s. 72 to s. 76 of the Road Traffic Act, 1930, no longer apply? Counsel for the urban district council invited the court to take a broad view, as he termed it, of the word "provided" in s. 65 (1), and that, I think, is the gist of the whole matter, but, in my view, the meaning of the word "provided" cannot be interpreted in that way. It must be ascertained with some precision having regard to the wording of the various sections. I think that counsel for Red & White Services, Ltd., was right in saying that the section which sheds a real light on this matter is s. 3, where the general duty of the commission is set out. Sub-section 1 of that section provides:

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"It shall be the general duty of the commission so to exercise their powers under this Act as to provide, or secure or promote the provision of, an efficient, adequate, economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods with due regard to safety of operation; and for that purpose it shall be the duty of the commission to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public, agriculture, commerce and industry . . ."

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That is the general duty of the commission, and it is to be observed that in that section one can conceive all sorts of matters within their powers. They can provide services themselves, or, instead, they can secure the provision of services or promote services, all to the end that their general duty under the section shall be fulfilled. In the present case it was shown that the commission controlled Red & White Services, Ltd., in the sense that they owned all the shares, with the possible exception of two, and they had the controlling power over the appointment and the dismissal of directors. On that s. 2 (6) is very important, because it contemplates that the commission shall control, directly or indirectly, corporate bodies. That sub-section says:

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"For the purposes of sub-s. (4) and of the provisos to sub-s. (2) and sub-s. (3) of this section, where a body corporate is directly or indirectly controlled by the commission, anything done by that body shall be deemed to be done by the commission . . ."

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Thus, this provision is limited very carefully to the matters which are set out in the sub-section. Therefore, although the commission control the company, although they own the shares, although they have the power to control the appointment and dismissal of directors, they do not own the property of the company. They do not own the vehicles which actually run on the roads. As my Lord pointed out, there is no power to sue the commission either in contract or in tort. Therefore, while popularly, or, if I may use counsel's phrase, "in a broad sense," one may say that the commission provide the services, because they control the company by owning the shares, yet, in fact, what they are doing here is, not to provide the services, but to secure that those

services are provided. In all these circumstances, I am clearly of opinion that this was not a case where the commission provided the services, and, that being so, s. 65 of the Act of 1947 which eliminates s. 72 to s. 76 of the Road Traffic Act, 1930, has no application, and I agree that this appeal should be allowed.

Appeal allowed. Motion for order of prohibition dismissed.

Solicitors: *M. H. B. Gilmour* (for the British Transport Commission and Red & White Services, Ltd.); *Lewin, Gregory, Torr, Durnford & Co.*, agents for *J. L. J. Price*, Merthyr Tydfil (for the Ebbw Vale Urban District Council). A

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

B

TIMS v. JOHN LEWIS AND CO., LTD.

[COURT OF APPEAL (Lord Goddard, C.J., Asquith and Birkett, L.J.J.), March 12, 13, 14, 1951.] C

False Imprisonment—Arrest without warrant—Person arrested to be taken before justice or police officer forthwith—No right of detention for purpose of investigation—Need to state reason for arrest—Reasonable steps to be taken in circumstances.

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The plaintiff and her daughter entered the defendants' shop where the daughter stole certain articles and placed them in a bag carried by the plaintiff. They then left the shop. Two detectives employed by the defendants followed the two women outside the shop and saw them go into another shop. The daughter again stole an article and placed it in the plaintiff's bag. As they came out into the street the plaintiff and her daughter were arrested by the two detectives, one of whom said to the daughter: "You have taken calendars and handkerchiefs from [the defendants]. You must come with me." The plaintiff was rather deaf, but the court took the view that she heard what was said and understood that the words were addressed to both herself and her daughter. The plaintiff and her daughter were then taken back to the defendants' shop and detained in an office for some time while the managing director of the defendants heard the account of the two detectives. The managing director then said that he was going to prosecute and telephoned the police station, and later he gave the two women into the custody of police officers, who took them to the police station. Subsequently the daughter was tried and convicted, but the charge against the plaintiff was withdrawn by consent of the court as the defendants were advised that there was insufficient evidence to justify a prosecution. On a claim by the plaintiff for damages for false imprisonment,

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HELD: (i) in taking the plaintiff into the office and detaining her there while inquiries were being made, the defendants had not fulfilled the requirement of the law that a person arrested without warrant must be taken forthwith before a justice of the peace or a police officer, and, therefore, there was a false imprisonment of the plaintiff for which she was entitled to damages.

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Hall v. Booth (1834) (3 Nev. & M. K.B. 316), *Wright v. Court* (1825) (4 B. & C. 596), and *Morris v. Wise* (1860) (2 F. & F. 51), applied.

Per curiam: Assuming that the deafness of the plaintiff prevented her hearing the charge on which she was being arrested, although a person

making an arrest without a warrant must inform the person arrested of the reason for the arrest, he is only obliged to do what a reasonable person would do in the circumstances, and, in arresting a deaf person, he would not be bound to possess himself of a speaking trumpet, or to shout at the top of his voice, or to take other unusual steps to ensure that the arrested person knew the reason for the arrest.

Christie v. Leachinsky ([1947] 1 All E.R. 567), distinguished.

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AS TO THE HANDING OVER OF A PERSON ARRESTED TO A JUSTICE OR CONSTABLE, see HALSBURY, Hailsham Edn., Vol. 9, p. 96, para. 122; and FOR CASES, see DIGEST, Vol. 14, pp. 172-176, Nos. 1488-1538 and Digest Supps.

Cases referred to:

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(1) *Christie v. Leachinsky*, [1947] 1 All E.R. 567; [1947] A.C. 573; [1947] L.J.R. 757; 176 L.T. 443; 111 J.P. 224; 2nd Digest Supp.

(2) *Walters v. Smith (W. H.) & Son, Ltd.*, [1914] 1 K.B. 595; 83 L.J.K.B. 335; 110 L.T. 345; 78 J.P. 118; 14 Digest 177, 1549.

(3) *Hall v. Booth*, (1834), 3 Nev. & M. K.B. 316; 14 Digest 175, 1531.

(4) *Wright v. Court*, (1825), 4 B. & C. 596; 4 L.J.O.S. K.B. 17; 107 E.R. 1182; 14 Digest 173, 1508.

C

(5) *Morris v. Wise*, (1860), 2 F. & F. 51; 175 E.R. 955; 14 Digest 175, 1533.

APPEAL by the defendants from an order of DONOVAN, J., dated Nov. 24, 1950, sitting with a jury, who awarded the plaintiff £15 general damages for false imprisonment, £161 15s. general damages for malicious prosecution, and £15 special damages for injury to health. Claims by the plaintiff for damages for slander and assault were dismissed. The defendants appealed in respect of the claims for false imprisonment and malicious prosecution, and the case is reported only on the issue of false imprisonment.

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Melford Stevenson, K.C., Wilson, K.C., and A.W. Hamilton for the defendants.
Colin Duncan and M. McLaren for the plaintiff.

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LORD GODDARD, C.J.: The defendants are drapers in Oxford Street, London, and they employ women as detectives to guard against shop-lifters. The persons with whom we are concerned are a mother, who is the plaintiff in the action, and her daughter, and on the occasion in question detectives who were watching them thought they were acting in concert. The daughter was

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seen to steal some calendars and she then went outside with her mother. There was no dispute that the daughter put what she had stolen into a bag which the mother was carrying. The detectives did not stop them at once, but they followed them. They went into another shop and there the detectives saw the daughter pick up a table cloth, examine it, and, as they said, show it to the plaintiff. The plaintiff and her daughter denied it was shown to the plaintiff,

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but the daughter also put that in the mother's bag. I should have thought it was stretching credulity too far to believe that those goods could have been put in the plaintiff's bag without her knowing it, but she might have thought the daughter had paid for them, which is quite another matter. After the plaintiff and her daughter came out of the second shop the detectives stopped them. One detective, Miss Wheeler, said—and the daughter said she was

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speaking to both her and the plaintiff: "You have taken calendars and handkerchiefs from John Lewis's. You must come with me." Thereupon, the other detective, Mrs. Collins, put her arm on the plaintiff's arm, but she said nothing at that time. There can be no doubt that the plaintiff heard a good deal, at any rate, of what was said to the daughter. Her account in evidence was:

"As we were coming out my daughter was in front, and there were two women. One put her hands up excitedly and said something. I did not

catch everything. I could only say what I caught, but it was something about calendars and handkerchiefs and 'You must come with me.' "

The plaintiff and her daughter were taken across the road, Mrs. Collins having her hand on the plaintiff all the time. She said she was helping her across the road because she was an old lady, and also, I suppose, to see that she did not get away, but it cannot be challenged that there was an arrest by the detectives. They took the plaintiff and her daughter back to the defendants' store and they were detained in an office there. They were seen by the managing director, Mr. Newdegate, and they were there for some time. Mr. Newdegate heard the account of the two detectives, and then said he was going to prosecute. A telephone call was made to Marylebone Lane police station, and two officers were sent to the office. The plaintiff and her daughter were given in charge to these officers, who then conveyed them to the police station where they were charged, and it was not until the evening that they were released on bail to appear at the Marylebone magistrate's court next morning. [His LORDSHIP added that the defendants instructed a solicitor, a Mr. Powell, to prosecute, and Mr. Powell, being in some doubt whether there was enough evidence to support a charge against the plaintiff, applied to the magistrate in the presence of the plaintiff and her daughter for a remand for fourteen days, and on the resumed hearing, on the advice of Mr. Powell, the defendants withdrew the charge against the plaintiff.] The plaintiff brought an action for false imprisonment and her counsel argued that this case comes within the exact four corners of the decision in *Christie v. Leachinsky* (1) which decided that if a person, be he a police officer or a private person, arrests without warrant, he must tell the person whom he is arresting for what offence he is being arrested. If the constable has no warrant, it is not enough for him to say: "You must come along with me. I am going to take you into custody." In *Christie's* case (1) VISCOUNT SIMON laid down the law in these terms ([1947] 1 All E.R. 572):

"If a policeman arrests without warrant on reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized."

Can there be any doubt that the plaintiff did know on what ground she was being taken into custody? Her whole case in her action for slander was that one of the detectives had said: "You have taken calendars and handkerchiefs from John Lewis's. You must come with me." So far as I can see, the only ground she has for saying that she did not know what she was being arrested for was that she was rather deaf and did not hear all the detective said. But, assuming that is so, I do not think the decision of the House of Lords means that if an officer is arresting a deaf person he has to possess himself of a speaking-trumpet or something of that sort, or shout at the top of his voice. He must do what a reasonable person would do in the circumstances. If a police officer who is not able to speak French has to arrest a Frenchman who does not speak English, he can only tell him what he is arresting him for in English and then take him to the police station and wait until some person who speaks the language comes to explain the whole thing to him. The person making the arrest has to act reasonably. One reason why he must say on what ground he is making the arrest is that a person who arrests without a warrant arrests at his peril, and it is to prevent the sort of thing which arose in *Walters v. Smith (W. H.) & Son, Ltd.* (2) where a man was arrested for something and it was found that the arrest was unjustifiable, but the prosecutors sought to say: "Yes, but in fact there was another thing for which you might have been arrested." Under

A the decision in *Christie v. Leachinsky* (1) the person arresting must state the offence for which he is arresting, because it might be that, if an arrest is made without a warrant for crime A, and it turns out that crime A has not been committed, it might be said: "I have, however, found out that your arrest was justified in connection with crime B." In the present case, I am of opinion that the plaintiff cannot be heard to say she did not know for what she was being arrested. The daughter's evidence was that the detective spoke to both women and that they were quite close to each other. The plaintiff herself says she heard enough to know there was a charge being put forward, and she heard the detective say to her: "You have taken calendars and handkerchiefs from John Lewis's. You must come with me." That is what she was being arrested for, and, in my opinion, the case does not fall within *Christie v. Leachinsky* (1), and there is no ground for saying that the arrest was unlawful on that ground.

B There is, however, another issue of considerably more interest, on which I think the plaintiff is entitled to succeed. After her arrest, she was taken to the defendants' store so that the detectives might get authority from the managing director to hand her over to the police for the purpose of a prosecution for theft. In my opinion, the law is well settled on this point, and we cannot give effect to a plea that in these days of large stores it is necessary to take a view of the law different from that which has been consistently applied by the courts for more than a hundred years. The law is that if a person, be he a constable or a private person, arrests without warrant, although the arrest may be perfectly justified on the ground that a felony has been committed, or, in the case of a police officer, that there is reasonable and probable cause for believing that the person arrested has committed the offence, it is the duty of the person arresting forthwith to take the person arrested before a justice. That was the original law, but now I think—and this is the only respect in which I should be at all inclined to depart from the law which has been laid down for very many years—it is the duty to take the arrested person before a justice or to a police station and before a police officer. I say that because, since the Summary Jurisdiction Act, 1879, as amended and extended by other Acts, a superintendent or inspector of police, or other officer of equal or superior rank, has power to grant bail where a person is brought to the police station having been arrested without a warrant. Obviously, the reason why the common law required that a person should forthwith be taken before a justice was because he was being imprisoned, in the sense that his liberty was being curtailed, and it was, therefore, for a justice at once to consider whether or not the case should be investigated there and then, as might have been done in the old days when he sat in his own justice room, or whether he should grant bail. Now that a police officer has statutory powers to grant bail, he will do so, except in cases of gravity or where for good reason he may think it would be unsafe. In an ordinary case of a crime of this sort a police officer is as equally efficacious for the protection of the subject as a justice, and for that reason the arrested person should be taken forthwith before a police officer.

G The first case to which our attention has been called on this point is *Hall v. Booth* (3). That was a case of false imprisonment, which is trespass against the person, and the plaintiff there alleged that he had been kept and detained and falsely compelled to go to a police station house. That was in 1834, and in those days a police officer had no power to grant bail. Among other things, it was H alleged that the plaintiff had stolen or was suspected of stealing a gun, and the plea of justification, which is set out in full, was this:

" . . . the defendant having reasonable and probable cause for suspecting, and actually suspecting, the plaintiff to have been guilty of and concerned in the feloniously stealing, taking, and carrying away of the said gun, did at the time when, etc., in the declaration mentioned, with the assistance of a certain policeman, jointly lay hands on the said plaintiff, and assaulted

him the plaintiff, and seized and laid hold of him, in order to carry and convey, and did carry and convey him the plaintiff to the said pawn-broker's shop in the declaration mentioned, for the purpose of ascertaining if the plaintiff was the person who had pawned the gun as aforesaid, and there kept and detained the plaintiff for a reasonable time in that behalf, as it was lawful for the defendant to do . . ."

That plea was overruled by the court. Mr. Cresswell, for the defendant, put forward the proposition: "A party may take another to the place where the theft was committed, in order to inquire," but DENMAN, C.J., said (3 Nev. & M. K.B. 319): "You may go to inquire, but you cannot take him." How does that case differ from this? Here the plaintiff and her daughter were taken to the defendants' store so that the detectives could inquire whether or not the managing director proposed to prosecute, and that is the very thing which DENMAN, C.J., said should not be done. That was a court which sat in the days of PATTESON, J., LITLEDALE, J., and WILLIAMS, J., which used to be called the golden era of the King's Bench, and there was the express view of the Chief Justice that those who made the arrest could not take the person arrested to the place where the theft had been committed for the purpose of inquiry.

The case I have just cited was in 1834, but in point of time *Wright v. Court* (4) came before it because it was heard in 1825. The judges who dealt with it were BAYLEY, J., LITLEDALE, J., and HOLROYD, J.,—a very strong court. The marginal note to the report is:

"A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer."

It does not matter whether the detention was for three days or for three hours, because what the court said was this (4 B. & C. 597):

"The plaintiff alleges that he was imprisoned for three days, and the first special plea admits that he was imprisoned for that space of time before he was taken to the magistrate for examination, and avers that it was a reasonable time for that purpose, and for enabling Clarke to collect and bring his witnesses to prove the felony. But it is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined. The justice might have been justified in ordering this plaintiff to be detained until Clarke could bring his witnesses, but it is clear that the defendants had no authority to detain him without such order."

Morris v. Wise (5) was tried at *nisi prius* by BYLES, J. The defendant arrested the plaintiff for an offence in connection with the cutting and carrying away of some grass, and instead of taking him direct to a justice he took him some distance in another direction to the place where the grass was alleged to have been cut—in other words to the scene of the theft, just as the defendants' store was the scene of the theft in this case—and it was held that that was a trespass and could not be justified. In the present case, therefore, although the arrest outside the second shop could be justified, I am of the opinion that the taking of these two women to the defendants' store instead of direct to a police station or to a magistrate's court could not be justified, and, that, therefore, technically there was a false imprisonment of the plaintiff.

We are told that this case is of enormous importance to stores who employ private detectives. So it may be, but it is just as well that they should know what the law is, if they did not know it before. If the proprietors of shops employ private detectives, it is their business to instruct them in the law, and if the

detectives are given power to arrest they must do that which the law requires—and that is to take the persons arrested before a justice or a police officer and not to take them back to the shop for the purpose of investigation. If an innocent person is taken back and on investigation it is found that he is innocent because he has paid for the goods and the detectives have made a mistake, that person is entitled to be compensated for having been arrested, because that is false imprisonment. I have no doubt that in this case the detaining of the plaintiffs for an hour at the defendants' store, which is the false imprisonment alleged here, was unjustified. Unfortunately this view was not taken by DONOVAN, J., at the trial. He was of the opinion that all he had to consider was whether, in seizing the women, the detectives had acted reasonably. I do not think that is right. The construction to be put on those words—the person making an arrest is to take the person arrested before a justice as soon as he reasonably can—does not give him a reasonable time to make up his mind what he is going to do. He has to take the person before a justice or a police officer as quickly as is reasonably possible. If a man makes an arrest in the middle of the night he cannot take the arrested person before a justice, and perhaps, not to a police officer, until the day time. On the other hand, if the arrest is made during the day he must take him before a justice as quickly as he can. If it is in a town, a court may be sitting, or, at any rate, there will be a police officer available. There is no authority for saying that instead of the man's being taken to the justice or the police station he can be taken to the place where the theft has been committed for the purpose of investigation and inquiry. The plaintiff, therefore, was entitled to succeed on the issue of wrongful imprisonment. The sum awarded to her as damages was £15. In one way, I think that was a very generous award, and if the case had been put in the way I have now put it, perhaps it would not have been so much, but I do not think it would be right for us to order a new trial on damages only, and so the plaintiff is entitled to those damages.

[HIS LORDSHIP examined the evidence with regard to the issue of malicious prosecution, found on the facts that it could not be contended that there was not reasonable or probable cause for instituting proceedings, and held that the plaintiff's claim on that ground failed and, therefore, to that extent the defendants' appeal succeeded.]

ASQUITH, L.J.: I entirely agree that on the issue of malicious prosecution the plaintiff is not entitled to succeed. As regards the issue of false imprisonment, there, again, I respectfully agree with my Lord that the plaintiff is entitled to hold her verdict on the narrow ground my Lord has explained, and I agree there should be no re-trial to ascertain damages.

BIRKETT, L.J.: I agree. The questions that have been debated are of the very greatest importance, affecting as they do the liberty of the subject and also the question of the respect which ought to be paid to the decisions of juries. The two questions which finally emerged for our decision were those of false imprisonment and malicious prosecution. DONOVAN, J., decided the matter in favour of the plaintiff on the cause of action for false imprisonment solely on the ground that she had not been informed at the time of her arrest of the reason for it. In view of the evidence I find it extremely difficult to understand how that decision was reached, and on the narrow ground on which my Lord has dealt with this matter, I agree with both his reasons and his conclusion. With regard to the cause of action for malicious prosecution, it is enough for me to say that I agree entirely with the judgments of LORD GODDARD, C.J., and ASQUITH, L.J.

Appeal allowed.

Solicitors: *Underwood & Co.* (for the defendants); *Philip Conway, Thomas & Co.* (for the plaintiff).

[*Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.*]

JONES v. SAVERY.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.JJ.), March 16, 1951.]

County Court—Possession action—Jurisdiction to postpone execution of order—County Courts Act, 1934 (c. 53), s. 48 (1)—County Court Rules, 1936, Ord. 24, r. 11.

The defendant was the tenant of a stable belonging to the landlord. In July, 1950, the landlord gave to the tenant valid notice to quit, but the tenant failed to deliver up possession. In December, 1950, the landlord brought an action in the county court for recovery of possession. The county court judge made an order for possession, but postponed its execution for three months.

HELD: although there was no express power under the County Courts Act, 1934, to postpone the execution of an order for possession, the county court judge had a discretion to allow a reasonable time before the execution of the order, but in the circumstances of the present case a postponement for three months was not a judicial exercise of that discretion, and the period should be reduced to one month.

Per SINGLETON, L.J.: It may be that under Ord. 24, r. 11, of the County Court Rules, 1936, there is power to postpone for a short period the operation of the order for possession.

AS TO RECOVERY OF POSSESSION, see HALSBURY, Hailsham Edn., Vol. 8, p. 174, para. 271; and FOR CASES, see DIGEST, Vol. 13, pp. 470, 471, Nos. 193-205.

Case referred to:

(1) *Sheffield Corpn. v. Luxford, Same v. Morrell*, [1929] 2 K.B. 180; 98 L.J.K.B. 512; 141 L.T. 265; 93 J.P. 235; Digest Supp.

APPEAL by the landlord from an order of His Honour JUDGE TUDOR REES, made at Brentford County Court on Jan. 22, 1951, in an action for the recovery of possession of a stable.

The learned county court judge granted an order for possession, but postponed its execution for a period of three months and deprived the landlord of his costs. In the Court of Appeal it was contended for the landlord that the county court judge had no jurisdiction to postpone the operation of the order for possession for a period of three months, and, further, that he was wrong in refusing to award the costs of the action to the landlord, the successful party.

W. G. Wingate for the landlord.

The tenant did not appear.

SOMERVELL, L.J.: The plaintiff is the landlord, and the defendant is the tenant, of a stable. In July, 1950, the landlord gave the tenant one week's notice to quit and asked for the key and the removal of some rubbish. The tenant remained in possession of the stable by leaving his horse or horses there. On Aug. 24 a letter was written by the landlord's solicitors asking the tenant again immediately to vacate the stable, and stating that if he failed to do so steps would be taken to evict him. Further letters followed, and in December, 1950, the landlord began this action to obtain possession. There was no defence, and the learned county court judge made an order for possession, but he postponed its execution for three months and deprived the landlord of his costs. From that order the landlord appeals.

It is submitted on his behalf that the county court judge had no jurisdiction to postpone execution of the order. The point came before the court in *Sheffield Corpn. v. Luxford* (1). At that time the operative County Courts Act (*i.e.*, the Act of 1888) contained, in s. 138, an express provision that where a tenant was under notice to quit and the county court had jurisdiction the judge might order that the possession of the premises be given " . . . either forth-

with or on or before such day as the judge shall think fit to name . . ." In the present County Courts Act, 1934, those latter words do not appear, and I think the conclusion is that no express power is given to the county court to postpone the operation of an order of possession. In *Sheffield Corpn. v. Luxford* (1), where notice to quit had been given by the corporation to two of their weekly tenants, the county court judge in one instance refused to make any order and in the other instance he made an order for possession, but postponed its operation for twelve months. The landlords appealed to the Divisional Court, and TALBOT, J., gave the judgment, with which WRIGHT, J., agreed. TALBOT, J., pointed out ([1929] 2 K.B. 184):

"On the information before us, the legal right of the plaintiffs, the landlords, was complete as soon as the notice to quit had expired, and the tenant's right to remain in occupation of this house had absolutely ceased."

The learned judge referred then to the fact that at that time Parliament had clearly given the county court a discretion in such a matter. He went on to to say, however (*ibid.*, 185):

"It is, of course, to some extent a question of degree, but I think the period must not be more than is reasonably adjusted to the circumstances of the case, including the nature of the tenancy, the term (in this case a weekly term) and the object which I think the legislature must be taken to have had in this enactment, that is to say, to relieve the judge of the necessity of making an order for possession to be given then and there without further warning to the tenant. I rather hesitate to name any time for giving possession, and we do not give judgment fixing any definite time; but I think that some such period as four or five weeks, in the absence of any altogether exceptional circumstances quite different from the facts here, would represent the outside limit of the postponement which under this power a judge would be justified in granting."

I will assume that in cases of this kind a county court judge and a High Court judge have a discretion similar to that indicated by TALBOT, J. It would seem that this discretion can be no greater where there is no statutory provision than where there was an express statutory provision. I am not seeking to lay down any period covering all cases. One can imagine, for instance, a large warehouse let on terms including a comparatively short notice to quit, and it may well be that that would be a relevant circumstance which the court would take into account in deciding what limited postponement should be given. In the present case I am satisfied, having regard to the period when the notice to quit was given, to the solicitors' letters, and to the nature of the premises, that the learned judge misdirected himself in postponing the execution of the order for three months. The maximum period of postponement that he could properly have given would, in my view, have been a month, and the period must be reduced accordingly.

I think the two points raised here go together and that the learned judge deprived the landlord of the costs because he misdirected himself with regard to the order for possession. The appeal should be allowed and the period reduced to a month. That would really mean that it should be executed forthwith.

SINGLETON, L.J.: I am of the same opinion. Counsel for the landlord drew the attention of the court to Ord. 24, r. 11, of the County Court Rules, 1936, which is in these terms:

"Every judgment or order requiring any person to do an act other than the payment of money or costs, shall state the time within which the act is to be done."

The order made in the present case was an order for possession, and it may be that under that rule there is power to postpone for a short period the operation

of an order for possession. Assuming that there is, I agree that in the circumstances of the present case, so far as we know them, a month was ample time to allow the tenant to remove his horse. On the question of costs, it is clear that the learned judge was moved by kindly feelings towards the tenant and his horse, but the ordinary principle must be adopted. If ever solicitors sought to behave kindly and to give time, the landlord's solicitors did. I think their action on behalf of the landlord was entirely proper and I cannot see any reason for depriving him of the costs.

DENNING, L.J.: I agree. It must always be remembered that in cases like the present the landlord, possibly, has a right at law to take possession. If, therefore, this horse had been taken out for exercise, the landlord had a perfect right to shut the stable door and then to take possession. It may be that he could enter the stable and lead the horse out and put it into a field and thus take possession. It would be a strange thing if by coming to the courts his right to take possession should be cut down by a provision that he is not to exercise it for three months. I agree that the courts have no power to limit the landlord's right in that way, and that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *Calvert, Smith & Sutcliffe* (for the landlord).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

Re SCARISBRICK'S WILL TRUSTS. COCKSHOTT v. PUBLIC TRUSTEE AND OTHERS.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.), June 15, 1950, February 28, March 1, 2, 16, 1951.]

Charity—Relief of poverty—Relations in needy circumstances—Immediate gift.

By her will, dated July 27, 1911, a testatrix, who died on Apr. 28, 1915, devised and bequeathed all her real and personal estate not otherwise disposed of to her trustees on trust to pay the income thereof in equal shares to her daughters, A. and E., during their joint lives and to the survivor during her life, and after the death of the survivor of them to pay the same income to her son T. during his life, "and after the death of the survivor of my said daughters and son the trustees . . . shall hold the same upon trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic Church and faith) for such interests and in such proportions and manner in every respect as the survivor of my said son and daughters shall by deed or will appoint." T. died on May 18, 1933. A. died on July 2, 1940, and E. died on May 12, 1948, without having exercised the power of appointment or designation. On the question of the validity and effect of the gift for the benefit of relations,

HELD: on the true construction of the will and having regard especially to the context of the relevant words, the testatrix intended by the gift to relieve poverty properly so called, and, although the "poor relations" cases tended to support the view that to fall within that class of cases

the gift must be one having perpetual continuance and the gift in the present case was one for distribution within the period allowed by the rule against perpetuities, it was, nevertheless, a valid charitable bequest for poor members of the class of relations of the three children of the testatrix.

A.-G. v. Bucknall (1742) (2 Atk. 328), *Mahon v. Savage* (1803) (1 Sch. & Lef. 111), *A.-G. v. Price* (1810) (17 Ves. 371), *Gillam v. Taylor* (1873) (L.R. 16 Eq. 581) and *Liley v. Hey* (1842) (1 Hare 580), explained.

Dictum of LORD GREENE, M.R., in *Re Compton* ([1945] 1 All E.R. 205), considered.

Thomas v. Howell (1874) (L.R. 18 Eq. 198), doubted.

Decision of ROXBURGH, J. ([1950] 1 All E.R. 143), reversed.

- B** AS TO HOW FAR "PRIVATE" CHARITIES ARE LEGAL CHARITIES, see HALSBURY, Hailsham Edn., Vol. 4, pp. 127-138, paras. 169-179; and FOR CASES, see DIGEST, Vol. 8, pp. 261-263, Nos. 240-252.

Cases referred to:

- (1) *Re Compton*, [1945] 1 All E.R. 198; [1945] Ch. 123; 114 L.J.Ch. 99; 172 L.T. 158; 2nd Digest Supp.
- C** (2) *Isaac v. Defriez*, (1764), Amb. 595; 27 E.R. 387; 44 Digest 890, 7479.
- (3) *Gibson v. South American Stores (Gath & Chaves), Ltd.*, [1949] 2 All E.R. 18; [1949] Ch. 572; [1949] L.J.R. 1228; on appeal, [1949] 2 All E.R. 985; [1950] Ch. 177; 2nd Digest Supp.
- (4) *Lambert v. Thwaites*, (1866), L.R. 2 Eq. 151; 35 L.J.Ch. 406; 14 L.T. 159; 37 Digest 478, 756.
- D** (5) *Wilson v. Duguid*, (1883), 24 Ch.D. 244; 53 L.J.Ch. 52; 49 L.T. 124; 37 Digest 532, 1232.
- (6) *Brown v. Higgs*, (1801), 8 Ves. 561; 32 E.R. 473; *affd.*, (1813), 18 Ves. 192; 34 E.R. 290; 44 Digest 746, 6037a.
- (7) *A.-G. v. Price*, (1810), 17 Ves. 371; 34 E.R. 143; 8 Digest 242, 12.
- (8) *Oppenheim v. Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31.
- E** (9) *Admiralty Comrs. v. Valverde (Owners)*, [1938] 1 All E.R. 162; [1938] A.C. 173; 107 L.J.K.B. 99; 158 L.T. 281; Digest Supp.
- (10) *A.-G. v. Comber*, (1824), 2 Sim. & St. 93; 57 E.R. 281; 8 Digest 244, 33.
- (11) *A.-G. v. Bucknall*, (1742), 2 Atk. 328; 26 E.R. 600; 8 Digest 396, 2203.
- (12) *White v. White*, (1802), 7 Ves. 423; 32 E.R. 171; 8 Digest 242, 10.
- (13) *Mahon v. Savage*, (1803), 1 Sch. & Lef. 111; 44 Digest 890, 7473 *iv*.
- F** (14) *Liley v. Hey*, (1842), 1 Hare 580; 11 L.J.Ch. 415; 66 E.R. 1162; 8 Digest 243, 25.
- (15) *Gillam v. Taylor*, (1873), L.R. 16 Eq. 581; 42 L.J.Ch. 674; 28 L.T. 833; 8 Digest 242, 14.
- (16) *Thomas v. Howell*, (1874), L.R. 18 Eq. 198; 43 L.J.Ch. 799; 30 L.T. 244; 38 J.P. 693; 8 Digest 243, 17.
- G** (17) *Nash v. Morley*, (1842), 5 Beav. 177; 11 L.J.Ch. 336; 49 E.R. 545; 8 Digest 293, 710.
- (18) *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund*, [1946] 1 All E.R. 501; [1946] Ch. 194; 115 L.J.Ch. 158; 174 L.T. 428; 2nd Digest Supp.
- (19) *Gilmour v. Coats*, [1949] 1 All E.R. 848; [1949] A.C. 426; [1949] L.J.R. 1034; 2nd Digest Supp.
- H** (20) *Re Drummond*, [1914] 2 Ch. 90; 83 L.J.Ch. 817; 111 L.T. 156; 8 Digest 244, 28.
- (21) *Spiller v. Maude*, (1881), 32 Ch.D. 158, *n.*; 8 Digest 348, 1412.
- (22) *Harding v. Glyn*, (1739), 1 Atk. 469; 26 E.R. 299; 44 Digest 890, 7477.
- (23) *A.-G. v. Northumberland (Duke)*, (1877), 7 Ch.D. 745; 47 L.J.Ch. 569; *varied* without affecting this point, (1878), 38 L.T. 245; 8 Digest 306, 856.
- (24) *Edge v. Salisbury*, (1749), Amb. 70; 27 E.R. 42; 44 Digest 893, 7517.

- (25) *Goodinge v. Goodinge*, (1749), 1 Ves. Sen. 231; 27 E.R. 1001; 44 Digest 616, 4436.
 (26) *Brunsdon v. Woolredge*, (1765), Amb. 507; 27 E.R. 327; 44 Digest 890, 7481.
 (27) *Widmore v. Woodroffe*, (1766), Amb. 636; 27 E.R. 413; 44 Digest 890, 7482.

APPEAL by the Attorney-General from an order of ROXBURGH, J., dated Dec. 21, 1949, and reported [1950] 1 All E.R. 143, whereby it was declared that a gift contained in the will of Dame Bertha Petronella Scarisbrick for the benefit of relations of her children "in needy circumstances" was not charitable. A

When the appeal first came before the Court of Appeal it was adjourned to enable persons to be joined to argue on behalf of those interested as next of kin (apart from the heir at law), and, consequently, the first-named plaintiff, Sir Everard Scarisbrick, was struck out as a plaintiff and added as a defendant, and there was also added as a defendant Frau von Schmieder, a grandchild of the testatrix. The relevant terms of the will are set out in the judgments of SIR RAYMOND EVERSHED, M.R., and JENKINS, L.J. B

Cross, K.C., and *Denys B. Buckley* for the Attorney-General.

Pennycuik, K.C., and *Wilfrid Hunt* for the Public Trustee, personal representative of the heir at law, Sir Tom T. L. Scarisbrick. C

E. B. Stamp for Sir Everard Scarisbrick, Bart., representing the next of kin of the testatrix.

J. F. Bowyer for Frau M. E. von Schmieder, representing next of kin in needy circumstances.

L. L. W. Edwards for the plaintiff, one of the trustees of the will of the testatrix. D

Cur. adv. vult.

Mar. 16. The following judgments were read.

SIR RAYMOND EVERSHED, M.R.: By cl. 11 of her will dated July 27, 1911, Dame Bertha Petronella Scarisbrick of Southport disposed of the residue of her estate on trusts to pay the income thereof first to her two daughters during their joint lives, then to the survivor of her daughters during the rest of her life and then to her son, Sir Tom T. L. Scarisbrick, for his life E

"And after the death of the survivor of my said daughters and son the trustees for the time being of this my will shall hold [the capital and income of the residue] upon trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic Church and faith) for such interests and in such proportions and manner in every respect as the survivor of my said son and daughters shall by deed or will appoint." F

The testatrix died on Apr. 28, 1915, and her will was proved by her son, the said Sir Tom T. L. Scarisbrick. Sir Tom himself died in 1933, being survived by both his sisters (the testatrix' two daughters mentioned in her will), and they in turn died respectively in 1940 and 1948. The survivor never purported to exercise any of the powers of "appointment" or designation in favour of relations referred to in cl. 11 of the will. G

The testatrix' residue consisted, at all material times, of realty only and is said to be of the value of about £12,000. In the circumstances there arose on the death of the survivor of the testatrix' three children the question what effect (if any) could be given to the terms which I have quoted of cl. 11 of the will in regard to relations of the son and daughters of the testatrix, and the present summons was taken out for the determination of that question by Sir Everard Scarisbrick (the son of Sir Tom Scarisbrick above mentioned) and H

Mr. John Cockshott, as the then and present trustees of the will. The original defendants were the Public Trustee (as personal representative of Sir Tom Scarisbrick) who claimed that, the gift in favour of relations being wholly ineffective, the residue (being realty) devolved on Sir Tom Scarisbrick as his mother's heir at law, and the Attorney-General, who claimed that the material terms of the clause constituted a valid charitable disposition and should, therefore, be made effective by the court, notwithstanding that the machinery designated by the testatrix had not in fact operated.

As will presently appear two distinct problems have arisen for consideration. First, what, on the true construction of the relevant part of cl. 11, was the intention of the testatrix? Did she, primarily, intend a benefit to such of a wide and otherwise unascertainable class of her children's "relations" as the survivor of her children should appoint subject only to the qualification that those selected should, in his or her opinion, be "in needy circumstances"—a qualification not by any means the same as that of the objective standard of poverty, and not having the effect of limiting the amount appointed to the relief of poverty? On that view of construction, the gift would have failed of effect by reason of the non-exercise of the power of appointment, and the claim of the heir at law would succeed subject only to the question whether there should be implied a gift over in default of appointment to the statutory next of kin of the three children of the testatrix respectively or in favour of some other class of their "relations." Did the testatrix, on the other hand, intend primarily to relieve poverty, the persons to be relieved being chosen from the class of "relations" of the three children? If that be the true construction of the will, then the present case must be added to the number of modern authorities, beginning with *Re Compton* (1), in which the validity of the claim to qualify as "charities" of the "poor relations" cases has been considered. Of the two questions I have posed ROXBURGH, J., did not expressly consider the first in his judgment, but he must be taken to have construed the will in the second of the senses above suggested, for his judgment was devoted entirely to a consideration of the second question. That question he decided adversely to the Attorney-General. Holding himself bound to treat as exceptions to the general rule, which requires a public interest or characteristic to support a charity, the "poor relations" cases, beginning with *Isaac v. Defriez* (2), he nevertheless decided that the present case was not within that class by reason of the fact that distribution once and for all among the selected "poor relations" was contemplated. From that decision the Attorney-General has appealed.

Before considering the two questions involved in the appeal, two preliminary matters must be referred to. It is to be noted that the relevant language in cl. 11 is part of a larger disposition comprehending charitable objects in Germany or the United Kingdom selected by the survivor of the three children, and that there is no gift over in favour of any class of "relations" in default of appointment. It is clear, therefore, that arguments could be presented (a) for the view that if that part of the disposition concerning the "relations" is invalid as a charitable bequest, the whole disposition fails and the heir at law can claim the entire residue; and (b) for the view (already indicated) that if the first suggested construction of the clause is correct there should be implied some gift over in default of appointment.

The first point was met before ROXBURGH, J., by an agreement between the Attorney-General and the heir at law to treat the residuary gift as being of two distinct parts, namely, (i) a gift of one half in favour of the class of relations or persons selected therefrom, and (ii) a gift of one half in favour of "such charitable objects either in Germany or in the United Kingdom," etc., and since it was conceded by the heir at law that the second part was unimpeachable as a good charitable gift, the debate was confined to the first part only.

regarded as a separate disposition of half the residue amounting in value to £6,000. I am not to be taken as criticising in any way the propriety of the agreement made, but it could bind no one interested in or claiming under the will save the parties to the agreement, the Attorney-General, and the heir at law. And it is not clear how far the agreement was meant to extend or could extend. For example, if the gift in favour of the relations be held a good charitable gift, but objects within the disposition should not be found sufficient to exhaust the fund, would the argument then be open that the whole residue should go to the "charitable objects . . . in Germany or in the United Kingdom"? I assume that it would. However that may be, it is sufficient (having regard to the concessions made on behalf of other parties presently mentioned) to say that for the purpose of deciding in this appeal the two main questions above formulated the gift can be treated as divided into two distinct and independent halves, but this assumption will not necessarily apply when the result has hereafter to be considered of the working out of any order made on the basis of the answers given to those two questions.

As regards the second preliminary point, when the appeal first came on for hearing in this court last June, the court's attention was drawn to the absence of anyone to argue for next of kin (counsel for the heir at law saying frankly that he felt somewhat embarrassed thereby). The appeal was stood over for the purpose of adding necessary parties. As a result, the name of Sir Everard Scarisbrick was struck out as a plaintiff and added as a defendant, and there was also added as a defendant Frau von Schmieder, one of the two children of Frau Puchof, the first of the testatrix' daughters to die. Counsel for Sir Everard Scarisbrick has argued for the view that the disposition in favour of relations being invalid as a charitable gift and there having been no appointment, there should be implied a gift in default of appointment equally in favour of all the next of kin of the three children respectively of the testatrix, a class in fact consisting of three persons, Sir Everard, Karl Puchof (if living) and Frau von Schmieder. The position of counsel for Frau von Schmieder was more delicate. His client is said to be in fact "in needy circumstances" and to be alone in that respect of the small class of "relations" so far known. That class is, in theory, capable of almost infinite expansion, but proof of relationship soon becomes extremely difficult in fact. Counsel, therefore, felt that his client's interest was first to support the argument for the Attorney-General. As an alternative (in case it were held that the disposition failed in effect as a charitable gift) he then asked the court to imply a gift over in favour of next of kin but having carried over into the implied gift (as it were) the same "poverty" qualification as appertains to the class of possible appointees.

I should observe it to be conceded that, if any gift over is to be or can be implied, it must be confined to statutory next of kin (whether further qualified as counsel for Frau von Schmieder says or not), for a gift over to all the persons composing the class of possible appointees, *i.e.*, all persons who could claim common ancestry however remote with any of the three children of the testatrix would plainly be void for uncertainty. As regards the agreement made between the heir at law and the Attorney-General, neither counsel for Sir Everard Scarisbrick nor counsel for Frau von Schmieder was able to suggest any ground for the view that the agreement was against the interests of their respective clients, and they were, therefore, both content to treat the agreement (limited as I have indicated above) as generally binding all present and future interests under the will. Counsel for Sir Everard Scarisbrick was in any case in the added difficulty that the agreement was in fact made in his presence as a party to the action albeit that he was then a plaintiff and suing in the capacity of a trustee of the will only.

I, accordingly, now turn to the first main question—that of the construction of the relevant words of cl. 11 of the will, and I confess I have for my part

found it one of considerable difficulty. It has been most forcibly pointed out by the Attorney-General's opponents that, if the words are intended (as he says) to be a disposition in relief of poverty, then the persons selected must qualify as "poor" when the disposition in their favour takes effect, and the disposition ought to be confined also to the relief of their poverty. If these were the purposes to be achieved, then the method selected of appointment by the deed or will of a person who was entitled to a prior life interest in the entire fund, and the unlimited terms of the discretion conferred by the power itself, could hardly (it was said) be less appropriate. An appointment by deed, without conditions which might be exceedingly difficult in this case effectively to frame, confers an immediate reversionary interest on the appointee, and he or she would, therefore, be entitled to take though he or she did not survive the life tenant, and however much in the meantime his or her circumstances might have changed. And an appointment by will (unless made very shortly indeed before the appointor's death) would hardly get over better the difficulty of possible change of circumstances. Thus (according to the argument) the machinery devised by the testatrix could only be really effective in the special case of an appointment by deed accompanied by a surrender *pro tanto* of the appointor's life interest. Then, further, the persons to be benefited are not those judged "poor" by some objective standard, but such as shall, in the opinion of the appointor, be "in needy circumstances," a qualification capable without extravagance or caprice of covering a far wider class than the poor. In spite, however, of these difficulties I have on the whole come to the conclusion that the primary intention of the testatrix was the relief of poverty properly or in conjunction with the other elements in the case, sufficient to cause the so called, and that the choice of bad or unworkable machinery is not, alone alternative view of the construction to prevail. The phrase "in needy circumstances" is, to my mind, merely periphrastic for "poor," and to the point founded on the words "in the opinion" of the appointor I venture to give the same answer as I gave to the similar point in *Gibson v. South American Stores (Gath & Chaves), Ltd.* (3).

E That case related to a trust in favour of a class of persons defined, so far as material, as follows:

"all persons who in the opinion of the [London board] are or shall be necessitous and deserving."

F It was argued that the London board had an uncontrolled power of selection, that those chosen for benefit would be chosen by reference not to any objective standard of poverty, but according as the London board judged them to be both necessitous and deserving. In reference to that argument I said in my judgment ([1949] 2 All E.R. 989), with which ASQUITH, L.J., and WYNN-PARRY, J., agreed:

G "The first point that arises—and again I think I can dispose of this quite briefly—is in regard to the effect of the words 'in the opinion of the London board,' for it is said that that is a discretion without limit and the result is that the class is not people who are, in truth, necessitous and deserving, but people who the London board may—and, it is suggested, may by the most extravagant process of thought—regard as covered by those two words. I do not think that such an extended meaning can be given to that phrase. I think that to begin with the discretion is a fiduciary one. A member of the class must be both necessitous and deserving. One can well imagine difficulties might arise, whether it could be said that a particular individual qualified under both heads. I take this provision to mean that in the event of doubt the opinion, which must be *bona fide* given in the exercise, as I say, of a fiduciary discretion of the London board, is to be taken as conclusive. I do not think, therefore, that extends the class so as to make it cease to be a gift for the relief of poverty."

I think that similar reasoning applies in the present case. I think here, as in the *South American Stores* case (3), that the discretion is fiduciary. Poverty in relation to any individual or individuals cannot be an absolute standard. To some extent it must always be a matter of degree. There will be cases of doubt and difficulty, and in such cases the opinion of the appointor (given *bona fide* and as an exercise of a fiduciary discretion) is intended to be conclusive. In my judgment, the discretion should not be treated as so extending the class of beneficiaries as to make the gift other than one for the relief of poverty. A

But the most powerful argument in favour of construing the gift in this sense lies, in my judgment, in the context in which the words are found. The disposition in favour of relations is part of a disposition, the other objects of which are "such charitable objects either in Germany or in the United Kingdom," etc. In that geographical position, as it were, it seems to me that the emphasis, the primary purpose, of the relevant words should be taken to be the relief of poverty. I, therefore, conclude that the disposition in question is one for the relief of poverty, and entitled, accordingly, to qualify as a charitable disposition, unless that result is defeated by the limitation of the class of possible beneficiaries to "relations" of the testatrix' children. It follows that the question of an implied gift over in default of appointment does not arise for determination, and that the claims of the next of kin represented by Sir Everard Scarisbrick and Frau von Schmieder fail. But since the case may go further, and since I think the point of construction one of difficulty, I will state in a few sentences my present view on those claims. B

In my opinion, if I am wrong in the view I take of the construction of the gift, there should here be implied a gift over in equal shares to the statutory next of kin of the three children respectively, to be ascertained at the date of determination of the last life interest, *i.e.*, as if each of the children had died on that date. The matter is no doubt one of intention or presumed intention to be derived from the language of the instrument. But it is, I think, also clear that, where there is a power to appoint among a class, there will *prima facie* be implied a gift over in default of appointment to all the members of the class in equal shares. For the testatrix has manifested an intention to benefit that class: see *Lambert v. Thwaites* (4) (L.R. 2 Eq. 155). It is no less clear that where the class is that of the "relations of A," then the gift over will be limited to the statutory next of kin of A, since otherwise the uncertainty of the class would render such a gift over void: see *Wilson v. Duguid* (5). It is, however, said by counsel for the heir at law that there is here no sufficient evidence of the necessary intention, and he particularly relies on the fact that the class is not the simple one of "the relations of A," but that of "the relations of three persons, A, B and C," being brother and sisters, and since they must be assumed to die successively but in a wholly uncertain order, the class of statutory next of kin of all of them is not a possible or intelligible conception. I am disposed to think that this argument is met by importing the word "respectively" so as to make the class the statutory next of kin of A, B and C respectively, and I do not see any real difficulty in making this importation. E

If (as must be assumed for this purpose) the testatrix' intention was not to relieve poverty among the relations specified but to benefit those relations, then I think it is legitimate to imply a gift over, in default of appointment, to the statutory next of kin of the three children respectively. On the other hand, I do not think, on this hypothesis, that it is right or necessary to qualify the class of next of kin by reference to a poverty qualification. On this hypothesis the testatrix is not intending the relief of poverty. The discretion to the appointor is unfettered in that respect, and the relevant words become equivalent to "such relations . . . as the appointor regards as deserving." F

Such a qualification, essentially personal to the appointor, cannot sensibly be carried over into the gift in default of appointment: see, for example, *Brown v. Higgs* (6), and generally, HAWKINS ON WILLS, 3rd ed., p. 73 *et seq.* G H

It becomes now necessary to consider the second main question: Does the gift constitute a good charitable disposition? On this question, as already indicated, ROXBURGH, J., though accepting as binding authority the "poor relations" cases, thought, nevertheless, that the present case fell outside their ambit. Founding himself mainly on the language of SIR WILLIAM GRANT, M.R., in *A.-G. v. Price* (7), he thus stated his conclusion ([1950] 1 All E.R. 148):

A "In the case of gifts for poor relations having perpetual continuance the courts have (rightly or wrongly) uniformly regarded the necessarily fluctuating body of recipients, not as a class standing in a personal relationship to the testator, but as constituting a particular section of poor people, but where the distribution among poor relations is to be completed within the period allowed by the rule against perpetuities, there is no such
B uniformity, and to regard such recipients, not as beneficiaries under a family trust, but as a particular section of the poor, would, in my judgment, be to defy, not only SIR WILLIAM GRANT, but also the Court of Appeal in *Re Compton* (1)."

I find myself unable to agree with this conclusion which appears to me to introduce into a subject already difficult a technical and unjustifiable refinement.
C Nor do I think it supported by authority, particularly the two authorities specifically relied on by the judge, *Re Compton* (1) and *A.-G. v. Price* (7). We have inevitably, but quite properly, been referred to a large number of authorities; but it will not be necessary for me, in this judgment, to refer to more than a few of them. Having regard to the judgments of this court in *Re Compton* (1) and to the judgments of this court and of the House of Lords
D in the cases which have followed *Re Compton* (1), ROXBURGH, J., held himself—and he could do no other—bound to treat the "poor relations" cases as anomalies or exceptions to the general rule, which requires benefit to the public, or to a section of the public, as an essential characteristic of a valid charity. And this court is bound no less than the court of first instance. Indeed, the language of LORD SIMONDS in the most recent case in the House of Lords,
E *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (8), provides support for the view that at this time the House itself might be disinclined to question the validity of the "poor relations" cases. LORD SIMONDS said ([1951] 1 All E.R. 35):

"I would also as I have previously indicated, say a word about the so-called 'poor relations' cases. I do so only because they have once more
F been brought forward as an argument in favour of a more generous view of what may be charitable. It would not be right for me to affirm or to denounce or to justify these decisions. I am concerned only to say that the law of charity, so far as it relates to 'the relief of aged, impotent and poor people' (I quote from the Charitable Uses Act, 1601) and to poverty in general, has followed its own line, and that it is not useful to try to
G harmonise decisions on that branch of the law with the broad proposition on which the determination of this case must rest. It is not for me to say what fate might await those cases if in a poverty case this House had to consider them, but, as was observed by LORD WRIGHT in *Admiralty Comrs. v. Valverda (Owners)* (9) ([1938] 1 All E.R. 174): 'This House has, no doubt, power to overrule even a long-established course of decisions of the courts, provided it has not itself determined the question . . . but in general this
H House will adopt this course only in plain cases, where serious inconvenience or injustice would follow from perpetuating an erroneous construction or ruling of law.' I quote with respect those observations to indicate how unwise it would be to cast any doubt on decisions of respectable antiquity in order to introduce a greater harmony into the law of charity as a whole."

The question for our determination is, therefore, reduced to a single narrow point: Is a trust for distribution once and for all within the perpetuity period

among selected members of a class of poor relations within the ambit of the "poor relations" authorities? The question falls to be answered by reference to principle and common sense, and also by reference to such authorities (to which alone it will be necessary to refer) as directly or indirectly bear on it. ROXBURGH, J. (as I have already indicated) thought there was a valid distinction between those cases (starting with *Isaac v. Defriez* (2)) in which the trust in favour of poor relations was "permanent," and those cases (such as the present) in which the testator or grantor has provided for what may be called, for brevity, immediate distribution among those persons selected as, or those found to constitute, the beneficiaries under the gift. Learned counsel have criticised the antithesis stated by the learned judge. Permanence is a very long time; and there would not appear to be any logical distinction for this purpose between a trust expressed to persist for ever, on the one hand, and a trust expressed to continue for some specified period of time, however short, on the other. But the real question still remains: Is a trust for what I have called immediate distribution among "poor relations" within the embrace of the exception so as to amount to a valid charitable disposition?

As a matter of principle, counsel for the heir at law thus forcibly formulated the argument for the heir at law. First, there is (said he) only one valid general rule applicable in charity cases—the general rule that a public interest or characteristic is necessary to support a valid charitable gift. Secondly, to this general rule the *Isaac v. Defriez* (2) line of cases form an anomalous, though well-established, exception. Thirdly, if any case is by its facts not shown to be necessarily covered by the *Isaac v. Defriez* (2) line of cases, then it must be dealt with according to the one valid rule or principle that has been established, and there is no warrant in logic or otherwise for extending the scope of the *Isaac v. Defriez* (2) cases so as to include "poor relations" cases (such as the present), which contemplate, not the maintenance in perpetuity or for some less period of the "trust" defined by the testator or settlor, but a distribution once and for all within the perpetuity period of the fund in question. As I have already indicated, I am unable to accept this argument. Were it otherwise, a new and (as I think) a wholly indefensible artificiality would be introduced into a subject already more than amply technical. Counsel, at one stage of his argument, was compelled to admit that a trust for immediate distribution among such poor inhabitants, of, say, the borough of Burton-on-Trent as might be selected by some individual specified in the will, would not constitute a good charitable disposition. I find this *reductio* impossible to accept. The supposed case would, as it seems to me, fall fairly and squarely within the terms and scope of the statute of Elizabeth. In truth, in no other class of case—that is in no case of a charitable disposition valid because of its public characteristic—is there any warrant for distinguishing between trusts maintained in perpetuity, or for some short or long period of time, and trusts for immediate or final distribution. Thus, in *A.-G. v. Comber* (10), a trust construed as being for the benefit of the poor widows and orphans of the parish of Lindfield in Sussex did not lose its qualification as a charity by reason of the fact that, owing to the smallness of the fund, a single and final distribution had to be made.

The "poor relations" cases may be justified on the basis that the relief of poverty is of so altruistic a character that the public element may necessarily be inferred thereby; or they may be accepted as a hallowed, if illogical, exception. In any case, the exception is in favour of trusts for "poor relations" and not of trusts of a particular type for poor relations. If the latter were the true view, then only those cases would be treated as exceptions to the general rule which, on their facts, were in substance identical with the "poor relations" cases in the books. Such a conclusion would lead inevitably to fine and irrational distinctions. The exception, in my view, is of "poor relations" cases generally, that is, of cases in which relief of poverty is to be exercised within a class of persons identified by reference to relationship with particular individuals, and

not within a class constituting, in strictness, a section of the community. If "poor relations" cases are to be qualified in the way suggested, then there will be introduced with "poor relations" cases a further anomaly, a distinction wholly foreign to all other kinds of charitable dispositions. In my opinion, it would be wrong for this court so to do. If there must be an anomaly, let it be itself logical and coherent.

If this conclusion is that which principle and common sense suggest, do the decisions provide compelling authority to the contrary? More particularly, did SIR WILLIAM GRANT, M.R., in *A.-G. v. Price* (7), lay down a distinction between trusts for poor relations to be maintained in perpetuity, or for some long or short period of time (which would be valid charitable dispositions), and trusts for "immediate" distribution among poor relations (which would not)? And has such a distinction been since affirmed by the courts, including this court in *Re Compton* (1), so as to conclude the present appeal against the Attorney-General? I think that in respect to the authorities counsel for the heir at law is on somewhat stronger ground, but not, in my judgment, on ground strong enough for his purpose.

Before I turn to the cases most strongly relied on by counsel, it is convenient to state two propositions: (i) In none of the cases starting with *Isaac v. Defriez* (2) and constituting the class of "poor relations" cases treated in *Re Compton* (1) and since as an exception to the general rule was there a distribution, once and for all, among the poor relations: all were cases of perpetual or continuing trusts; (ii) where there is a gift of a fund or sum of money in favour of the "relations" of A.B. so that all members of the class are entitled to participate, the courts (in order to prevent failure of the gift on grounds of uncertainty) have construed "relations" as meaning statutory next of kin, and the gift as a simple gift to specific individuals, that is, those who constitute at the relevant date the class of statutory next of kin of A.B. But where the gift is in favour of such of the relations of A.B. as may be selected by the trustees or by a person named for the purpose, the courts will not restrict the meaning of the word "relations." It is, therefore, only in the case of the latter type of gift that such a problem as is here presented to the court can arise.

The first case relied on by counsel for the Attorney-General, the founding authority, as it were, for his submission, is *A.-G. v. Bucknall* (11) before LORD HARDWICKE, L.C., in 1741. The case is somewhat shortly reported, but it is referred to (sometimes as *A.-G. v. Buckland*), and relied on as good authority in later cases. We also referred to the order made by LORD HARDWICKE preserved in the Public Record Office. From this material it is clear that a sum of money had been handed to another for application "to assist Ward's poor relations." That other having died without having completely distributed the fund, the residue had passed to the defendant Bucknall, and the question was whether in her hands the money was subject to a valid, that is a valid charitable, trust. The Attorney-General sued at the relation of several relatives who were not all of them comprised in the class of Ward's next of kin. The Lord Chancellor held it to be a valid charitable trust of the capital of the fund, but counsel for the heir at law in the present case was justified in pointing out that no one was before the court to argue for an intestacy, or, more particularly, to argue for the view that the gift, being a gift of the corpus of the fund, had in the circumstances failed.

I find it necessary only to refer to two others of the cases cited by counsel for the Attorney-General, for he conceded that the rest added nothing in his favour. The first was *White v. White* (12), in which a trust for "putting out our poor relations" as apprentices was held good, and it was clear from the order (which we also obtained from the Public Record Office) that capital as well as income was used for the benefit of such as were found ready for apprenticeship. But the form of order showed also that the trust would be maintained at any rate for an appreciable period of time. The second case was the Irish

case of *Mahon v. Savage* (13), where a trust for distribution among the testator's poor relations was held valid and effectual, *A.-G. v. Bucknall* (11) being relied on as authority. But in that case the executors appointed by the testator were still acting and ready to make the necessary selection. It may, therefore, be doubted whether the question of charity was ever in strictness before the court.

On the other side *A.-G. v. Price* (7) is the "founding authority," and since the distinction upheld by ROXBURGH, J., may be said to rest on the language used by SIR WILLIAM GRANT, M.R., it is necessary to examine the report of the arguments and judgment somewhat closely. The subject-matter was a devise by will made in 1581, after a limited interest to the testator's wife, to Evan Johnes and his heirs with a direction that they should

"for ever divide and distribute according to his and their discretion amongst my poor kinsmen and kinswomen and amongst their offspring and issue . . . the sum of £20 by the year . . ."

The bill was filed by three poor relations of the testator on behalf of themselves and all others. The answer submitted that the devise was void for uncertainty. Counsel for the bill contended that the devise was a good charitable devise and relied, not on *Isaac v. Defriez* (2), but on *White v. White* (12). Counsel for the defendants (and I quote from the report)

"distinguished that case: as a fund to be immediately applied in putting out as apprentices poor relations . . . which was properly a charity to the persons, answering that description: this being a trust to distribute an annual payment among persons, denoted merely by the general description 'poor kinsmen and kinswomen'."

The material part of the judgment is as follows (17 Ves. 373):

"This appears to me to be in the nature of a charitable bequest: particularly upon the case of *Isaac v. Defriez* (2); which is both imperfectly and erroneously reported. This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations."

It is plain enough that SIR WILLIAM GRANT, M.R., was distinguishing the case before him from that of a bequest for immediate distribution, but I think it far from plain that he was thereby intimating his view (which would have been mere *obiter*) that the latter was not a valid charitable bequest. Such an opinion would have been in flat contradiction to, and would have made nonsense of, the arguments submitted to him. As is clear from the report, the whole burden of the argument for the defendants and against the validity of the devise was that the case before the court, being a perpetual trust, was distinguishable from and not, therefore, governed by *White v. White* (12). If SIR WILLIAM GRANT, M.R., had meant what in some later cases he seems to have been thought to have meant, he would, on the face of the arguments, have been disapproving *White v. White* (12), and it is to my mind inconceivable that he would not either have said so in terms or otherwise have explained its effect. It was quite unnecessary for SIR WILLIAM GRANT, M.R., in deciding *A.-G. v. Price* (7), to express any opinion on the validity or otherwise of a gift for immediate distribution, and whatever be the true analysis of *White v. White* (12) it certainly cannot be suggested that that case decided adversely to such a gift.

The truth, to my mind, lies in the fact that SIR WILLIAM GRANT, M.R., had found *Isaac v. Defriez* (2) (which had not been cited to him) and that *Isaac v. Defriez* (2) provided the answer to the distinction pointed out by the counsel for the defendants between *A.-G. v. Price* (7) and *White v. White* (12). In my judgment, therefore, SIR WILLIAM GRANT, M.R., meant, and could only have meant, that the case before him, being a case of a perpetual trust, was covered by the authority of *Isaac v. Defriez* (2), and was, therefore, a good charitable

devise, although it was not (as was, according to the argument, *White v. White* (12)) a bequest of a sum to be immediately distributed among poor relations. The report of the judgment is no doubt abbreviated, but the sense of it cannot, I venture to think, in the light of the arguments be in doubt. In my opinion, therefore, the judgment of SIR WILLIAM GRANT, M.R., provides no authority for the validity of the distinction relied on by counsel for the heir at law.

A There can, I think, be no doubt that this view has not generally been accepted in the later cases. It will be sufficient for me to refer to three of them, on which, in addition to *A.-G. v. Price* (7), counsel for the heir at law substantially relied, viz., *Liley v. Hey* (14) before SIR JAMES WIGRAM, V.-C., *Gillam v. Taylor* (15) before SIR JOHN WICKENS, V.-C., and *Thomas v. Howell* (16) before SIR RICHARD MALINS, V.-C. In each of these cases the subject-matter of the gift was or was concerned with real estate, so that, if the relevant trusts were charitable, they would be void through failure to comply with the Charitable Uses Act, 1735 (9 Geo. 2, c. 36), and this was the result in *Gillam v. Taylor* (15), where the trust being in favour of the lineal descendants of Richard Wilson "as they may severally need," and being of a permanent character, was held (with regret by the Vice-Chancellor) to be a charity. But the contrary result was achieved in the other two cases. In *Liley v. Hey* (14) a discretionary trust to distribute income among twenty-four named persons was construed (the discretion not having then been exercised) as conferring beneficial interests for their lives on all the twenty-four. *Thomas v. Howell* (16) went somewhat further. The gift was "to each of ten poor clergymen of the Church of England . . . to be selected by my friend, Joseph Butterworth Owen . . . £200," and the will was held to operate as conferring immediate gifts on the persons to be selected. Thus in both *Liley v. Hey* (14) and *Thomas v. Howell* (16) the court was able to say that the gifts did not amount to charitable trusts and were not, therefore, avoided. The statement of SIR WILLIAM GRANT, M.R., was cited (as it was also cited in *Gillam v. Taylor* (15), where the opposite conclusion was reached) in support of the supposed distinction *vis-a-vis* charity between continuing trusts and trusts for immediate distribution. So counsel for the heir at law invited us to hold in the present case that (as in *Thomas v. Howell* (16)) there was a special power of appointment among the class of relations which, if exercised, would have produced, in effect, the result that the names of the appointees would be read into the will as legatees, but which, not having been exercised, failed altogether of effect.

F I cannot accept the argument, and the cases cited are not authorities which bind this court so to do. For reasons which I have given, I do not think that SIR WILLIAM GRANT'S judgment can or ought to be read as asserting the essential distinction. In my judgment, the court in both *Liley v. Hey* (14) and *Thomas v. Howell* (16) by a benevolent interpretation sought to avoid and avoided the defeat of dispositions which it was anxious to uphold. In *Thomas v. Howell* (16) SIR RICHARD MALINS, V.-C., said (L.R. 18 Eq. 208):

H "There is no doubt that his object was to confer a benefit on those that required it, and they were to be selected by Mr. Owen. In one meaning of the word, that is certainly a charity, and so in a certain sense wherever a legacy is given it is a charity, but it would be carrying the doctrine of the court a long way to say, that because a legatee is to have a gift on account of his being a poor man, that therefore it is a charitable bequest within the meaning of the Mortmain Act. It would be a monstrous injustice to hold this when the very object of requiring assistance is the fact of a man being poor. In every case it depends on whether there is a charity, which is to continue for a certain specified time, as in the case of *Nash v. Morley* (17), where you have not only old and infirm individuals and people with large and sick families, but they are to sustain a particular character

at a particular time. Here I am asked to treat the bequest as if poverty were the principal ground of the gift. Nothing is more opposed to the meaning, in my opinion. It is said that because the legacies are given to them as poor men, that therefore they cannot have it unless there is enough of pure personalty to satisfy the charitable legacies. Suppose the testator had said, 'I give to A., B., and C., who are poor clergymen,' that would not be a charitable legacy, but in giving to ten poor clergymen, who are quite as good, and of the same class of clergymen as those who are not poor, it is said that is a charity. It appears to me to be just the same as if they had been named, and I do not see on principle that it makes any difference, or why they should not have it, because they happen to be poor."

The Vice-Chancellor's resolve to affirm the validity of the gift is patent, but I find difficulty in accepting all his reasoning, and the argument of counsel for the heir at law, in my judgment, begs the essential question—was the testatrix' primary intention to benefit selected members of a class of her children's relations or to relieve poverty?—a question which I have already answered in a sense adverse to the heir at law.

It remains only to refer once more to *Re Compton* (1) and to the passage in the judgment of LORD GREENE, M.R. ([1945] 1 All E.R. 205), where he referred to *A.-G. v. Price* (7). It is true that he quoted the second part of SIR WILLIAM GRANT's judgment, which I have set out above. ROXBURGH, J., drew, therefore, the conclusion that the learned Master of the Rolls was deliberately affirming the distinction and confining the exceptional "poor relations" cases to those only, like *Isaac v. Defriez* (2), where the trusts were continuing. I do not so read LORD GREENE's judgment. The existence and validity of the alleged distinction was not relevant to the decision and was plainly not, in my judgment, present to the minds of the court. I think that no inference can be drawn relevant to the present case from the citation of SIR WILLIAM GRANT, M.R. Although, therefore, I think the decided cases tend to support the heir at law rather than the Attorney-General, I do not find any authority binding on this court one way or the other, and I would, therefore, decide the present question in the Attorney-General's favour on grounds of principle, coherence and common sense. In my judgment, the appeal should be allowed, and it should be declared that one half of the testatrix' residue is held on valid charitable trusts for distribution among poor members of the class of relations of her three children.

JENKINS, L.J.: This is an appeal from a judgment of ROXBURGH, J., dated Dec. 21, 1949, on an originating summons raising questions as to the validity and effect in the events which had happened of the trusts declared by the will of Dame Bertha Petronella Scarisbrick (whom I will call "the testatrix") with respect to her residuary real and personal estate.

By her will dated July 27, 1911 (so far as material for the present purpose) the testatrix appointed her son, Sir Tom Talbot Leyland Scarisbrick, Bart., and her two daughters, Alexandra Emma von Lang Puchof and Erneste Beatrice Kraemer, to be executors and trustees thereof, and made (by cl. 11) the following disposition of her residuary real and personal estate:

"I devise and bequeath all my real and personal estate in the United Kingdom of Great Britain and Ireland and in the British Dominions beyond the seas not hereby otherwise disposed of unto my trustees upon trust to pay the income thereof in equal shares to my said daughters during their joint lives and to the survivor of them during her life and after the death of the survivor of them to pay the same income to my said son Sir Tom Talbot Leyland Scarisbrick Bart. during his life and after the death of the survivor of my said daughters and son the trustees for the time being

of this my will shall hold the same upon trust for such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances and for such charitable objects either in Germany or in the United Kingdom of Great Britain and Ireland (preferably charitable objects connected with the Roman Catholic Church and faith) for such interests and in such proportions and manner in every respect as the survivor of my said son and daughters shall by deed or will appoint."

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The testatrix died on Apr. 28, 1915, survived by the son and two daughters above referred to, and her will, with one codicil thereto not material for the present purpose, was duly proved by the son on June 15, 1915, power (never exercised) to prove the same being reserved to the two daughters. The son,

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Sir Tom Scarisbrick, died on May 18, 1933, and his interest as heir at law of the testatrix in any real estate of hers undisposed of by her will passed to the Public Trustee as his legal personal representative. He left him surviving one child, *viz.*, a son, Sir Everard Talbot Scarisbrick, Bart. The daughter, Mrs. Puchof, died on July 2, 1940, survived by a daughter, Mary Erneste von Schmieder. She had one other child, *viz.*, a son, Karl Herman Ernst von Lang

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Puchof, but he has not been heard of for many years, and it is not known whether he is living or dead or whether he ever had any issue. Mrs. Kraemer, the remaining daughter of the testatrix, died without issue on May 12, 1948. She, as "the survivor" of the testatrix' "said son and daughters", was the person by whom the power of appointment conferred by cl. 11 of the will became exercisable according to the terms of that clause, but in fact she never did exercise it. The whole of the testatrix' personal estate was exhausted in the payment of funeral and testamentary expenses, debts, and legacies, and the property now remaining subject to the trusts of her will consists exclusively of assets forming part of or representing her real estate.

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It will be apparent from the foregoing narrative that questions of considerable difficulty arose with respect to the destination of the trust property on the death of Mrs. Kraemer, particularly in view of the inclusion amongst the objects of the unexercised power of

"such relations of my said son and daughters as in the opinion of the survivor of my said son and daughters shall be in needy circumstances."

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The remaining objects of the power are, of course, by the express terms of the will exclusively charitable, and if the power had been confined to these it would only have been necessary to apply to the court for the settlement of a scheme with a view to the application of the trust property to charitable objects in Germany or in the United Kingdom selected with due regard to the preference expressed by the testatrix for charitable objects connected with the Roman Catholic Church and faith. But is the trust charitable at all so far as it includes

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as objects of the power such relations of the three children of the testatrix as in the opinion of the survivor of them shall be in needy circumstances? If it is charitable *quoad* these objects, then, no doubt, the court can and should give effect to the charitable purpose of the testatrix by means of a scheme providing for the selection of the persons who are to take and the amounts they are to receive, and thus making good the failure of Mrs. Kraemer to exercise the power herself. If, on the other hand, the trust is not charitable *quoad* these objects, what effect (if any) can be given to this branch of it in default of appointment? Is there an intestacy on the ground of uncertainty, or is there an implied trust in default of appointment in favour of some ascertainable class of "relations" of the three children, limited or not to such members of the class as can be shown to be in "needy circumstances"? Apart from the agreement, to which I am about to refer, that question would on the face of it give rise to two further questions, namely: If there is such an implied

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trust, to what proportion of the property does it extend? and, if there is an intestacy, is it limited to some proportion of the property or does the uncertainty to which it is due extend to and vitiate the entire disposition?

Before ROXBURGH, J., the area of controversy was limited in the following respects: (i) In the proceedings as then constituted, the plaintiffs were Sir Everard Scarisbrick and Mr. George Cockshott as the present trustees of the will, and the only defendants were the Public Trustee (as representing the estate of Sir Tom, the heir at law) and the Attorney-General (as representing the claims of charity). In those circumstances (to quote the learned judge) ([1950] 1 All E.R. 144):

"It appeared early in the argument that there might be some conflict between the heir at law, who was represented by counsel, and other persons, who were not represented, as to the destination of any part of the fund not effectually given to charity, and it was thereupon agreed that my decision should be confined to the question whether the whole, or, if not, how much, of the fund was thus effectually given. The bequest plainly falls into two parts, and the second part is admittedly charitable."

(ii) It was agreed before ROXBURGH, J., between the Public Trustee and the Attorney-General that half the property should in any event be considered as having been effectively devised for the admittedly and expressly charitable objects mentioned in the second branch of the trust. In view of this agreement and the state of the case as regards parties the learned judge in effect confined himself to the question whether the remaining half of the trust property, *i.e.*, the half to which the trust for relations in needy circumstances (as distinct from the trust for charitable objects *eo nomine*) was in accordance with such agreement treated as confined, was effectively devoted to charity, and on grounds to which I will presently refer decided this question in the negative, declaring accordingly that one half and no more of the trust property was effectively so devoted, and directing the settlement of a scheme for the regulation and management of such one half. When the case first came before this court, it was adjourned with a view to amendment as regards parties in order that we might deal with the destination of the half of the property not effectively devoted to charity according to the decision of ROXBURGH, J., in the event of that decision being upheld. Accordingly, Sir Everard was struck out as a plaintiff and he and Frau von Schmieder were added as defendants.

Sir Everard's counsel argued for a trust in default of appointment in favour of the relations (limited on the principle stated in *Wilson v. Duguid* (5) (24 Ch.D. 251) to next of kin) of the testatrix' son and daughters. Frau von Schmieder's counsel argued for a trust in default of appointment in favour of such relations similarly limited, but with a further limitation to next of kin in needy circumstances. Sir Everard's counsel supported counsel for the Public Trustee in defending the decision of ROXBURGH, J., while opposing him in his claim that an intestacy resulted. Frau von Schmieder's counsel steered a somewhat complicated course, his primary claim being to the effect that his client, being in needy circumstances, should participate on the footing of a valid charitable trust, and the contention above indicated being in the nature of an alternative in the event of the trust being held not to be charitable. It should be noted that the agreement between the Public Trustee and the Attorney-General by which the contest was limited to half the trust property was in this court adhered to by them, and accepted by the other parties. But it does not follow that for the purpose of determining the primary question whether the trust is charitable so far as it includes relations in needy circumstances as objects of the power cl. 11 should be construed as if it gave one half of the property to such relations of the testatrix' three children as in the opinion of the survivor of them should be in needy circumstances for such interests, etc., as such survivor should appoint, and the other half to such charitable objects *eo nomine* for such interests, etc.,

as such survivor should appoint. Whatever the position in default of appointment may be, it is clear that under cl. 11 as a matter of construction Mrs. Kraemer, as the survivor of the three children of the testatrix, could have appointed the whole of the property to relations in her opinion in needy circumstances to the exclusion of charitable objects *eo nomine*, or could have appointed the whole to charitable objects *eo nomine* to the exclusion of relations in needy circumstances, or could have appointed in any proportions she thought fit between or amongst any relations in needy circumstances and any charitable object or objects *eo nomine*.

As regards what I have termed the primary question, the following general propositions may be stated: (i) It is a general rule that a trust or gift in order to be charitable in the legal sense must be for the benefit of the public or some section of the public: see *Re Compton* (1); *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (18); *Gilmour v. Coats* (19). (ii) An aggregate of individuals ascertained by reference to some personal tie (*e.g.*, of blood or contract) such as the relations of a particular individual, the members of a particular family, the employees of a particular firm, the members of a particular association, does not amount to the public or a section thereof for the purposes of the general rule: see *Re Drummond* (20); *Re Compton* (1); *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (18); *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (8). (iii) It follows that according to the general rule above stated a trust or gift under which the beneficiaries or potential beneficiaries are confined to some aggregate of individuals ascertained as above is not legally charitable even though its purposes are such that it would have been legally charitable if the range of potential beneficiaries had extended to the public at large or a section thereof (*e.g.*, an educational trust confined as in *Re Compton* (1) to the lawful descendants of three named persons, or, as in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (8) to the children of employees or former employees of a particular company). (iv) There is, however, an exception to the general rule in that trusts or gifts for the relief of poverty have been held to be charitable even though they are limited in their application to some aggregate of individuals ascertained as above, and are, therefore, not trusts or gifts for the benefit of the public or a section thereof. This exception operates whether the personal tie is one of blood (as in the numerous so-called "poor relations" cases, to some of which I will presently refer) or of contract (*e.g.*, the relief of poverty amongst the members of a particular society, as in *Spiller v. Maude* (21), or amongst employees of a particular company or their dependants, as in *Gibson v. South American Stores (Gath & Chaves), Ltd.* (3)). (v) This exception cannot be accounted for by reference to any principle, but it is established by a series of authorities of long standing, and must at the present date be accepted as valid, at all events as far as this court is concerned: see *Re Compton* (1), though doubtless open to review in the House of Lords (as appears from the observations of LORD SIMONDS and LORD MORTON OF HENRYTON in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (8)).

Applying these general propositions to the present case, I ask myself whether the trust in cl. 11 for

"such relations . . . as in the opinion of the survivor of [the testatrix] son and daughters shall be in needy circumstances . . . for such interests and in such proportions . . . as the survivor . . . shall by deed or will appoint"

is a trust for the relief of poverty. If it is such a trust, then, as I understand the exception above referred to, it matters not that the potential objects of such trust are confined to relations of the son and daughters. If language means anything, a person in needy circumstances is a person who is poor and as such a proper object of charity, and no one can take under this trust who is not in needy circumstances. I do not think the effect of the expression "in needy

circumstances" is materially altered by the qualifying words "in the opinion of the survivor . . ." "Poverty" is necessarily to some extent a relative matter, a matter of opinion, and it is not to be assumed that the person made the judge of "needy circumstances" in the present case would have acted otherwise than in accordance with an opinion fairly and honestly formed as to the circumstances, needy or otherwise, of anyone coming into consideration as a potential object of the power. Under a similar trust which did not expressly make the appointor's opinion the test of eligibility the appointor would in practice have to make the selection according to the best of his or her opinion or judgment. The express reference to the appointor's opinion merely serves to reduce the possibility of dispute as to the eligibility or otherwise of any particular individual on the score of needy circumstances. Accordingly, I dismiss the words "in the opinion of the survivor" as having no material bearing on the character of this trust. In so doing, I am fortified by the similar conclusion reached in this court as to the effect of the words "in the opinion of the London board" in *Gibson v. South American Stores (Gath & Chaves), Ltd.* (8) ([1949] 2 All E.R. 989).

It is, no doubt, true that a gift or trust is not necessarily charitable as being in relief of poverty because the object or objects of it in order to take must be poor. Such a gift or trust may be no more than an ordinary gift to some particular individual or individuals limited to the amount required to relieve his or their necessities if in necessitous circumstances. One can conceive of a testator making a limited provision of this character for a child or children whose conduct, in his view, had reduced their claims on his bounty to a minimum. A disposition of that sort would obviously not be for the relief of poverty in the charitable sense. The same must be said of gifts to named persons if in needy circumstances, or to a narrow class of near relatives, as, for example, to such of a testator's statutory next of kin as at his death shall be in needy circumstances. It is difficult to draw any exact line, but I do not think the trust here in question can fairly be held disqualified as a trust for the relief of poverty in the charitable sense on grounds such as those illustrated above. The class of relations to whom the selective power of appointment here extends is not confined to relations of the testatrix herself but consists of relations of the testatrix' son and daughters. "Relations" in this context cannot, in my opinion, be construed as meaning only the statutory next of kin of the son and daughters. It is, I think, well settled that a power of selection amongst the relations of a given person, as distinct from a plain gift to such relations, extends to relations in the full sense (*i.e.*, all persons who can claim a common ancestor with the person in question) and is not confined to statutory next of kin as has been done in cases of plain gifts to "relations" to prevent complete failure of such gifts on the ground of uncertainty: see *Harding v. Glyn* (22); *Mahon v. Savage* (13). Moreover, the language used points to a class of "relations" common to all three children of the testatrix, which is appropriate to "relations" in any degree, but hardly to statutory next of kin, as the statutory next of kin of each child would comprise a different class, and the trust is not expressed to be for the respective relations of the three children. The ambit of the trust thus extends to relations in every degree of the three children on both sides of the family. It should be added that the class of potential beneficiaries falls to be ascertained at the death of the survivor of the three children, not at the testatrix' own death. The power, therefore, extends to such of the relations in every degree of the three children on both sides of the family as might be in existence at the death of the survivor of the three children, and should then, in the opinion of such survivor, be in needy circumstances. Thus the class of potential beneficiaries, so far from being confined to a limited number of individuals whom the testatrix might be taken to have regarded as having some personal claim on her bounty, at all events to the extent necessary to relieve them from want, is so extensive as to be incapable of being exhaustively

ascertained, and includes persons whom the testatrix may never have seen or heard of, and persons not even in existence at the time of her death.

Some gifts of the "poor relations" type may be found on their true construction to be gifts to the poorest of the class or to the class with a preference for the poorest, thus failing to satisfy the observation of SIR GEORGE JESSEL, M.R., in *A.-G. v. Northumberland (Duke)* (23) (7 Ch.D. 749) that:

- A "A gift which is not a gift to the poor, that is, the actually poor, is not a charity."

That is not the case here. As pointed out above, no part of the property is appropriated to the exclusive purpose of appointment amongst the relations in needy circumstances. A person shown to be a relation and to be in needy circumstances would have become eligible as an object of the power, but neither

- B any one relation individually nor even all the relations collectively (on the impossible supposition that they could be exhaustively ascertained) would have been entitled to claim that some part of the property must in any event come to him or to them or some of them, inasmuch as the whole of the property could have been appointed to charitable objects *eo nomine*. Accordingly, in the view I take, this is a trust for the relief of poverty in the charitable sense
- C amongst the class of relations described, and, being a trust for the relief of poverty, is, in the view of the exception above stated, not disqualified from ranking as a legally charitable trust by the circumstance that its application is confined to a class of relations (albeit a wide class) with the result that its potential beneficiaries do not comprise the public or a section thereof under the decisions to which I have referred. I am, accordingly, of opinion that as the law now
- D stands the trust in question should be upheld as a valid charitable trust for the relief of poverty.

The learned judge took a different view. He founded himself, in effect, on the reluctance with which this court in *Re Compton* (1) recognised the exception of gifts or trusts for the relief of poverty from the general rule—that all forms of charity to be legally such must be for the benefit of the public or a section

- E thereof—as an exception of an anomalous character, which could not be assigned to any principle, but rested simply on the effect of a series of old decisions not now properly open to question in this court. The exception being of that nature, the learned judge reasoned, in effect, that where a gift ostensibly for the relief of poverty, but lacking the element of public benefit required under the general rule, is in question, it should, in accordance with the general rule, be
- F held invalid as a charitable gift, unless it is in such terms as to fall unequivocally within the exception as established by the decided cases. Approaching the authorities from this point of view, the learned judge found that, while gifts in perpetuity for poor relations had been uniformly held charitable, there was a conflict of authority as to the charitable status of gifts for immediate distribution amongst poor relations. He held that the trust in the present case was
- G of the latter description, and accordingly that, as the decided cases showed no more than that there was a conflict of authority on the question whether it was to be regarded as charitable or not, its claim to fall within the exception was not made out, with the result that the general rule must be applied, and that the trust in the present case did not qualify as a valid charitable trust, because it was not for the benefit of the public or a section thereof.

- H We were referred, as was the learned judge, to a large number of the so-called "poor relations" cases. In some of them gifts for immediate distribution amongst poor relations variously described have been held charitable: see, *e.g.*, *A.-G. v. Bucknall* (11); *Mahon v. Savage* (13). In others gifts for immediate distribution amongst such persons have been held (like gifts to "relations" *simpliciter*) to be confined to the statutory next of kin of the *propositus*, the implication being that they were regarded as mere gifts to individuals not falling within the ambit of charity at all, which would accordingly fail for

uncertainty unless so confined: see, e.g., *Edge v. Salisbury* (24); *Goodinge v. Goodinge* (25); *Brunsdon v. Woolredge* (26); *Widmore v. Woodroffe* (27). On the other hand, gifts of a perpetual character for the benefit of poor relations variously described have uniformly been held charitable: see *Isaac v. Defriez* (2); *White v. White* (12); *A.-G. v. Price* (7); *Gillam v. Taylor* (15). It does not appear that in all the cases of this type the perpetual character of the gift was the *ratio decidendi*. Indeed, *White v. White* (12) may be said to cut both ways, as, while the record shows the trust for putting out apprentices to have extended to the children of two families and their descendants (which implies perpetuity), it also shows that the capital as well as the income was applicable for that purpose (which in practice would necessarily limit the duration of the trust by exhaustion of the fund). But, in *A.-G. v. Price* (7), SIR WILLIAM GRANT, M.R., following *Isaac v. Defriez* (2), said (17 Ves. 374):

"This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations."

It was, I think, on this observation of SIR WILLIAM GRANT'S, that the learned judge largely founded himself in deciding as he did in the present case. In this connection, reference may also be made to the following passage from the judgment of SIR JOHN WICKENS, V.-C., in *Gillam v. Taylor* (15) (L.R. 16 Eq. 584):

"The words here seem to me to import, beyond all question, the creation of a perpetual fund or institution, in which no person or persons is or are to have a personal right, but which is to be given only to such as need in the opinion of the trustees, and to be given to them according to their necessities."

I should also refer to *Thomas v. Howell* (16), where a gift of £200 each to ten poor clergymen to be selected by a specified person was held to be simply a gift to individuals just as if they had been actually named in the will and therefore not a charitable gift and not defeated by the Charitable Uses Act, 1735. *Liley v. Hey* (14), which also raised the question of mortmain, concerned a trust on the face of it unlimited in time to distribute the rents and profits of land annually amongst certain families according to their circumstances as in the opinion of the trustees they might need such assistance. This trust was held by SIR JAMES WIGRAM, V.-C., not to involve a perpetuity and not to be avoided by the Statute of Mortmain, but the decision, which has been doubted, seems to have turned on the construction which the Vice-Chancellor placed on the gift as being, in the first instance (in effect) no more than a discretionary trust for a number of persons during their respective lives, and therefore free from objection during that period.

I find myself unable to accept the learned judge's view as to the effect of the authorities. I think the true question in each case has really been whether the gift was for the relief of poverty among a class of persons, or rather, as SIR WILLIAM GRANT, M.R., put it, a particular description of poor, or was merely a gift to individuals, albeit with relief of poverty amongst those individuals as the motive of the gift, or with a selective preference for the poor or poorest amongst those individuals. If the gift is perpetual in character that, no doubt, is an important circumstance as demonstrating that the intention cannot have been merely to benefit the statutory next of kin of the *propositus* or other particular individuals identified by the gift. Moreover, the gift, if perpetual, can only be supported on the footing that it is charitable—an illogical though, in past practice, probably a persuasive, reason for holding it such. But I see no sufficient ground in the authorities for holding that a gift for the benefit of poor relations qualifies as charitable only if it is perpetual in character. I do

not think the observation of SIR WILLIAM GRANT, M.R., above referred to, goes by any means as far as that. It is fully satisfied if taken as meaning that an immediate bequest of a sum to be distributed among poor relations may on its true construction be no more than a gift to particular individuals (*i.e.*, the next of kin of the *propositus*) whereas a gift having perpetual continuance cannot be so confined. If a gift or trust on its true construction does extend to those in need amongst relations in every degree, even though it provides for immediate distribution, then, inasmuch as the class of potential beneficiaries becomes so wide as to be incapable of exhaustive ascertainment, the impersonal quality, if I may so describe it, supplied in continuing gifts by the element of perpetuity, is equally present. To use the words of the passage quoted from *Gillam v. Taylor* (15) (L.R. 16 Eq. 584), although no "perpetual fund or institution" is set up, the fund in such a case is nevertheless one in which

" . . . no person or persons is . . . to have a personal right, but which is to be given only to such as need in the opinion of the trustees . . . "

It may further be observed that just as a gift in perpetuity can only be supported if it is charitable, so too a gift to relations in every degree—in the absence, or in default of any exercise of, some power of selection—must fail for uncertainty unless it is charitable, this, indeed, being the reason for the restriction of any implied trust in default of appointment in such cases to statutory next of kin: see *Wilson v. Duguid* (5).

The exception of gifts or trusts in relief of poverty from the general rule under which an element of public benefit is essential to every other form of legal charity may be anomalous, but that cannot, in my view, justify the restriction of its effect by recourse to yet another anomaly, the result of which would be that gifts or trusts in relief of poverty, which alone among charitable dispositions require no element of public benefit to make them valid, must alone among charitable dispositions—unless, indeed, it so happens that they do possess the element of public benefit—be of perpetual duration in order to be legally charitable. A disposition obviously cannot be held charitable merely because it involves a perpetuity or conversely be held not charitable merely because it is to take immediate effect. In cases of the class here in question the presence of perpetuity may aid the inference of charitable intent, but where a charitable intent is otherwise to be inferred from the terms of the disposition the absence of perpetuity is surely immaterial. Perpetuity in the strict sense would, as it seems to me, be a very capricious test to apply. The learned judge does, however, appear to have taken this as the test, and to have held that no trust for poor relations could qualify as legally charitable unless liable to exceed in duration the limit of a life in being and twenty-one years thereafter allowed by the rule against perpetuities. On this footing a trust to apply the income of a fund in perpetuity in the relief of poverty amongst the poor relations of "X" would be charitable, but a trust precisely similar in every respect save that it was limited in its duration to the period of the life of the last survivor of the issue now in being of His late Majesty King Edward VII and twenty-one years thereafter, a period which might reasonably be estimated at ninety, and might, perhaps, extend to a hundred years or so, would not be charitable. I find myself wholly unable to accept that position. This difficulty was raised in the course of the argument, and I understood counsel for the heir at law to concede that perpetuity in the strict sense was not essential, and that some degree of continuity would suffice. But what degree of continuity? To that he could provide no satisfactory answer, save that the distribution must not be "immediate," but what amounts to "immediacy" in this context? On this basis the test propounded leads to nothing but a morass of uncertainty. One might add that if "immediate distribution" is fatal on account of the personal quality it imports into the disposition, surely the relevant starting point from which to measure "immediacy" (in the case of a testamentary

disposition) is the death of the testator, not the date on or from which distribution is to take place. In this case, the date marked out for distribution and ascertainment of potential beneficiaries was that of the death of the survivor of the testatrix' three children, an event which did not in fact take place till some thirty-three years after her death.

For my part, I am content to accept as correctly stating the law on this subject the final paragraph of the passage from *TUDOR ON CHARITIES*, 5th ed., p. 27, quoted by the learned judge:

" . . . the sounder view is thought to be that a gift for immediate distribution among poor relations, kindred, and so forth, is charitable except in cases where the intention of the donor, derived from the construction of the documents, is to confine the benefit of the gift to statutory next of kin. Outside this limit no line can be drawn, and the objects ought not to be treated as less extensive where the gift is for immediate distribution than where a perpetual trust is intended."

I should, perhaps, add that I do not think any assistance can be derived from *Thomas v. Howell* (16). It was not a "poor relations" case, and must, I think, be regarded as of at least doubtful authority. As it happened, it seems from the report that the person named to select the ten poor clergymen in fact survived to perform that function. Had he not done so, it seems that according to the terms of the will the power of selection would have devolved on the testator's executors. If the power of selection had been confined to an individual who died without exercising it I venture to suspect that (questions of mortmain apart) the court would have had no difficulty in making the selection itself on the ground that the gift was clearly charitable. But, the selector having survived, the gift could be carried out literally in accordance with its terms. Effect could be given to it without recourse to the special powers of the court in relation to charities just as if it had been a simple gift of a pecuniary legacy to each of ten named persons. In these circumstances, the court found it possible to hold that the gift was not charitable for the purposes of, and therefore not defeated by, the Charitable Uses Act, 1735. I, therefore, find nothing in that case to displace the conclusion to which I have come; and I would say the same of *Liley v. Hey* (14) having regard to the grounds on which that decision appears to have proceeded.

For the reasons I have endeavoured to state I hold that this appeal should be allowed, and that in lieu of the order made by *ROXBURGH, J.*, there should be a declaration to the effect that the whole of the residuary estate is effectively devoted to charitable purposes with appropriate consequential directions as to the settlement of a scheme. The view I have formed on the primary question makes it unnecessary for me to decide what the destination of the half of the property, to which by the agreement above mentioned the issue was confined, might have been on the basis of the decision of *ROXBURGH, J.* Accordingly, notwithstanding the interesting arguments addressed to the court on this question, I refrain from expressing any opinion on it.

HODSON, L.J.: Before *ROXBURGH, J.*, the parties then before the court agreed that the contest should be limited to half the trust property referred to in cl. 11 of the will of the testatrix on the footing that in any event one half of the property should be considered to have been validly devised for the admittedly charitable objects mentioned in the second part of the trust. The learned judge decided that there must be a declaration that the last mentioned part of the trust property and no more was effectively devoted to charity, leaving over the question as to the destination of the other half of the trust property. On the appeal of the Attorney-General to this court, the Public Trustee (representing the heir at law) has argued in support of the judgment

given in the court below, claimed a partial intestacy, and resisted the contention of added parties that a trust in default of appointment should be implied either in favour of the next of kin of the testatrix' son and daughters or in favour of the same relations limited to next of kin in needy circumstances. I have nothing to add to the judgments which have been delivered on the question of construction, nor as to the formulation of the principles applicable to the question whether or not the disputed half of the residuary estate is held on valid charitable trusts.

There remains the question whether, the "poor relations" cases being anomalous and an exception to the general principle, an exception within an exception exists so as to exclude gifts for immediate distribution from the ambit of charity. As ROXBURGH, J., pointed out, the authorities, where there is no perpetuity, are conflicting. In *A.-G. v. Price* (7), where the gift was in favour of the testator's poor kinsmen and kinswomen and their offspring and issue which shall dwell in the county of Brecon, SIR WILLIAM GRANT, M.R., followed *Isaac v. Defriez* (2), saying (17 Ves. 374):

"This seems to be just as much in the nature of a charitable bequest as that. It is to have perpetual continuance, in favour of a particular description of poor; and is not like an immediate bequest of a sum to be distributed among poor relations."

It is, I think, true to say that the *dictum* of SIR WILLIAM GRANT, M.R., however it may be explained, has been treated in some of the later cases, as for example, in *Thomas v. Howell* (16), as supporting the distinction drawn by the learned judge between gifts for poor persons having perpetual continuance and similar gifts for immediate distribution, so as to exclude the latter from the scope of charitable bequests. On the other hand, in other cases, as my Lords have indicated, the distinction seems to have been treated as non-existent.

It appears to me that, on principle, it is unsound to draw such a distinction, and that some, at any rate, of the difficulty in the cases dealing with immediate distribution arises from the fact that sometimes it is hard to say whether an immediate gift is for charity in the legal sense or whether a gift is given to persons because they are poor. This seems to have been in the mind of SIR RICHARD MALINS, V.-C., in *Thomas v. Howell* (16), when he said (L.R. 18 Eq. 208):

"... it would be carrying the doctrine of the court a long way to say, that because a legatee is to have a gift on account of his being a poor man, that therefore it is a charitable bequest within the meaning of the Mortmain Act."

The judgment of LORD GREENE, M.R., in *Re Compton* (1), quoted at length by the learned judge, does not, in my opinion, although it quotes the much debated *dictum* of SIR WILLIAM GRANT, M.R., *in toto* and without comment, support the distinction. The cases referred to in the passage cited were all cases of perpetual trusts and the distinction now considered was not before the court.

It is said, however, that on general principles the cases of immediate distribution should be controlled by the general law and not be subject to the anomalous treatment given to perpetual trusts in the "poor relations" cases. This is to create an anomaly on an anomaly which is not easy to justify. It is also suggested as a practical justification for this treatment that the cases of perpetual trusts for poor relations are in practice difficult to assail because many long established charities are dependent on them, whereas there is not the same practical objection to declaring a gift for immediate distribution to be outside the scope of charity. I am, however, clearly of opinion that in spite of the state of the authorities the sounder view is against the distinction between immediate distribution and perpetual trusts, and that the position is correctly stated in

the passage cited from TUDOR ON CHARITIES, 5th ed., p. 27. Accordingly, the gift here in question is charitable even if regarded as one for immediate distribution. In any event, I find a difficulty in ascertaining what is meant by immediate distribution. It would seem reasonable to understand "immediate" as immediate in relation to the death of the testator. There seems no sound reason to choose the end of the period allowed by the rule against perpetuities which may, as JENKINS, L.J., has pointed out, be far distant, rather than the period following at once on the death of the testator in any particular case as setting a limit up to which gifts are not charitable and beyond which they are. For myself, I do not think that the authorities relied on by the Public Trustee compel the conclusion that immediate distribution is to be extended beyond the natural implication of the words to any period up to the limit set by the perpetuity rule. It would appear, therefore, that it is at best open to doubt whether the trust in the first part of cl. 11 of the will of the testatrix can properly be described as a trust for immediate distribution although it is not, of course, a perpetual trust.

In view of the conclusion reached on this part of the case, I, for myself, would not desire to express an opinion as to the destination of the disputed half had the trust for relations in cl. 11 of the will been held not to be charitable. I agree that the appeal should be allowed and that there should be a declaration to the effect that the whole of the residuary estate is effectively given to charity.

Appeal allowed.

Solicitors; *Treasury Solicitor* (for the Attorney-General); *Pritchard, Englefield & Co.*, agents for *Cockshott & Rayner*, Southport (for all other parties).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

NATIONAL COAL BOARD v. AMALGAMATED ANTHRACITE COLLIERIES, LTD. SAME v. SAME.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.JJ.), March 12, 13, 21, 1951.]

Coal—Nationalisation of industry—Workmen's compensation—Contribution—Miner suffering from gradual disease—Compensation paid by National Coal Board—Right of board to contribution from miner's employers before nationalisation—Workmen's Compensation Act, 1925 (c. 84), s. 43 (1) (c) (iii)—Coal Industry Nationalisation Act, 1946 (c. 59), s. 7 (1), s. 10 (3), sched. II.

On Oct. 20, 1947, a miner employed by the National Coal Board was certified as suffering from an industrial disease which was of such a nature as to be contracted by a gradual process and to be due to the nature of his employment while working for a colliery company before Jan. 1, 1947, the date on which the assets of the company vested in the board, and the board after that date. The miner was paid workmen's compensation by the board who claimed to be entitled to contribution from the colliery company as the "other employers" of the miner within the meaning of s. 43 (1) (c) (iii) of the Workmen's Compensation Act, 1925.

HELD: (i) (by SOMERVELL and SINGLETON, L.JJ., DENNING, L.J., *dissentiente*) on and after Jan. 1, 1947, there was a change of the employers of the miner from the colliery company to the board and the company became "other employers" within the meaning of s. 43 (1) (c) (iii), but

(ii) (by SOMERVELL and DENNING, L.JJ., SINGLETON, L.J., *dissentiente*), s. 43 (1) (c) (iii) did not apply as between the board and the colliery company because, on the natural construction of para. 3 of the terms of reference

of the tribunal set up under s. 10 (3) of the Coal Industry Nationalisation Act, 1946, to assess the compensation payable to the coal industry, the tribunal must be taken to have debited the estimated cost of all future workmen's compensation against the industry as a whole and arrived at a global sum which relieved the industry of liability to contribution in respect of diseases certified after the vesting date; and, therefore, the board had no right of contribution from the colliery company.

A FOR THE WORKMEN'S COMPENSATION ACT, 1925, s. 43 (1) (c) (iii), see HALSBURY'S STATUTES, Vol. 11, p. 581, and FOR THE COAL INDUSTRY NATIONALISATION ACT, 1946, s. 7 (1), s. 10 (3), and sched. II, see *ibid.*, Second Edn., Vol. 16, pp. 287, 291 and 337.

Case referred to:

B (1) *Nokes v. Doncaster Amalgamated Collieries, Ltd.*, [1940] 3 All E.R. 549; [1940] A.C. 1014; 109 L.J.K.B. 865; 163 L.T. 343; 2nd Digest Supp.

APPEALS by the National Coal Board from a decision of His Honour JUDGE TREVOR MORGAN, K.C., given at Llanelly County Court on Oct. 10, 1950, whereby he held that the board were not entitled to contribution from the Amalgamated Anthracite Collieries, Ltd., in respect of workmen's compensation paid by the board to two miners who, prior to Jan. 1, 1947, had been in the employment of the company.

C The first case concerned one Davies, who, on Oct. 20, 1947, was certified under s. 43 (1) of the Workmen's Compensation Act, 1925, as suffering from miner's nystagmus. In the second case one Jenkins was, on May 3, 1948, certified under s. 47 (1) of the Act and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, as suffering from pneumoconiosis. With regard to both diseases it is provided that any other employers who, during the twelve months (five years in the case of pneumoconiosis) previous to the date of disablement, employed the workman shall be liable to make to the employer from whom compensation is recoverable such contribution as may, in default of agreement, be settled by arbitration. Since the point at issue in both cases was the same, the appeal, in the main, was confined to the effect of s. 43 (1) of the Act of 1925 on the rights and liabilities of the parties. For the board it was contended that the colliery company, as the previous employers of Davies were "other employers" of him within the meaning of s. 43 (1) (c) (iii) of the Act and, therefore, liable to make contribution. The colliery company submitted that, having regard to the Coal Industry Nationalisation Act, 1946, and in particular sched. II to that Act, the company were not "other employers." If they were, the right to contribution had been impliedly extinguished by that Act. The facts appear in the judgment of SOMERVELL and SINGLETON, L.JJ.

E *Paull, K.C., Diplock, K.C., and Sir Shirley Worthington-Evans* for the National Coal Board.

G *Sir Walter Monckton, K.C., and Brunyate* for the colliery company.

Cur. adv. vult.

Mar. 21. The following judgments were read.

H **SOMERVELL, L.J.:** This appeal concerns two applications under the Workmen's Compensation Act, 1925. The applicant is the National Coal Board (hereinafter called "the board"), the statutory body which, under the Coal Industry Nationalisation Act, 1946 (hereinafter called "the Act of 1946") took over—to use general words which will not prejudice any issue—the working and running of the coal mines of Great Britain as from the vesting day, Jan. 1, 1947. The first case concerns a Mr. Davies, who, on Oct. 20, 1947, was certified within s. 43 (1) (i) of the Workmen's Compensation Act, 1925, as suffering from nystagmus. He was at that time in the employment of the board. The second case concerns a Mr. Jenkins who, on May 3, 1948, was certified within the Coal

Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made pursuant to s. 47 (1) of the Act of 1925, as suffering from pneumoconiosis. For the purposes of the present appeal there are no material differences between the provisions of s. 43 (1) and the scheme. I propose, therefore, to consider Mr. Davies' case. The conclusion in that case will cover the other case.

The Amalgamated Anthracite Collieries, Ltd., the respondents to the application (hereinafter called "the colliery company"), were, prior to the vesting day, the owners of the mine in which Mr. Davies worked and in which he continued to work after that day until he was certified on Oct. 20, 1947. Section 43 (1) and sched. III, as extended by the Workmen's Compensation (Industrial Diseases) Consolidation Order, 1929 (S.R. & O., 1929, No. 2), applies the Workmen's Compensation Act to certain industrial diseases including nystagmus which are due to the nature of the workman's employment. Mr. Davies had been in the employment of the colliery company from 1932 down to the end of 1946 when the board took over. Section 43 (1) provides:

"Where—(i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in sched. III to this Act and is thereby disabled from earning full wages at the work at which he was employed . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications . . ."

It is not disputed that nystagmus was due to the nature of Mr. Davies' employment while he was working for the colliery company and for the board. As will be seen from the dates, twelve months from the date of certification takes one back to Oct. 21, 1946, when he was in the employment of the colliery company. The issue turns on the provisions of sub-s. (1) (c) (iii) which read as follows:

"if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation, or, if the amount of compensation is not in dispute, as may be determined by arbitration under this Act."

As I have given the date of certification in Mr. Jenkins' case I should say that under the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943 (S.R. & O., 1943, No. 885), para. 8, the period for contribution is not one year but five years. It is admitted that nystagmus is of such a nature as to be contracted by a gradual process. In their particulars of claim the board state, and this is not disputed, that, as the last employers of Mr. Davies, they became liable to pay him compensation in respect of the said disease. They then claim to be entitled under the provisions of s. 43 (1) (c) (iii) to contribution from the colliery company as "other employers" who during the twelve months previous to the date of disablement employed the workman in the employment to the nature of which the disease was due.

The defence raised by the colliery company is twofold. It is submitted, first, that, having regard to the provisions of the Act of 1946, and, in particular, sched. II to that Act, the colliery company is not an "other employer" within s. 43 (1) (c) (iii). Alternatively, it is submitted that, assuming the colliery

company is an "other employer," the right to contribution has been impliedly extinguished or repealed by the Act of 1946. Reliance for this purpose is placed on the absence of any express provision preserving the right, and, more strongly, on the terms of reference to the tribunal which was set up to determine the aggregate amount of the compensation to be made in respect of the transferred interests. These terms of reference are referred to in s. 10 (3) of the Act of 1946.

- A I will refer, first, to the scheme of the Act in broad outline and to those provisions on which the first point depends. The Act of 1946 set up a National Coal Board which as from the vesting date was to work and get coal in Great Britain to the exclusion of others. The long title describes the Act as one to establish public ownership and control of the coal-mining industry and certain allied activities. Sections 5 to 9 deal with the transfer of the assets from the various
- B colliery companies by whom the industry was carried on to the board. Under s. 5 and sched. I certain assets—the unworked coal and certain plant and equipment—were transferred without option; certain other assets were transferable at the option of board or owner; in respect of other assets, if one party wanted transfer and the other objected, there was provision for arbitration. That was the broad scheme. Section 7 and sched. II dealt with rights and
- C liabilities under contracts and these require examination in some detail. Section 7 (1) is as follows:

"Subject to the provisions of this section, contracts such as are mentioned in sched. II to this Act shall have effect in favour of and against the board as therein mentioned and to the extent therein mentioned."

- D In sub-s. (2) to sub-s. (5) there are special provisions with regard to contracts entered into after Aug. 1, 1945, which do not affect the present issue. Paragraph 1 (1) of sched. II provides that, subject to certain limitations, only one of which is relevant, the schedule shall apply to the provisions of any contract so far as they are provisions entered into in the course of or for the purposes of any coal industry activities or for the purposes of the utilisation or disposal
- E of things owned or used for any such activities. This, of course, would cover contracts of service with miners such as Mr. Davies. Paragraph 1 (3) excepts certain provisions of contracts which are within the schedule by reason of the preceding paragraphs. Sub-paragraph (c) excepts provisions for or in connection with pensions, gratuities or other like benefits. Counsel for the board, for reasons which will become apparent, relied on this as showing that contracts
- F of service, in so far as they contained such provisions, were to that extent altered by the schedule. The transfer is dealt with in para. 2, the relevant parts of which provide:

"Provisions of a contract being provisions to which this schedule applies shall have effect in favour of and against the board so far as the performance thereof is due under the contract on or after the primary vesting date (or, where the application of this schedule depends upon the vesting of an interest in the board by virtue of the exercise of an option, on or after the date of its vesting), as if the board had been a party to the contract instead of the concern, subsidiary or owner mentioned in sub-para. (1) or sub-para. (2) of para. 1 of this schedule: Provided that—(a) rights and liabilities in respect of payments due on or after the date aforesaid for goods or utilities delivered or supplied before that date, or for work done or services rendered before that date, shall be excepted from the operation of this paragraph . . ."

- G The broad position is clear. The board did not take over pre-vesting date rights or liabilities. In respect of performance due by either party after that date the board are substituted for the original owner. There is a power to make regulations for apportionments (para. 4 (b)). No such regulations were actually
- H

put in, but in the case of a contract of service the intention would seem plain; the colliery companies pay whatever is due, apportioned if necessary, up to the vesting day and the board pay what is due thereafter.

It is in the main on the provisions of sched. II that counsel for the colliery company rely for their submission that the company is not an "other employer" within s. 43 (1) (c) (iii) of the Act of 1925. This submission commended itself to the learned county court judge and has been accepted by DENNING, L.J. I have, for reasons which I will state, come to a different conclusion. It is, I think, right to say that the normal case contemplated by proviso (iii) to sub-s. (1) (c) is that of a man who has moved from an undertaking in which a disease-producing process was carried on to another undertaking where he continued to work at the same process. In the case of a miner the ordinary case for contribution would be where the miner had gone from one mine owned by one colliery company to another mine owned by another colliery company. On the other hand, the words of the proviso seem to me to cover a case where the man continued to work in the same mine, but for a new employer who had taken over the mine. If the disease was certified within the twelve months the new employer would claim a contribution from the former employer unless under the terms of transfer he had agreed to relinquish that right. Counsel for the colliery company do not, I think, dispute that, at any rate in certain circumstances, this might be so. They rely on the words which I have read from para. 2 of sched. II to the Act of 1946. They rely on the fact that the provisions of the contract remain unaltered, though the board are substituted as the party to it. They submit that there has been no change in the employment, and, therefore, no other employer within proviso (iii) of s. 43 (1) (c). The question under the proviso is not, as it seems to me, whether there has been a change in the employment in its terms or conditions, but whether within the twelve months the workman has been employed by an employer other than the employer from whom compensation is recoverable. To this question there seems to me only one answer. The employer from whom compensation is recoverable is the board, but within the twelve months Mr. Davies was employed by the colliery company.

Counsel for the colliery company referred to s. 9 (2) of the Workmen's Compensation Act, 1925, which reads as follows:

"The rules for calculating the weekly payment in the case of total incapacity shall be—(i) The weekly payment shall subject to rule (ii) be a sum not exceeding fifty per cent. of the workman's average weekly earnings during the previous twelve months, if he has been so long employed by the same employer, but if not, then for any less period during which he has been in the employment of the same employer."

Counsel submitted that, if a workman had continued to be employed on the same terms although B. had been substituted for A. as employer, the subsection should be applied as if the workman had been employed by the same employer throughout. This seems to me in conflict with the words of the subsection. The question under s. 43 (1) as under s. 9 (2) (i) is: Has he been employed throughout by the same employer? The question whether the terms are the same is irrelevant. If the question was whether the terms of employment have been altered, there is, I think, force in the point of counsel for the board based on the provision in para. 1 (3) (c) of sched. II with regard to pensions and gratuities. On the view I take it is unnecessary to rely on this, nor was there any evidence in relation to Mr. Davies' contract. I also do not accept the submission made on behalf of the colliery company that there was no "change of employment." In a contract of employment the identity of the employer is a fundamental term of the employment.

I will now turn to the second argument submitted by the colliery company.

This is based in the main on s. 10 (3) of the Act of 1946, and the terms of reference therein referred to. Section 10 (3) provides:

A "The aggregate amount of the compensation to be made in respect of the coal industry value of all the transferred interests shall be a sum fixed, in accordance with the terms of reference specified in the agreement made in that behalf before the passing of this Act between the Minister and the Mining Association of Great Britain by a tribunal constituted as therein specified."

B Counsel for the board submitted in the first place that the court could not consider the terms of reference* as relevant to the legal rights of the parties to the appeal. I do not take this view. They are, in my view, *prima facie*, in the same position as if they were set out in a schedule. They are made part of the statutory scheme on the all-important question of the sum to be paid. I say *prima facie*, because if a conflict emerged between the terms of reference and a provision of the Act, it might be relevant to take into account the fact that the terms of reference had been settled before the Act was passed and could not be amended. No such question, in my view, arises. The paragraph C of the terms of reference relied on is para. 3, which reads as follows:

D "The tribunal shall determine the global sum required to provide fair compensation to the owners of the assets described in annex I hereto for the transfer of those assets to public ownership, and for that purpose shall ascertain the amount which the assets might be expected to realise if sold as one unit in the open market as assets of a going concern by a willing seller to a willing buyer on the basis of (a) the net annual maintainable revenue, that is to say the net annual revenue which the assets as a whole might reasonably be expected to earn in the future, if they were not transferred to public ownership, and (b) the number of years purchase to be applied thereto."

E The argument for the colliery company may be summarised as follows. The paragraph requires the tribunal to assess the net annual maintainable revenue which the assets would have earned if not transferred. But for the transfer the owners as a whole would have had to bear the whole expense of compensating Mr. Davies. Whether a right of contribution existed or not is irrelevant as the tribunal are considering the net revenue of the industry as a whole. F Therefore, it is said, the tribunal must be taken to have deducted from the estimated future revenue the whole of the estimated expense of compensating workmen disabled in the future. I will put the argument in a slightly different way, using some simple figures to illustrate it. I will assume the incidence of industrial disease was stable. If the curve was upwards or downwards, that, no doubt, would be taken into account, but would not affect the present problem. I will G take purely nominal figures for my illustration. I assume that every year there are twenty men with industrial diseases being paid £100 each. Each year one man dies or recovers and one new case is certified. It may be that in respect of that new case the last employer can collect four-fifths of the liability from another employer. This is irrelevant in considering the net maintainable revenue of the industry as a whole. For purposes of assessing net maintainable revenue, H which, assuming stability, would be based on past experience, the deduction would be £2,000 which would year by year "take care of" this liability. If in a case certified after the vesting date the board can recover four-fifths from the owners, this would be putting on them, the owners, a burden additional to the £2,000 which covers the full liability and which they have borne by the reduction of the gross revenue by that sum.

* Cmd., 6716 (Dec., 1945).

I will now seek to formulate the argument for the board. It is common ground that the board are not liable in respect of pre-vesting day accidents, whether actual accidents or industrial diseases certified before that day. Under s. 43 of the Act of 1925, an industrial disease is treated as an accident which happens over a period of time. As a matter of machinery and for the convenience of the workman the last employer is made liable to the workman. If one assumes a man certified a week after the vesting date, the "accident" has occurred in the main while the man was in the employment of the colliery company, and as the result of work of which it had the benefit. It would be contrary to the scheme as well as to the letter of s. 43 that this, which is, in effect, treated by s. 43 as a pre-vesting day liability should be taken over by the board. It is a special case which, in the absence of evidence to the contrary, it must be assumed the calculation of net maintainable revenue took into account. Counsel for the board also relied on s. 48 (1) of the Act of 1946 in which special provisions are made in respect of breaches of rights of support in cases where the right of action accrues after the appointed day. It provides that the board should take over liability notwithstanding the fact that apart from the section the colliery companies would be liable. There is no such provision with regard to the present subject and it should not, it is submitted, be implied. I think this complicates, without solving, the problem. We have no information as to how this was fitted in to the terms of reference.

I have myself been troubled, though it was not relied on by the board, by the fact that since the Workmen's Compensation (Coal Mines) Act, 1934, by law—and, no doubt, before that date in fact—over a large part of this field the liabilities to workmen were borne by insurance companies or compensation trusts and did not fall as such on the year's profits. I would assume that what fell to be deducted in arriving at a figure of net maintainable revenue would be the premiums or payments to trusts. Was the potential liability to contribution covered by the policy in force at the date when the man was working for the former employer or at the date when he was certified as disabled? It might well, as it seems to me, be the former. If one assumes a mine closing down and the miners going to work in other mines, the potential liability for contributions might well be a liability "in respect of the employment of workmen" at that time—i.e., before the mine closed down: see s. 1 (1) (a) of the Act of 1934 referred to above. If so, it would or should have been covered by the policies in force at that time, the premiums for which will have been deducted in arriving at net maintainable revenue. If this is right, to decide in favour of the colliery company might be to relieve insurance companies or trusts of liabilities which they have received premiums or funds to cover. Counsel for the board did not, as I understood him, take or press this point and no evidence was put in as to the terms of policies. In these circumstances, I propose to disregard it. I have thought it right to refer to it because it brings out an uneasy feeling which I have had, namely, that in the absence of any evidence on this point and as to how the figures put before and accepted by the tribunal dealt with this problem, one may come to a conclusion which is not fair as between the two parties. However, each side could have tendered such evidence, so, perhaps, one should assume that there is nothing which could have assisted.

Counsel for the board submitted that the onus was on the colliery company to show by evidence that the tribunal's award was on the basis that the right to contribution was extinguished. I was attracted by this argument at one time, but I have come to the conclusion that the argument for the colliery company prevails having regard to the terms of reference. I have done my best to set out that argument and I need not repeat it in detail. I think that the terms of reference on their natural construction lead to a figure for compensation which relieves the colliery company of liability to contribution in respect of diseases certified after the vesting day. It was said on behalf of the board that this amounted to a repeal of s. 43. I would not so express it. I can myself

see no objection, if A took over B's mine, to an agreement which might be express or implied that as between A and B, A would not exercise the right of contribution which he would otherwise have. *A fortiori*, the terms of a statutory transfer may be such as to produce the same result. I, therefore, though for different reasons, come to the conclusion that the learned county court judge was right and that the appeal should be dismissed. I should add that the learned county court judge assessed the amount of the contribution which he would have found in the two cases if he had decided in favour of the board. The board appealed against his decision on this point, but after some discussion this was abandoned. It does not in any event arise on the conclusion to which I have come. The appeal, therefore, in my opinion, should be dismissed.

SINGLETON, L.J.: Section 43 (1) of the Workmen's Compensation Act, 1925, provides that a workman may recover compensation in respect of certain industrial diseases, of which miner's nystagmus is one. If the examining surgeon certifies that the workman is so suffering and the disease is due to the nature of any employment in which the workman was employed at any time within twelve months previous to the date of the disablement, the right to compensation arises as if the disease were a personal injury by accident arising out of and in the course of that employment. The compensation is recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due. For some ten months immediately prior to Oct. 20, 1947, W. E. Davies was employed as a miner by the National Coal Board. On that date the examining surgeon certified that he was suffering from miner's nystagmus. The disease is due to the nature of his employment as a miner. He is entitled to compensation under the Act, and he has been paid compensation by the National Coal Board. Section 43 (1) (c) (iii) of the Act provides that, if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to make to the employer from whom compensation is recoverable such contributions as may, in default of agreement, be settled by arbitration. Section 47 (1) of the Act, and the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, made under that section, provide for the payment of compensation by employers in certain industries or processes involving exposure to dust to workmen who are found to be suffering from pneumoconiosis. On Apr. 13, 1948, the medical board certified that John Jenkins was suffering from pneumoconiosis and suspended him from work in regard to all processes specified in para. 2 of the scheme. Paragraph 5 of the scheme provides that, if the workman has been employed in the industry for a period or periods amounting to not less than five years, the disease shall be presumed to be due to employment in the industry unless the employer proves the contrary. Jenkins had been employed in coal mining for many years, and for some fifteen months prior to the date of certification his employers were the National Coal Board, as they have paid him the compensation to which he was entitled. By para. 8 (2) the scheme further provides that any other employers who employed the workman in the industry during the five years preceding the date of the injury (certification) shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined by arbitration. Before the Coal Industry Nationalisation Act, 1946, came into operation both Davies and Jenkins had been employed by the Amalgamated Anthracite Collieries, Ltd. (later referred to as "the company"). On May 12, 1950, the National Coal Board commenced proceedings against the company claiming contribution in respect of the compensation paid to the two men. The claim was resisted by the company and the dispute came before His Honour JUDGE TREVOR MORGAN, K.C., at the

Llanelly County Court for his decision. The learned judge on Oct. 10, 1950, made an award in favour of the company, and from that award the National Coal Board appeals to this court.

The National Coal Board was established by the Act of 1946—an Act to establish public ownership and control of the coal-mining industry and certain allied activities. The primary vesting date under the Act was Jan. 1, 1947. Under s. 5 (1) of the Act the assets described in Part I of sched. I vested in the board on the primary vesting date. The later sub-sections made provision for the vesting of certain other assets in the board subject, in cases falling within Parts III and IV of sched. I, to arbitration in the case of objection. Section 7 of the Act provided for the transfer of rights and liabilities under contracts mentioned in sched. II to the extent therein mentioned. Section 9 (1) provided that regulations should be made for ascertaining, verifying and recording particulars of the assets, property and rights that vest in the board by virtue of s. 5 or s. 6 and of contractual rights and liabilities so far as transferred to the board by virtue of s. 7.

The claim of the board is that the company are "other employers" within the meaning of those words in s. 43 (1) (c) (iii) of the Workmen's Compensation Act, 1925, in the case of Davies, and within the meaning of the scheme made under s. 47 in the case of Jenkins. This is disputed by the company. It was said that the provisions as to "other employers" were meant to cover the case of the wandering workman, maybe a collier who worked sometimes at one pit and sometimes at another. None the less the provisions as to contribution would seem to be sufficiently wide to cover the case of one undertaking acquiring another. In such a case one would expect that the agreement would provide for the liability in respect of claims being made subsequently for contribution. The words "other employers" must be given their ordinary meaning. If either of the workmen was asked in whose employment he was in the year 1946, the answer would be he was employed by the Amalgamated Anthracite Collieries, Ltd., and if he was asked by whom he was employed in 1947, the answer would be that he was then employed by the Coal Board. There was no uncertainty about that. Everyone—especially those engaged in coal mining—knew of nationalisation of the coal industry. Now, these are two different bodies, the one a limited company and the other a board established by statute. They are in no sense the same, and it seems to me that the company must be regarded as "other employers." I do not derive help from s. 7 of the Act of 1946, nor from sched. II, though it may be said that it would cover contracts by the week, or by the shift, between the company and colliers. No doubt, there were at times difficulties in the way of workmen in certain industries leaving their employment, but we were not referred to anything which would have prevented any workman who did not wish to work for the Coal Board declining to do so. The men must be taken to have known the law which established public ownership and control of the coal-mining industry, and that if they attended on Jan. 1, 1947, their employers would be the Coal Board. In any event, they were paid by the Coal Board thereafter. It was only certain assets that were taken over by the Coal Board. For all one knows the company may have continued to carry on some of their activities, and there was no reason why a man should not have asked to remain with the company if he did not wish to work for the board. It must be assumed that he knew the difference.

The next point for consideration is whether it can be said that in some way the Act of 1946 wiped out the obligation of the "other employers" to pay contribution under the Act of 1925. It was submitted that the Act of 1946 ought to be regarded as having repealed the provisions as to contribution in the Workmen's Compensation Act. I confess that I find this argument difficult to follow. The liability to make contributions is imposed on an employer by statute just as is the liability to pay compensation in respect of an accident

arising out of and in the course of the employment. No one suggests that the liability to pay compensation in respect of an accident happening to a workman the day before the primary vesting day is affected by the Act of 1946. The liability remains on the company though it (or the amount of compensation) may not be determined until months have elapsed. Industrial diseases, such as those contracted by Davies and Jenkins, are the result of a gradual process as the county court judge found. It is for that reason that the statute made provision for contribution. It is possible to imagine a case of certification within a very short time of change of employment. The question of industrial diseases and the liability arising therefrom has been a burning question in some industries for many years, and not least in the coal-mining industry. If Parliament had intended by the Act of 1946 to repeal the provisions of the Workmen's Compensation Act as to contribution, it would have said so in clear terms. Moreover, s. 7 and sched. II deal only with the transfer of certain rights and liabilities under contracts. The natural inference is that no liabilities other than those mentioned are taken over. There is no provision anywhere for the transfer of statutory liabilities.

The next question arises on the terms of reference. Counsel for the board submitted that we could not look at them, and, alternatively, that they were not relevant to the issue. They are referred to in s. 10 (3) of the Act—the compensation section—and we ought to look at them. Under sub-s. (3) the aggregate amount of compensation to be made in respect of the coal industry value of all the transferred interests

“shall be a sum fixed, in accordance with the terms of reference . . . by a tribunal . . .”

The most important parts of the terms of reference are para. 3 and para. 4 (1). Under para. 3 the tribunal is to determine the global sum required to provide fair compensation to the owners of the assets described in annex 1 for the transfer of those assets to public ownership, and for that purpose the tribunal is to ascertain the amount which the assets might be expected to realise if sold as one unit in the open market as assets of a going concern by a willing seller to a willing buyer on the basis of (a) the net annual maintainable revenue, that is to say the net annual revenue which the assets as a whole might reasonably be expected to earn in the future, if they were not transferred to public ownership, and (b) the number of years purchase to be applied thereto. Paragraph 4 provides that the tribunal shall have regard to all relevant circumstances, subject to certain express reservations which are not material for the purposes of this appeal. Thus, it would be the duty of the tribunal to arrive at the gross annual revenue and then to deduct the necessary and proper expenses incurred in order to earn that revenue. Among the expenses would be payments by way of workmen's compensation. It is obvious that, in arriving at the global sum of fair compensation, there must be a difference between a case in which all liabilities are taken over and a case in which the previous owner of the assets is left saddled with certain liabilities. So long as he had the going concern those liabilities could be discharged out of the revenue he earned, but, if his assets are taken over and liabilities remain, the compensation ought to be more than it would be if both are taken over. That is axiomatic. Any other view would not lead to fair compensation and would mean that regard was not had to all relevant circumstances. The liability to pay compensation to workmen injured before the primary vesting day was not taken over by the Coal Board, and thus, apart from any question of insurance, this would be a liability to be considered by the tribunal, and so would be, I think, the potential liability to claims for contribution. This was a well appreciated risk, especially in the South Wales coalfield.

It is now necessary to consider how questions of insurance affect the points at issue. In the ordinary business concern workmen's compensation risks would

be covered by insurance. The premiums paid year by year would be treated as a debit item in arriving at the net revenue. That is a simple case. There is more complication in the case of a concern whose workmen are subject to the risks envisaged by s. 43 and s. 47 of the Workmen's Compensation Act, 1925, and I do not know in what way claims for contribution were covered or were dealt with. It may be that a successful claim for contribution was treated in just the same way as a successful claim for compensation, and that it was covered by the premium for that year. But what was the position if the concern went out of business and claims for contribution arose thereafter? The liability remained on the employers (apart from agreement in the case of the business being taken over), and unless they had covered this risk they would have to meet it. Further complications arise from the Workmen's Compensation (Coal Mines) Act, 1934—an Act to provide that the owners of coal mines in Great Britain shall insure against, or ensure the discharge of, their liabilities under the Workmen's Compensation Act, 1925, etc. By s. 1 (1) of that Act it was provided that

“ . . . the owner of a coal mine shall not, at any time, employ any workmen for the purposes of the undertaking carried on at that mine unless there is in force either—(a) a contract of insurance subscribed by an authorised insurer, being a contract which . . . insures the owner against all liability under the [Act of 1925] in respect of the employment of workmen by him . . . ; or (b) an instrument . . . conforming with the requirements of the schedule to this Act, for securing, by means of a special trust fund, the discharge of all the owner's liability under the [Act of 1925] in respect of the employment of workmen as mentioned in para. (a) of this sub-section.”

Thus, the Act placed on the company, as owners of a coal mine, the duty of covering all liability under the Act of 1925 in one or other of the ways prescribed. We have no information as to how they did this. It seems clear that the words of s. 1 (1) of the Act of 1934 are wide enough to cover the liability to make contributions under s. 43 or s. 47 of the Act of 1925. In the course of the argument I said, and I still feel, that we ought to have been given further facts. In the circumstances we must assume that the company carried out the duty placed on it by s. 1 (1) of the Act of 1934. Must we not also assume that it is covered by the premiums it has paid under (a) or by the payments it has made under (b)? It may be that under the provisions of s. 7 of the Act of 1946 and sched. II the Coal Board could secure to themselves the benefit of these arrangements. They cannot have it both ways, and probably it suits them better to adopt the course of seeking contribution from the former owners, leaving them to such rights as they have against their insurers or in respect of the compensation trust funds. I believe that the decision in this appeal depends on whether the former owners are “other employers” within the meaning of those words in s. 43 (1) (c) (iii) and in the scheme under s. 47 (1).

I agree that normally the net maintainable revenue can be ascertained without reference to the fact that there may be claims for contribution in the future. These may be covered by insurance, or that which has happened before is a guide. The tribunal had to determine the net maintainable revenue of the undertaking as a going concern. Once it ceases to be a going concern in the hands of the former owners, they have no revenue out of which to pay accruing liabilities. They are left with liability to pay workmen's compensation in respect of past accidents, and to pay contribution in respect of subsequently certified industrial diseases within the specified periods. Herein lies the importance of the terms of reference as to (a) fair compensation in para. 3, and (b) the tribunal having regard to all relevant circumstances in para. 4. It was for the tribunal to consider these matters, and I presume that they would have before them the policies or compensation trusts, and they would be able to form an opinion

whether the owners were completely covered. (I am assuming that they took the view which I take as to "other employers"). The parties have not seen fit to give us this information. If the tribunal thought that the owners were covered against all such liabilities, by insurance or by the compensation trust funds, there was no need to consider this matter further. On the other hand, if the tribunal thought that there was some remaining liability on the former owners, they would be right in making allowance for it, not in arriving at the net maintainable revenue but as to what was fair compensation—perhaps as an element in considering the number of years purchase to be applied.

Let me put it in another way. Contribution payments, which are payments within the industry, are not a relevant matter for consideration in arriving at the net maintainable revenue of the industry. The tribunal had to determine fair compensation to the industry for the taking over of its revenue-producing assets. First, the net maintainable revenue had to be ascertained: that is only one stage. There must, as I have already pointed out, be a difference between the compensation awarded in a case in which both assets and liabilities are taken over and a case in which assets are taken over and liabilities (or some of them) left to be carried by the concern which is taken over. In assessing compensation the tribunal must have regard to the burden left on the owners whose assets are acquired by the Coal Board. The company was left with a burden. So were other owners in regard to compensation and contribution. These matters must have been considered by the tribunal if, as I assume, the position as to running compensation in respect of past accidents and as to contribution was put before them. Everyone in the industry knew of the likelihood of claims for contribution in the case of a change of employers. We ought, therefore, to conclude that the tribunal gave consideration to such questions. It may be that they were of opinion that the former owners were sufficiently covered in one way or another, or it may be that they thought they were not, and so allowed something in arriving at fair compensation. We do not know, and the parties do not put before us material on which to consider it further. Clearly these were matters for the tribunal, and we must assume that they considered them and acted according to their terms of reference.

If my view on this is right, the liability to contribution in respect of industrial diseases remains on the former employers. I find nothing in the Act of 1946 or in the terms of reference to give any indication that the contribution provisions of the Act of 1925 ought to be regarded as repealed. The real question for decision is whether the company, in the events which have happened, are "other employers" within the meaning of those words in s. 43 (1) (c) (iii) and in the scheme under s. 47 (1) of the Act of 1925. I have already stated that, in my view, they are, and for the reasons I have given I would allow the appeal.

DENNING, L.J.: On Jan. 1, 1947, the coal industry was nationalised. In consequence, the National Coal Board became liable to pay workmen's compensation to those men who subsequently became disabled from industrial disease. In many cases the disease had been gradually progressing, unrecognised, for some time before the vesting date. On that account the board now claim from the former colliery owners a contribution towards the compensation which they have to pay the men. They rely for this purpose on the provisions of s. 43 (1) (c) (iii) of the Workmen's Compensation Act, 1925.

I desire to say at once that, in my opinion, the National Coal Board cannot make out their case by reliance on s. 43 (1) (c) (iii) alone. That section was passed in 1925 to enable the various employers in one industry to claim contribution from one another. It did not envisage a state of affairs whereby a whole industry became nationalised, and it did not, therefore, make any provision as to the right of a nationalised industry to claim contribution from the former owners. I am prepared to acknowledge that the words of s. 43 (1) (c) (iii), taken literally, are wide enough to cover the situation, but, nevertheless, no one can possibly suppose that the Parliament of 1925 intended to legislate for this turn

of events which they never had in mind at all. On all sound principles of interpretation the enactment should be restricted to the circumstances contemplated by the Parliament of 1925 and should not be extended to this unanticipated turn of events. If, therefore, the claim of the board to contribution is to be made good, it must, I think, be done by means of something in the Coal Industry Nationalisation Act, 1946—something in it which expressly or impliedly brings s. 43 (1) (c) (iii) into play in the nationalised industry. After all, it was the Parliament of 1946 which created the new situation, and it was that Parliament which should have provided for it. In my opinion, therefore, the solution of this case depends ultimately on the Act of 1946. Before I turn to it, I must, however, draw attention to some of the salient features of the Act of 1925 so as to see what effect the Act of 1946 had on them. The rights and liabilities of workman and employer under the Workmen's Compensation Act, 1925, depend entirely on there being in existence a contract of service between them: see s. 3 of the Act of 1925. If there is no contract of service, but only a contract for services, the Act does not apply. Nor does it apply if there is only a relationship created by statute, such as paupers in a workhouse or trainees in a government instructional centre. There must always be a contract of service. This is so fundamental that the provisions of the Act can be regarded almost as statutory provisions annexed to a contract of service.

Now, one of the distinctive features of a contract of service is that it cannot be assigned on either side. Neither the employer nor the workman can transfer the burden or benefit of it to anyone else. If the employer sells his business, the contracts of service of the workmen do not thereby become transferred to the purchaser. There is no relationship of employer and workman between the purchaser and the men unless and until the men enter into new contracts of service with the purchaser. Then, and then only, is there a new employer. If the sale of the business is unknown to the workmen—so that they do not then enter into new contracts of service with the purchaser—then the old contracts of service remain in existence, and the old employer remains their employer. It follows inexorably that when the Act draws a distinction between the same employer and any other employer it must have contemplated not only that there was a different legal person owning the business in which the workman served, but also a different contract of service. On the one hand, of course, there are the cases where the workman himself leaves his old employer and goes to a new one, in which case it is obvious that there is always a new contract of service with the new employer. On the other hand, there are the cases where the employer sells his business to another, or his business is transferred by law to another as on a dissolution or amalgamation. In those cases it is quite clear from *Nokes v. Doncaster Amalgamated Collieries, Ltd.* (1) that the workman does not, automatically on the sale or transfer, become under a contract of service with the purchaser or transferee. In *Nokes'* case (1) four months had elapsed since the dissolution of the employing company, and, nevertheless, it was held that the workman had not entered into, nor was he working under, a contract with the new owners. That means that there was not the relationship of employer and workman between them. Not until there was some new agreement, express or implied, between the workman and the new owners, would there be a contract of service between them. Not till then would there be a new employer. After a new contract of service was made with the new owners, however, there would be a state of affairs in which the new owner became the new employer and the former owner became the previous employer. If, after the new contract was made, the man within the next twelve months succumbed to an industrial disease which had been developing for a long time, the new employer could claim contribution from the previous employer under s. 43 of the Act of 1925 unless the terms of sale expressly or impliedly excluded it.

Turning now to the Coal Industry Nationalisation Act, 1946, one thing is clear—on the vesting date there were no new contracts of service made by

agreement between the men and the board. All that happened was that the provisions of the old contracts of service—which had previously existed between the men and the colliery owners—were compulsorily and automatically transferred so as to apply thenceforward between the men and the board. Paragraph 2 of sched. II of the Coal Industry Nationalisation Act, 1946, makes it clear that there was a statutory assignment of the benefits and burdens of these contracts from the colliery owners to the board. Neither men nor board were asked to agree to it. Neither of them at that moment had any choice in the matter. Whereas the common law, like a nursing mother, had refused to transfer contracts of service without the consent of those concerned, now this statute came like a tyrant and said that they were to be transferred, whether they liked it or not. It was this statutory assignment which brought the Workmen's Compensation Act, 1925, immediately into play in the nationalised industry. It was nothing else that did it. There were not at that moment new contracts of service on which the workmen's compensation could operate afresh. There was only this statutory assignment of the old contracts. The effect of it, as between the men and the board, was that the board became liable to the workmen for all future accidents or diseases, that is, for all accidents that happened and all industrial diseases that were certified on or after the vesting date, the reason being because the contracts of service took effect for future purposes, in the words of para. 2—" . . . as if the board had been a party to the contract instead of the concern . . ." in which case, of course, the board would have been their employer and liable to pay the compensation payable under the Act of 1925. The assignment, however, left the colliery owner liable to the workman in respect of all past accidents and diseases, the reason being because the assignment only operated for the future, or, again to use the words of para. 2—" . . . so far as the performance thereof is due under the contract on or after the primary vesting date . . ."

So much is clear, but for present purposes it is important to see how this statutory assignment operates when it is necessary to work out the actual compensation payable by the board to the men under the Act of 1925. Suppose an accident takes place after the vesting date and it is necessary to ascertain a man's earnings "in the employment of the same employer" during the previous three years (s. 8 (2) (i) of the Act of 1925), or during the previous twelve months "if he has been so long employed by the same employer" (s. 9 (2) (i)). Is the man to be regarded as if he had been in the employment of the same employer all along, that is, the same employer after the vesting date as before? The answer is, I think, clearly, Yes, because the Act of 1946 says that his contract of service takes effect as if the board had been a party to it instead of the colliery owner, in which case the board would have been the employer from the beginning. This gives a sensible result which the board's accountants themselves adopted in this very case. They took the man's earnings over the previous twelve months which covered a period both before and after the vesting date, and calculated the compensation on that basis. That was, I think, quite right. It carries out the intention of Parliament which plainly was that the workman should be no worse off, and no better off, by reason of the transfer than he was before: compare s. 37 of the Act of 1946. Again, suppose that a workman told the colliery owners when he entered their employment that he had not previously suffered from the industrial disease, whereas, in fact, he had, and after the vesting date he is overtaken by the self-same disease as he had previously denied. Can the board take advantage of that representation so as to say that no compensation is payable? That depends on whether he is to be regarded as if he entered the employment of the board, not on the vesting date, but at the time when he entered the employment of the colliery owners: s. 43 (1) (b) of the Act of 1925. I think it clear that he is to be so regarded, because the contract of service takes effect as if it had been made with the board, in which case he would have entered the employment of the board when he first made the

contract with the colliery owners. This gives a just result and is in accordance with the settled rule that an assignee takes subject to equities and also has the benefit of them.

I realise that we are concerned today with the effect of the statutory assignment, not as between the men and the board, but as between the board and the colliery owners. If, however, I have rightly stated the effect of the statutory assignment as between the men and the board, it throws much light on its effect as between the board and the colliery owners, for, if the colliery owners and the board are to be regarded as the same employer for the purposes of s. 8, s. 9 and s. 43 (1) (b) of the Workmen's Compensation Act, 1925, so also they should be regarded as the same employer for the purposes of s. 43 (1) (c) (iii). The board are the employers who employed the workman at the time when he was certified to be suffering from the disease. The colliery owners cannot be regarded as "any other employers," because the contracts of service with the men take effect as if they had been made with the board, in which case the board would have been the men's employers ever since they started their contracts of service at the colliery for the colliery owners.

That is sufficient to decide the case. I prefer, however, to put the matter on a broader ground. The effect of the statutory assignment by the Act of 1946 of the men's contracts of service was that the provisions of the Workmen's Compensation Act, 1925, applied from Jan. 1, 1947, as between the men and the board, but there is nothing in the Act of 1946 to make the provisions of the Workmen's Compensation Act apply as between the board and the former colliery owners. There is nothing whatever in the Act of 1946 to bring s. 43 (1) (c) (iii) into play in the nationalised industry, and, in the absence of any provision in that behalf, I am of opinion, as I said at the outset, that s. 43 (1) (c) (iii) does not apply as between the board and the former colliery owners. In addition, there are two clear indications that it was not intended to apply between them. First, it was the duty of the colliery owners to insure against their liabilities to the workmen employed by them: see the Workmen's Compensation (Coal Mines) Act, 1934. The benefits of those insurances pass to the board under sched. II to the Act of 1946. I do not know whether those insurances cover liability for industrial diseases which develop after the vesting date, but if they do cover that liability, the board has the benefit of the insurances just as if they had taken out the policies themselves. They can, therefore, recover full indemnity from the insurance companies for their liability to the workmen; and the colliery companies can recover nothing. It is inconceivable that in those circumstances the board should recover contribution from the colliery owners. Secondly, the terms of reference require the global sum payable to the colliery owners to be assessed according to the net annual revenue which the industry as a whole might be expected to earn if there had been no nationalisation. Now the industry as a whole would have had to bear the whole of the workmen's compensation payable to the men who were struck down by industrial disease without getting any contribution from anybody. In assessing the global sum, therefore, the whole cost of the future workmen's compensation has already been debited against the industry as a whole, and it cannot be supposed that Parliament intended that an additional debit should afterwards be made against individual owners by way of contribution. I find myself in full agreement with all that SOMERVELL, L.J., has said on this point.

My conclusion is that the board has no right of contribution from the former colliery owners, for the simple reason that the Act of 1946 does not give it, and it is illegitimate for the board to revert back to the Act of 1925, which was passed for a different purpose altogether. I agree with SOMERVELL, L.J., that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. S. S. Allen* (for the applicants); *Herbert Oppenheimer, Nathan & Vandyk* (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

STANLEY v. COMPTON.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), February 23, 26, March 14, 1951.]

Rent Restriction—Sub-tenancy—Exclusive use of part of flat—Kitchen shared with tenant—Order for possession against tenant—Landlord's right to possession against sub-tenant—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 15 (3)—Landlord and Tenant (Rent Control) Act, 1949 (c. 40), s. 8 (1).

The tenant of a flat which was subject to the Rent Restrictions Acts lawfully sub-let one room, the sub-tenant having the use of the kitchen in common with the tenant. After the landlord had obtained an order for possession against the tenant, he sought possession of the premises occupied by the sub-tenant on the ground that the sub-tenant was a trespasser. The sub-tenant claimed the protection of the Rent Restrictions Acts, 1920 to 1939, basing his claim, *inter alia*, on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and, alternatively, on the Landlord and Tenant (Rent Control) Act, 1949, s. 8 (1).

HELD: (i) on the true construction of s. 15 (3) of the Act of 1920, the protection given by the sub-section to a sub-tenant as against the head landlord applied only where the premises sub-let were a dwelling-house within the meaning of the Rent Restrictions Acts.

Dictum of LORD MACDERMOTT in *Baker v. Turner* ([1950] 1 All E.R. 852), not adopted.

(ii) assuming that the sub-tenant had become the tenant of the landlord "on the same terms as he would have held from the tenant if the tenancy had continued" within s. 15 (3) of the Act of 1920, the sub-tenant could not claim the protection of the Rent Restrictions Acts, 1920 to 1939, as against the landlord since, by reason of the sharing agreement, he could not have claimed their protection as against the tenant.

(iii) as the landlord had not let the rest of the flat after obtaining possession of it and was at present entitled to use the kitchen himself, although he had not exercised his right to do so, the sub-tenant was not entitled to the use of the kitchen "in common with another person . . . not being or including the landlord," within s. 8 (1) of the Act of 1949, and, therefore, the separate accommodation of which he had been granted a sub-tenancy by the tenant was not within the protection of the Rent Restrictions Acts, 1920 to 1939.

FOR THE INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 15 (3), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1019.

FOR THE LANDLORD AND TENANT (RENT CONTROL) ACT, 1949, s. 8 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 13, p. 1103.

G Cases referred to:

- (1) *Baker v. Turner*, [1950] 1 All E.R. 834; [1950] A.C. 401.
- (2) *Neale v. Del Soto*, [1945] 1 All E.R. 191; [1945] K.B. 144; 114 L.J.K.B. 138; 172 L.T. 65; 2nd Digest Supp.
- (3) *Barrell v. Fordree*, [1932] A.C. 676; 101 L.J.K.B. 529; 96 J.P. 278; *sub nom. Fordree v. Barrell*, 147 L.T. 206; Digest Supp.
- (4) *Shackleton v. Greenhalgh*, [1950] 2 All E.R. 1223.

H APPEAL by the sub-tenant from an order of His Honour JUDGE LEON, made at Willesden County Court on Dec. 19, 1950.

After obtaining an order for possession against the tenant of a flat which was subject to the Rent Restrictions Acts, the landlord claimed from the sub-tenant possession of part of the premises, *viz.*, one room, which the tenant had sub-let on terms which included the use by the sub-tenant of the kitchen in common with the tenant. The sub-tenant contended, *inter alia*, that, under

the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), he was entitled, as against the landlord, to the protection of the Rent Restrictions Acts, 1920 to 1939. The learned county court judge held that the sub-tenancy was not within the protection of the Acts and made an order for possession in favour of the landlord.

E. O. F. Stocker for the sub-tenant.

Stranger-Jones for the landlord.

SOMERVELL, L.J.: On Aug. 3, 1949, a Mr. Barratt, who was then the tenant of a flat which was subject to the Rent Restrictions Acts, lawfully sub-let part of the premises, namely, one room, on a weekly tenancy at a rent of 4s. 6d. a week to the sub-tenant who had the use of the kitchen in common with the tenant. The interest of the tenant was determined on May 10, 1950, an order for possession being made against him. The landlord then sought possession of the premises occupied by the sub-tenant on the ground that the sub-tenant was a trespasser, but the sub-tenant claimed the protection of the Rent Restrictions Acts. On the authorities, the latest decision being *Baker v. Turner* (1), while the sub-tenant held his sub-tenancy from the tenant, he could not have claimed as against the tenant the protection of the Rent Restrictions Acts, 1920 to 1939, because he was sharing the kitchen with the tenant. Under the Landlord and Tenant (Rent Control) Act, 1949, s. 7, if that sharing had continued, the sub-tenant could have had protection under the Furnished Houses (Rent Control) Act, 1946, in respect of the amount of his rent, but he could not have claimed the protection which the Rent Restrictions Acts, 1920 to 1939, afford to the tenant of a separate dwelling-house.

The first point which arises is under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), which deals with sub-tenants and provides:

"Where the interest of a tenant of a dwelling-house to which this Act applies is determined, either as the result of an order or judgment for possession or ejection, or for any other reason, any sub-tenant to whom the premises or any part thereof have been lawfully sub-let shall, subject to the provisions of this Act, be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued."

Counsel for the sub-tenant contends that the words "to whom the premises . . . have been lawfully sub-let" apply whether or not the sub-letting was of a dwelling-house within the meaning of the Rent Restrictions Acts. He says that these words would apply if the tenancy was a furnished tenancy, or a tenancy for business purposes, or if, as here, it was a tenancy which, by reason of a sharing provision, was not protected by the Acts. He relies on the fact that there are no express words, such as "of a dwelling-house within the meaning of this Act," or similar words, defining the sub-tenancies with which the sub-section deals, and he points out that there are such words in certain other provisions in the Rent Restrictions Acts, e.g., in the Rent and Mortgage Interest Restrictions Act, 1923, s. 7 (1), the opening words of which are:

"Where part of a dwelling-house to which the principal Act applies is lawfully sub-let, and the part so sub-let is also a dwelling-house to which the principal Act applies . . ."

He also referred to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 4 (1), which contains similar words. There are, however, other sub-sections in the Acts where such words do not appear, but the subject-matter is plainly a dwelling-house within the Acts. It is, of course, always right to

compare the wording of one section with another when there is a dispute as to its scope, but I have come to the conclusion that the learned judge was correct when he decided that s. 15 (3) of the Act of 1920 applies only where the premises sub-let are a dwelling-house within the meaning of the Rent Restrictions Acts.

The first reason for my decision is that, as has been pointed out many times, these Acts are for the protection of homes or dwelling-houses. Business premises are excluded. Also, if a statutory tenant who vacates a dwelling-house has no intention of returning to it although he continues to pay the rent, he loses the protection of the Acts so far as possession is concerned. I would, therefore, lean in favour of construing a provision dealing with sub-tenancies as limited to the type of sub-tenancies with which the Acts as a whole are concerned, viz., sub-tenancies of unfurnished dwelling-houses within the protection of the Acts. It is important also to have in mind that in the latter part of s. 15 (3) of the Act of 1920 it is provided that the sub-tenant

“ . . . shall . . . be deemed to become the tenant of the landlord on the same terms as he would have held from the tenant if the tenancy had continued.”

Those words, I think, are important on the second and alternative ground on which the learned judge based his judgment. He said:

“ Assuming, however, that my opinion on the effect of s. 15 (3) is wrong and that the [sub-tenant] did become a tenant of the [landlord] by virtue of that section, such a tenancy was, in my opinion, still a tenancy to which the Rent Restrictions Acts do not apply, having regard to the decision in *Neale v. Del Soto* (2).”

By that the learned judge meant that, if the sub-tenant were to be regarded as having become the tenant of the landlord on the same terms as he had held from the tenant, as he could not have claimed the protection of the Rent Restrictions Acts against the tenant, he cannot claim their protection as against the landlord.

Before I deal further with the argument of counsel for the sub-tenant, I will say a word about a *dictum* of LORD MACDERMOTT in *Baker v. Turner* (1) on which counsel for the sub-tenant relied. The actual points decided in *Baker v. Turner* (1) do not seem to me applicable to the present case, the first point decided being that, where a tenant of a dwelling-house subject to the Acts had sub-let one room, furnished as a bed-sitting room, and had given the sub-tenant the right to use the kitchen, this did not constitute a sharing on the part of the tenant, and the house was still let to the tenant as a separate dwelling, and, therefore, the landlord was not entitled to recover possession of the house from the tenant. It was also decided that, though the bed-sitting room was sub-let furnished, the tenancy thereof was not deprived of the protection of the Rent Restrictions Acts as against the landlord by the Rent and Mortgage Interest Restrictions Acts, 1939, s. 3 (2) (b), because that sub-section applied only to a separate dwelling let furnished, and *ex concessis* a bed-sitting room with the right to use the kitchen was not a separate dwelling. That decision distinguished *Barrell v. Fordree* (3) in which it was held that, where a tenant had sub-let as a separate dwelling-house certain furnished rooms, the landlord could obtain an order for possession of those rooms. The passage from the speech of LORD MACDERMOTT on which counsel for the sub-tenant relies is where the noble Lord, in considering ([1950] 1 All E.R. 852) the policy of the Acts and the wording of various sections including s. 15 (3) of the Act of 1920, plainly regarded the words “ or any part thereof ” which occur in the sub-section as applying to a part which would not or might not amount to a separate dwelling. That was not the *ratio decidendi*, and, with great respect to LORD MACDERMOTT,

I do not so construe the sub-section. I think the words "or any part thereof" in s. 15 (3) are inserted because frequently a part of premises which are within the Acts are let as, and become, a separate dwelling.

Counsel for the sub-tenant does not suggest that the sub-tenant could have had the protection of the Rent Restrictions Acts as against the tenant, but, now that the tenant has gone, he seeks to rely, among other things, on the provisions of s. 8 of the Landlord and Tenant (Rent Control) Act, 1949, which deals with the effect of accommodation being shared. Section 7, which deals with the case where a tenant shares accommodation with the landlord, gives the tenant the protection of the Furnished Houses (Rent Control) Act, 1946, which applies to rent. Section 8 of the Act of 1949 deals with the position where the tenant shares accommodation with other persons, but not with the landlord, and s. 8 (1) provides that, in that case, the separate accommodation shall be deemed to be a dwelling-house to which the Rent Restrictions Acts, 1920 to 1939, apply, notwithstanding the sharing. It is unnecessary to speculate on the reasons for the distinction, but it may have been thought desirable to encourage those who had houses to allow a sub-tenant to share with them without feeling that the sub-tenant obtained the full protection of the Rent Restrictions Acts. Where, however, a landlord has premises capable of housing two or more groups of people, there is no reason why they should not each have against him the protection of the Rent Acts although there is a sharing of accommodation. Counsel for the sub-tenant contends that the sub-tenant now comes within s. 8 (1) of the Act of 1949, *i.e.*, that he is a person sharing accommodation with another person, but not with the landlord. Alternatively, he contends that there is no sharing because the sub-tenant is the only person in the flat, though he is not entitled to occupy the whole of it. I do not think that the sub-tenant brings himself within s. 8 (1). If he had been left in possession and the landlord had then let in another tenant, giving that other tenant the right to share the kitchen, s. 8 (1) might have come into operation, but that is not the position. Assuming that the sub-tenant is at present lawfully in possession, he has only a right to share the kitchen with his landlord, because that was the only right he had under the original sub-tenancy. The landlord has not exercised the right which he has to use the kitchen, but the tenant is not sharing with someone other than the landlord.

In *Shackleton v. Greenhalgh* (4), a decision of this court, the headnote is:

"A tenant of a dwelling-house to which the Rent Restrictions Acts applied sub-let a part of the house unfurnished, the sub-tenant having the use of the kitchen and other essential parts of the premises in common with the tenant. The tenant vacated the part occupied by her, and the landlord claimed possession of the other part from the sub-tenant. *Held*: section 9 of the Landlord and Tenant (Rent Control) Act, 1949, was intended to protect the tenant against the landlord where the tenant had created a sub-tenancy under which certain parts of the premises were shared, but it was not intended to protect the sub-tenant under such a sub-tenancy against the landlord where the tenancy between the tenant and the landlord had been terminated, and, therefore, the landlord was entitled to possession."

The facts in that case seem to me in all material particulars indistinguishable from the facts in the case now before us, and in that case this court made an order for possession. Counsel for the sub-tenant points out, however, that the argument which he advances under s. 15 (3) of the Act of 1920 does not appear to have been advanced in this court. I am not sure that, even if I took a different view of the argument, it would be right for us to come to a conclusion different in result from that which was come to in *Shackleton v. Greenhalgh* (4), but, for the reasons which I have given, I think that, if that argument had been advanced

in *Shackleton v. Greenhalgh* (4), it would have failed. In my judgment in that case, in dealing with the position before the tenant went out, which is the analogue of the position in the present case before the tenant had the order for possession made against him, I said ([1950] 2 All E.R. 1225):

"It seems to me plain that that was the position of the sub-tenant during the period of Mrs. Wilde's tenancy, and, in my opinion, it would need very plain words to lead to the conclusion that the position of the sub-tenant was improved as the result of the tenant from whom he derived his interest giving up her interest altogether."

JENKINS, L.J., said (*ibid.*, 1226) that he agreed with me:

"... that there is nothing in [s. 9 of the Act of 1949] which constrains the court to place that meaning on it, and I agree that it cannot be intended in a case like the present, after the tenant has vacated the premises and given up the tenancy and the tenant's landlord has stepped into the tenant's shoes as the immediate landlord of the sub-tenant, to put the sub-tenant in a better position as against the landlord than he was in under his contract with the tenant."

We said, in that case, that plain words would be necessary to effect that result, and I find no sufficiently plain words in any of the sections on which counsel for the sub-tenant in the case now before us relies to justify us in coming to the conclusion that the sub-tenant is now in a better position than he was in under his contract with the tenant. For these reasons I think the appeal should be dismissed.

SINGLETON, L.J.: I agree.

DENNING, L.J.: I remember well that in the housing shortage between 1920 and 1930 no one thought that, when part of a house was sub-let unfurnished, the sub-tenant lost the protection of the Rent Restrictions Acts because he shared the kitchen with the tenant. *Neale v. Del Soto* (2), however, shows that the practitioners of that earlier time were wrong, and that the sub-tenant of rooms in a house subject to the Acts loses the protection of the Acts if he shares a kitchen with the tenant, to the extent, at any rate, that the tenant can evict the sub-tenant on giving a proper notice to quit. That is the law binding on this court today, and the question is: What is the position of such a sub-tenant when the tenant goes out? Is he protected as against the head landlord? Counsel for the sub-tenant contends that he is protected by reason of s. 15 (3) of the Act of 1920. The effect of s. 15 (3), as I have always understood it, is that, if a sub-tenant is a protected sub-tenant, then, when the tenant goes out, he becomes a direct tenant of the head landlord on the same terms as he held before. If, therefore, he was previously a protected statutory or contractual sub-tenant, he becomes a protected head tenant, statutory or contractual, as the case may be, holding directly from the head landlord on the same terms as he had previously held from the tenant. The sub-section only applies, however, to protected sub-tenancies. It does not apply to furnished sub-tenancies, nor to business sub-lettings because they are not protected. Therefore, if this sub-letting was unprotected by reason of sharing, s. 15 (3) does not apply.

In the course of the argument I suggested that the law in a sharing case has been amended by the Act of 1949 so as to render this sub-letting a protected sub-tenancy as against the head landlord. It seemed to me that s. 9 of the Act of 1949 covered the position exactly. It envisages (a) a landlord and (b) a sub-tenant sharing certain accommodation, and it provides that, as against the landlord, the rooms occupied by the sub-tenant are to be treated as a dwelling-house to which the Acts apply, but preserves (by the words in parenthesis) the right of the tenant to get rid of the sub-tenant. Counsel for

the sub-tenant then drew our attention, however, to *Shackleton v. Greenhalgh* (4), which decides that the protection afforded by this section as against the landlord only avails the tenant and not the sub-tenant. That decision binds this court and shows that the view which I suggested was wrong. It follows that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Seifert, Sedley & Co.* (for the sub-tenant); *H. R. Hodder & Son* (for the landlord).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

NOTE.

R v. YEO.

[MANCHESTER ASSIZES (Gorman, J.), March 1, 1951.]

Criminal Law—Evidence—Wife—Charge against husband of sending letter threatening to murder her—Admissibility of wife's evidence—Offences against the Person Act, 1861 (c. 100), s. 16—Criminal Evidence Act, 1898 (c. 36), s. 4, schedule.

On Mar. 1, 1951, at Manchester Assizes the prisoner, Thomas Yeo, was indicted on a charge of maliciously sending to his wife, Mary Ann Yeo, "knowing the contents thereof, a letter or writing, threatening to murder her," contrary to s. 16 of the Offences against the Person Act, 1861.

On a question as to the competence of the wife as a witness for the prosecution,

GORMAN, J., ruled that the evidence of the wife was not admissible. The wife could not be called as a witness under s. 4 of the Criminal Evidence Act, 1898, because s. 16 of the Act of 1861 was not an enactment mentioned in the schedule to the Act of 1898. Nor was the wife a competent witness at common law as in a case where the husband was indicted for personal injury to her: see **ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE, AND PRACTICE**, 32nd ed., p. 478; for there was no authority for saying that a threat to murder was a "personal injury" to the wife.

No other evidence having been offered by the prosecution, on the direction of the judge the jury returned a verdict of Not Guilty and the prisoner was discharged.

P. C. S. Kershaw for the Crown.

B. H. Gerard for the prisoner.

Solicitors: *P. B. Dingle*, town clerk, Manchester (for the Crown); *Shasha & Hanwell* (for the prisoner).

M.D.C.

ADAMS v. SUNDAY PICTORIAL NEWSPAPERS (1920), LTD.
AND ANOTHER.

[COURT OF APPEAL (Somervell and Denning, L.JJ.), October 5, 6, 1950.]

Libel—Interrogatory—Fair comment—Malice—Interrogatories as to defendants' sources of information or grounds of belief—R.S.C., Ord. 31, r. 1A.

A The plaintiff brought an action for damages for libel in respect of an article printed and published by the first defendants and written by the second defendant. The article stated, *inter alia*, that the plaintiff had boasted that "he sends many letters to anti-British newspapers and politicians in the United States 'exposing the plight of the unemployed' and says that they use his outpourings for propaganda against Marshall Aid." The

B defendants pleaded fair comment made *bona fide* on a matter of public interest. The plaintiff, by his reply, pleaded that the defendants were actuated by malice, and he applied for leave to administer to the defendants ten interrogatories, of which the first, second, third and fifth were in the following terms: "1. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge sent any letter or letters to any and what anti-British newspaper or newspapers and/or politician or politicians in the United States of America? If yea, identify the said letter or letters. 2. Before you published the words complained of or caused them to be published did you know of any and what anti-British newspaper or newspapers politician or politicians having on any and what date or dates in any and what way or ways used any and what utterances of the plaintiff for propaganda against Marshall Aid? 3. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge used on any and what date or dates in any and what way or ways the plight of the unemployed for an attack on Britain? 5. What steps and/or precautions did you take and what inquiries did you make before publishing the words complained of or causing them to be published to ascertain whether the expressions of opinion contained therein were founded on fact?"

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HELD: in substance, the interrogatories were as to the defendants' sources of information or grounds of belief, and, under R.S.C., Ord. 31, r. 1A, must be disallowed.

FOR R.S.C., ORD. 31, r. 1A, see THE ANNUAL PRACTICE, 1950, Vol. 1, p. 507.

APPEAL by the plaintiff from an order of PARKER, J., in chambers, dated July 11, 1950, dismissing an appeal by the plaintiff from an order of Master HORRIDGE, who had disallowed certain interrogatories.

The action was brought in respect of an alleged libel published in a newspaper, the first defendants being the proprietors, printers and publishers of the newspaper, and the second defendant being the author of the words complained of. The article was headed "A little man who does a great deal of harm" and stated, *inter alia*, that the plaintiff, the honorary secretary of the Bolton Unemployed Workers' Committee, "claims to be the spokesman of the unemployed in Bolton, Lancashire's prosperous cotton and engineering town. He is not very important there, and I would not bother you with his activities if he confined them to Lancashire. But [the plaintiff] boasts that he sends many letters to anti-British newspapers and politicians in the United States, 'exposing the plight of the unemployed,' and says that they use his outpourings for propaganda against Marshall Aid . . . [The plaintiff] agreed . . . that these unfortunates [*i.e.*, certain disabled unemployed in Bolton] would be unsuitable for heavy work. But he could see nothing wrong in using their plight for his damaging attack on Britain . . ." The plaintiff pleaded that by these words the defendants meant, and were understood to mean, that he was an unpatriotic

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man who deliberately misrepresented to anti-British newspapers and politicians in the United States of America the number and plight of unemployed persons in Great Britain, well knowing that he might thereby cause Marshall Aid to cease or to diminish and that this would bring about widespread distress and increase unemployment in this country, and that the plaintiff was, therefore, utterly unfit to continue in his office or to associate with right-thinking people. The defendants did not admit that the words complained of meant or were understood to mean what was set out in the innuendo, and they pleaded justification and fair comment made *bona fide* and without malice on a matter of public interest. By his reply, the plaintiff pleaded that the words complained of were printed and published with express malice. The plaintiff applied to be allowed to administer ten interrogatories of which the first five were as follows:

"1. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge sent any letter or letters to any and what anti-British newspaper or newspapers and/or politician or politicians in the United States of America? If yea, identify the said letter or letters.

"2. Before you published the words complained of or caused them to be published did you know of any and what anti-British newspaper or newspapers politician or politicians having on any and what date or dates in any and what way or ways used any and what utterances of the plaintiff for propaganda against Marshall Aid?

"3. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge used on any and what date or dates in any and what way or ways the plight of the unemployed for an attack on Britain?

"4. When you published the words complained of or caused them to be published did you believe that the said words were true?

"5. What steps and/or precautions did you take and what inquiries did you make before publishing the words complained of or causing them to be published to ascertain whether the expressions of opinion contained therein were founded on fact?"

Of the first five interrogatories, interrogatory No. 4 was allowed, but the other four interrogatories were disallowed. It was now contended for the plaintiff that R.S.C., Ord. 31, r. 1A, did not prohibit the administering of these four interrogatories since they were directed to ascertaining the actual information and knowledge of the defendants as distinct from the sources of their information and their actual belief, and that the answers would be vital to the plaintiff's case on the issue of express malice and to dispose fairly of the cause or matter.

Cartwright Sharp, K.C., and *Travers* for the plaintiff.

Milmo for the defendants.

SOMERVELL, L.J.: This is an appeal by the plaintiff from an order of PARKER, J., affirming a decision of Master HORRIDGE disallowing certain interrogatories. It is with four only of those interrogatories that we are concerned in the present appeal.

By the Rules of the Supreme Court (No. 1), 1949 (S.I., 1949, No. 761/L.7) a new rule was added to R.S.C., Ord. 31, namely, r. 1A, which reads as follows:

"In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief shall be allowed."

Admittedly, the rule disallows many interrogatories that were previously allowed. The question raised in the present case is whether that rule applies to the interrogatories in dispute here,

The plaintiff claims damages for libel against the proprietors, publishers and printers of the newspaper and the second defendant, who was the writer of an article which refers to the plaintiff and was headed: "A little man who does a great deal of harm." The article states that the plaintiff

A "claims to be the spokesman of the unemployed in Bolton, Lancashire . . . [The plaintiff] boasts that he sends many letters to anti-British newspapers and politicians in the United States 'exposing the plight of the unemployed,' and says that they use his outpourings for propaganda against Marshall Aid . . ."

There is a reference in the article to the nature of the unemployed whom the plaintiff represented. It was suggested that most of them were men who suffered from some disability and the writer says:

B "Adams [the plaintiff] agreed with me that these unfortunates would be unsuitable for heavy work. But he could see nothing wrong in using their plight for his damaging attack on Britain."

C The defence is a defence of justification and fair comment in the ordinary form. It is not disputed by counsel for the plaintiff that R.S.C., Ord. 31, r. 1A, applies to the present proceedings, that is to say, that any interrogatory which fell within its scope would be rightly disallowed.

I will read the first interrogatory:

D "1. Before you published the words complained of or caused them to be published had the plaintiff to your knowledge sent any letter or letters to any and what anti-British newspaper or newspapers and/or politician or politicians in the United States of America?"

E The second interrogatory is on similar lines. In my view, having regard to the words used in the article, the learned judge was entitled to disallow interrogatories Nos. 1 and 2 without reference to the new rule. Counsel's answer to that was based on the innuendo pleaded, which put a special meaning on the words complained of. Whether an innuendo may be put on the words so as to give them a meaning other than their natural meaning, thereby extending the scope of discovery, does not fall to be decided at the moment. In any case, I think both interrogatories fall within the rule, since, in reality, they concern the defendants' source of information.

F With regard to interrogatory No. 3, again, I think, the learned judge could have disallowed it on ordinary principles, but, assuming that apart from the new rule, it was admissible on the wording of the article complained of and on the pleadings, I think, it falls within the new rule. This interrogatory seems to me to be based on the view that the writer of the article is saying that the plaintiff used the unemployed's plight for an attack on Britain, and it plainly asks the defendants for either the source of their information or the grounds of their

G belief.

H Interrogatory No. 5 is plainly within the rule. To answer it properly the defendants must state what steps they took. If the author of the article had written letters asking questions, he would have to set out the persons to whom he had written and all the questions which he had asked. That would fall within the territory which the rule covers, namely, that a defendant is not to be interrogated about the source of his information.

Counsel for the plaintiff pointed out that the issue of malice is raised here by the reply. The interrogatories now forbidden by R.S.C., Ord. 31, r. 1A, were usually directed to that issue, and if the defendant answered: "No, I did not take any steps," that would, or might, assist the plaintiff in showing malice. It does not, however, assist the court in deciding whether the interrogatory is or is not within the new rule because the same consideration would apply to an interrogatory plainly within the rule. If, in express terms, the defendant

were asked: What were your sources of information, and the answer was: I had none, that answer would assist the plaintiff, but an interrogatory of that kind would be plainly prohibited by the rule. For these reasons I think that the appeal fails.

DENNING, L.J.: I agree. At one time it was common practice for interrogatories to be allowed in the form which is set out in GATLEY ON LIBEL (3rd ed.), pp. 845, 846. Those interrogatories used to be permitted to establish malice when there was a defence of fair comment, but they were never of any value. At any rate, in the course of some years' experience I never found them of any use. They were simply a nuisance and ran up costs. The truth is that the burden on the defendant who pleads fair comment is already hard enough. If he proves that the facts were true and that the comment, objectively considered, was fair—that is, if it was fair when considered without regard to the state of mind of the writer—I should not have thought that the plaintiff had much about which to complain. Nevertheless, it has been held that the plaintiff can still succeed if he can prove that the comments, subjectively considered, were unfair because the writer was actuated by malice. As to this, I would say that, if the plaintiff has any evidence of malice, let him call it at the trial. If he has no evidence, or insufficient evidence, I do not see why the court should assist him by allowing him to cross-examine the writer before the trial, for that is what these interrogatories come to. The new rule clearly means that interrogatories such as these are no longer to be allowed, and disallowed they must be.

It was said, quite rightly, that the rule does not in express terms disallow interrogatories as to belief, and for that reason the master and the judge did allow interrogatory No. 4 which asked whether the defendant believed that the words were true. I very much doubt, however, whether such an interrogatory helps at all. It might properly be disallowed because Ord. 31, r. 2, says:

“ . . . leave shall be given as to such only of the interrogatories as shall be considered necessary either for disposing fairly of the cause or matter or for saving costs.”

It seems to me that since the new rule all these common-form interrogatories are gone. The present appeal is, in effect, an attempt to re-establish them, and I agree that it should be dismissed.

Appeal dismissed.

Solicitors: *Robinson & Bradley* (for the plaintiff); *Godden, Holme & Co.* (for the defendants).

[Reported by C. N. BEATTIE, ESQ., Barrister-at-Law.]

Re DUFF'S SETTLEMENTS TRUSTS. NATIONAL PROVINCIAL BANK, LTD. v. GREGSON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 8, 21, 1951.]

Company—Share premium account—Distribution to shareholders—Whether capital or income in hands of payee—Companies Act, 1948 (c. 38), s. 56 (1), (2) (3).

A *Settlement—Capital or income—Shares in limited company—Payments to shareholders out of share premium account—Companies Act, 1948 (c. 38), s. 56 (1), (2), (3).*

The trustee of certain settlements held as part of the funds subject thereto 33,947 £1 shares in H., Ltd. From time to time H., Ltd., had allotted certain of its shares at a premium, and the aggregate amount of the premiums so received was, in conformity with the Companies Act, 1948, s. 56 (1), paid to its share premium account. In 1950 the company resolved to pay to the holders of the company's shares 2s. 6d. per share out of the share premium account, and on Mar. 27, 1950, the reduction of the account was sanctioned by the court. The trustee now raised the question whether the moneys so received in respect of the shares held by him constituted capital or income of the various trust funds.

C HELD: section 56 of the Act of 1948 in effect created a new class of capital of a company, not being share capital, but not being distributable as income any more than any other capital asset, and, therefore, the moneys received by the trustee were capital assets.

Dictum of EVE, J., in Re Bates ([1928] Ch. 687), applied.

D *Dictum of LORD RUSSELL in Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* ([1930] A.C. 733), considered.

AS TO THE COMPANIES ACT, 1948, s. 56, see HALSBURY, 1949 Edn., Vol. 5, p. 163, para. 289; and see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 508.

Cases referred to:

E (1) *Drown v. Gaumont-British Picture Corp., Ltd.*, [1937] 2 All E.R. 609; [1937] Ch. 402; 106 L.J.Ch. 241; 157 L.T. 543; Digest Supp.

(2) *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.*, [1930] A.C. 720; 144 L.T. 65; *sub nom. Re Hill (Richard)*, 99 L.J.P.C. 191; Digest Supp.

F (3) *Re Doughty*, [1947] 1 All E.R. 207; [1947] Ch. 263; 176 L.T. 173; 2nd Digest Supp.

(4) *Re Sechiari*, [1950] 1 All E.R. 417.

(5) *Re Bates*, [1928] Ch. 682; 97 L.J.Ch. 240; 139 L.T. 162; Digest Supp.

(6) *Bouch v. Sproule*, (1887), 12 App. Cas. 385; 56 L.J.Ch. 1037; 57 L.T. 345; 40 Digest 665, 2035.

G ADJOURNED SUMMONS to determine whether, having regard to the Companies Act, 1948, s. 56, moneys distributed by a company to its shareholders out of the company's share premium account constituted capital assets or income in the hands of the trustee of certain settlements.

J. V. Nesbitt for the plaintiff, the trustee of the settlements.

Raymond Walton for the first three defendants, interested in income.

H *Harold Lightman* for the remaining defendants, interested in capital.

Cur. adv. vult.

Mar. 21. HARMAN, J., read the following judgment. By this originating summons the plaintiff, as trustee under the several settlements mentioned in the heading to the summons, seeks the direction of the court in connection with a sum of approximately £4,000 which it has received as such trustee from a company called Highfields (Ceylon), Ltd. The question is whether the sum so in the plaintiff's hands should be treated as income or capital. The first

three defendants are interested to argue that it is income, and the remainder that it is capital. The exact interests of the defendants do not matter for the present purpose.

Highfields (Ceylon), Ltd., was a company having a share capital divided into £1 shares of which 33,947 were at the relevant time and still are registered in the plaintiff's name as trustee of one or other of the before mentioned settlements. This company had, it appears, from time to time allotted certain of its shares at a premium and the aggregate amount of these premiums was, in obedience to the Companies Act, 1948, s. 56, transferred to its share premium account. In 1950 the amount standing to the credit of that account was £254,645 12s. 6d. Section 56 of the Act of 1948 provides:

"(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called 'the share premium account,' and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the share premium account were paid up share capital of the company. (2) The share premium account may, notwithstanding anything in the foregoing sub-section, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares, in writing off—(a) the preliminary expenses of the company; or (b) the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or in providing for the premium payable on redemption of any redeemable preference shares or of any debentures of the company. (3) Where a company has before the commencement of this Act issued any shares at a premium, this section shall apply as if the shares had been issued after the commencement of this Act . . ."

In 1950 a special resolution of the company was passed resolving to pay to the holders of each of the fully paid shares in the company 2s. 6d. per share out of the share premium account, thus reducing that account by £50,929 2s. 6d. A petition was presented to this court to sanction that reduction, and it was duly sanctioned by an order made by myself on Mar. 27, 1950. As a result, the sum here in question has been paid to the plaintiff and represents 2s. 6d. a share in respect of the trust share holding.

It is argued for those interested in income that s. 56 made no alteration in the nature of the sums received by companies as premiums on the allotment of their shares. It is well known that before the Act of 1948 these sums ranked as profits available for payment of a dividend, as, indeed, is shown by the decision of CLAUSON, J., in *Drown v. Gaumont-British Picture Corp., Ltd.* (1). The headnote to the report reads as follows:

"There is no principle of law which prevents a company from paying dividends out of assets representing premiums received on the issue of shares."

It is argued that the only effect of s. 56 is to make the process of distribution subject to the sanction of the court. It was pointed out that s. 56 (2) allows the premium account to be used for certain limited purposes, for instance, the paying up of bonus shares and in writing off certain expenses. It is also pointed out that s. 56 (1) causes the reduction provisions of the Act to apply

"as if the share premium account were paid up share capital of the company."

This must mean, it is said, that the account, though to be treated in this respect as paid up capital, is not, in fact, capital, but remains in the company's hands

money available, subject to the limitations imposed by the section, for distribution as dividend.

It was also argued for those interested in income that, whatever the share premium account might be in the hands of the company, moneys made distributable out of it were income in the hands of the recipient, and it was pointed out that this is often so in cases where a company returns to its shareholders a capital profit on which neither the company nor the recipient shareholder will have to pay income tax because of its capital nature. None the less, it is now well settled, and has been since the celebrated case of *Hill (R. A.) v. Permanent Trustee Co. of New South Wales, Ltd.* (2), that this is the law: cf. *Re Doughty* (3), and, for a striking example recently, *Re Sechiari* (4).

LORD RUSSELL OF KILLOWEN, in delivering the opinion of the Privy Council in *Hill's* case (2), made certain observations which might be taken, if read out of their context, as favourable to the views put forward by those interested in income, but neither LORD RUSSELL nor anyone else who has dealt with this subject has considered s. 56 or the new type of asset which has been created by it, and it seems to me that, if that section be held in mind, certain modifications of the principles laid down in *Hill's* case (2) may be required. For instance, the first two points laid down by LORD RUSSELL were as follows ([1930] A.C. 730):

(1) A limited company when it parts with moneys available for distribution among its shareholders is not concerned with the fate of those moneys in the hands of any shareholder. The company does not know and does not care whether a shareholder is a trustee of his shares or not. It is of no concern to a company which is parting with moneys to a shareholder whether that shareholder (if he be a trustee) will hold them as trustee for A. absolutely or as trustee for A. for life only. (2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus,' or any other name, it still must remain a payment on division of profits . . ."

He then said (*ibid.*, 733):

"There is no decision in the courts of this country which justifies the view that a person beneficially entitled in remainder to shares in a limited company is entitled to any interest in profits lawfully distributed during the lifetime of the tenant for life by a company not in liquidation, and such a view is, their Lordships think, contrary to principle."

It will be observed that the moneys mentioned under point (i) are moneys available for distribution among the shareholders and that does not apply to moneys standing to the credit of the share premium account. Again, the authorised reduction of capital mentioned in point (ii) is a reference, I think, to share capital, but it is no longer true that there is not any means other than a reduction of share capital of parting with moneys to shareholders except by way of dividing profits. Section 56, in fact, supplies a new way exactly analogous to, but not the same as, the reduction of share capital. Section 56 is a novelty which seems to me to create a new class of capital of a company, not being share capital it is true, but not being distributable as income any more than any other capital asset. It seems to me that on a winding-up the surplus moneys in the share premium account would be returned to the shareholders as capital and that so long as the company is a going concern these same moneys can never be returned to the shareholders except through the medium of a reduction petition, or, in other words, except under exactly the

same conditions as those under which any other capital asset can reach the shareholders' hands.

I must, I think, refer shortly to the well-known case of *Re Bates* (5), a decision of EVE, J., which has received the highest approval. He said ([1928] Ch. 687):

"In this state of affairs it [the money] was a fund which the company could treat as available for dividend and could distribute as profits, or having regard to its power to increase capital could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalised it retained its characteristics of a distributable profit, and on the authority of the passages which have been read from LORD HERSCHELL's speech in *Bouch v. Sproule* (6), the only method by which a company with power to increase its capital can capitalise such a fund is to increase its capital by an amount equivalent to the sum sought to be capitalised. No such procedure was adopted here, and in my opinion no change in the character of the fund was brought about by the company's expressed intention to distribute it as capital. It remained an uncapitalised surplus available for distribution, either as dividend or bonus on the shares, or as a special division of an ascertained profit derived, not from the trading of the company, but from a fortunate appreciation in value of some or other of its capital assets, and in the hands of those who received it it retained the same characteristics."

The fund in the present case was not one which the company could treat as available for dividend or could distribute as profits, though it could, it is true, declare a bonus and apply the money to paying up the bonus shares. These would, however, become a capital asset. It is true also that the share premium account itself represents a profit in the sense that the company got more for its shares than their nominal value. Nevertheless, this is not *distributable* profit, and, in my judgment, the observation of LORD RUSSELL in *Hill's* case (2) ([1930] A.C. 733), which I have already read, needs modification if one reads it having in mind s. 56.

It was further argued that the return of this money to the shareholders did not reduce the share capital, and, therefore, could not be a reduction of capital, and, if not that, must necessarily be the payment of a dividend. I do not think this dilemma now exists. A share in a company, as was pointed out for those interested in capital, has been described as "a bundle of rights," and one of those rights since the passing of the Act of 1948 has been to maintain the share premium account inviolable except to the extent to which it may be distributed by virtue of the section itself. It follows, in my judgment, that when the share premium account is reduced in accordance with the section there has been a reduction in the value of every share, and it is, therefore, right to say that there has been a reduction of capital though it is not share capital. The section has, in fact, produced a novel type of capital, distributable only by the same process as any share capital, and having, in my judgment, both in the hands of the company and in the hands of those who receive it as a result of a reduction petition, the quality of capital. I shall, therefore, answer the first question on the originating summons by declaring that this sum ought to be treated as capital to be added to the fund.

Order accordingly.

Solicitors: *Slaughter & May* (for the plaintiff and the first three defendants); *Peake & Co.* (for the remaining defendants).

[Reported by H. McL. MORRISON, ESQ., Barrister-at-Law.]

ANGLO-CYPRIAN TRADE AGENCIES, LTD. v. PAPHOS WINE INDUSTRIES, LTD.

[KING'S BENCH DIVISION (Devlin, J.), March 20, 1951.]

Costs—Disallowing costs of successful plaintiff—Breach of contract—Goods supplied alleged to be valueless—Full purchase price claimed—Statement of claim amended by leave during trial to cover cost of remedying trivial defect in goods—Plaintiffs unsuccessful on main claim, but successful on amendment—Right of defendants to costs.

Pleading—Damage—Special damage—Breach of contract—Sale of goods—Goods supplied alleged to be valueless—Full purchase price claimed—Alternative claim where goods not valueless, but depreciated.

In their statement of claim in an action for damages for breach of contract the plaintiffs pleaded in effect that goods sold to them by the defendants were valueless and claimed the full purchase price which amounted with certain other items to £2,028. At the trial evidence was given by the defendants that the defect in the goods could be easily removed at a cost of £52, and the plaintiffs were permitted to amend their statement of claim to cover damage under this head, no question as to costs being raised at the time. The plaintiffs failed on their main claim, but the judge held that there was in law a breach of contract and gave judgment for the plaintiffs for the sum of £52 on the amendment to their statement of claim. On the question of costs,

HELD: the amendment to the statement of claim was not a mere technicality but a matter of substance, as, if the plaintiffs had pleaded its terms in their original statement of claim, the defendants might have settled the action or paid the £52 into court, and, therefore, the plaintiffs' success on the amendment should not affect the order for costs which would have been made if the judgment had been given on the original pleadings; apart from the amendment, although the plaintiffs would have been entitled to nominal damages, they could not be regarded as "successful" plaintiffs as they could not have established anything which was of value to them; and, therefore, the court had a discretion to award the costs of the action to the defendants.

Per DEVLIN, J.: There exists an impression in some circles that, when pleading special damage, one can plead a certain figure and then set up a lower figure in court and seek to justify it. In my view, that is not the proper way to plead special damage . . . If the plaintiff wishes to say that the goods are valueless, the special damage will be pleaded in the way in which it was done in this case [*viz.*, the plaintiff will plead that the goods are valueless and that he is, therefore, entitled to recover their full value], but, if he also wishes to say that, if they are not valueless, they have depreciated substantially in value, then it is his duty to plead in the alternative that they have depreciated in value and to set out the method of calculation by which he arrives at the figure claimed in the alternative so as to enable the defendant to know what is the case against him and to obtain evidence for his defence. If, on the other hand, the goods have depreciated so little that the measure of damage is to be arrived at by ascertaining what would be the small cost of putting them right, still more is it necessary to put that in as a further alternative so that the defendant may know what he has to meet.

AS TO THE DISCRETION OF THE JUDGE AS TO COSTS, see HALSBURY, Hails-ham Edn., Vol. 26, pp. 96, 97, paras. 181-183; and FOR CASES, see DIGEST, Practice, pp. 854-858, Nos. 3995-4036.

ACTION for damages for breach of a contract for the sale of goods.

In their statement of claim the plaintiffs pleaded that wine sold to them by the defendants was unsound, unmarketable and of inferior quality, and in the particulars of special damage they claimed the full purchase price which amounted with other outgoings to £2,028. By their defence the defendants denied that the wine was defective. The action was heard on Mar. 15 and 16, 1951, and the defendants contended that the taint which the wine had suffered was so slight that it could easily be put right as a matter of commerce, and, therefore, there was no breach of contract as there was no real defect in the goods. Alternatively, they contended that the defect was so small that it could be compensated for by trivial damages, *viz.*, the cost of removing the defect. During the trial **DEVLIN, J.**, granted an application by the plaintiffs to amend their pleading to cover damages on this basis, no question being raised at that stage as to costs. The learned judge found as a fact that the defect in the wine was trivial and could be remedied at a cost of £52, and he held that that was the amount of damages to which the plaintiffs were entitled. The defendants applied for the costs of the action. The report deals only with the question of costs.

E. V. Falk for the plaintiffs.

G. R. F. Morris for the defendants.

DEVLIN, J.: In this case the plaintiffs have failed on the main part of their claim, which was for £2,028 as damages in an action for the breach of a contract for the sale of goods, but they have recovered £52 under a paragraph which I permitted to be added to the statement of claim by way of amendment during the course of the trial. But for that paragraph, they would have recovered only nominal damages. Accordingly, I have been invited by counsel for the defendants to say that the defendants have been substantially successful and that I ought to award to them the costs of the action.

Treating the matter in the first instance as being a case in which, on the pleading as originally drafted, the plaintiffs could have recovered only nominal damages, counsel for the plaintiffs contends that, even if I did not think that the plaintiffs were entitled to their costs, it would be wrong for me to give the costs to the defendants inasmuch as the plaintiffs have been successful in establishing a legal right. It is, however, conceded that no principle has been laid down by any superior court which would make it wrong for me to award costs to the defendants if I thought it proper to do so. I cannot accept the contention of counsel for the plaintiffs. No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful, and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a "successful" plaintiff. In certain cases he may be, *e.g.*, where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case.

In this case the defendants relied merely on one point which was directed both to the substance and to damages. They said that the taint which the wine—the subject-matter of the contract—had suffered was very slight and could easily be put right as a matter of commerce, and, therefore, there was no real defect in the goods and no breach of contract. They said further that, if they were wrong about this, the defect in the goods was so trivial that it could be compensated for by trivial damages. In substance, therefore, the defence consisted of one point, although it was addressed to alternative contentions of the plaintiffs. I found that, though it was a good point in fact,

it was not right to say in law that there was no breach of contract, and, therefore, I held that trivial damages ought to follow. The plaintiffs, therefore, have not established anything which is of the least value to them, and, in my judgment, they are not to be regarded as successful plaintiffs. If the matter stopped there, therefore, I should treat the defendants as having succeeded and award them the costs of the action.

- A By virtue of the amendment to the statement of claim, the plaintiffs recovered the sum of £52. If their original pleading had contained the amended claim, while I do not suppose that I could have given them the costs of the action since they recovered only £52 when their main claim was for a much larger sum, I do not think that it would have been right to order them to pay all the costs of the defendants. Accordingly, I have to consider whether the
- B amendment was a necessary one, or whether, as counsel for the plaintiffs has submitted, it was merely a technical amendment which ought to be disregarded when one comes to consider the question of costs. I think that it was a necessary amendment and that, far from being a mere technicality, it was a matter of the first importance. The claim, as pleaded, set out in effect that the wine
- C of its price on the basis that it was valueless. The claim that has succeeded is that the wine is commercially sound except for the defect that could easily have been removed, and that the plaintiffs are entitled to receive as damages only the cost of removing the defect.

- There exists an impression that, when pleading special damage, one can plead a certain figure, arrived at in some way, and one can then set up
- D any lower figure in court and seek to justify it. In my view, that is not the proper way to plead special damage, and, if it were persisted in to its logical conclusion, it would reduce to a farce the pleading of special damage, of which particulars have to be given. It would never be necessary to do more than to plead that the goods were valueless and then say in court: "They may not have been valueless, but they were only worth seventy-five per cent., or
- E some other percentage, of their true value." Such a practice would not only reduce the giving of particulars of special damage to a farce, but would prevent what is one of the objects of the giving of those particulars, *viz.*, to enable the defendant to know what is really being claimed so that he may, if he so desires, make a payment into court. In this case, if the plaintiffs, in their statement
- F of claim, had claimed as damages only the amount which they have recovered, their claim would, I imagine, have been met either by a settlement of the action or by a payment into court, as it was on the evidence of the defendants that the claim for £52 was ultimately made out and proved. I do not mean that one must scrutinise each set of particulars of special damage as a matter of figures. If, for example, a market price is pleaded as being £5, that figure may be justified by evidence of a market price of £4 10s. to £5 10s. No one expects
- G minute accuracy, but, in my view, the special damage which is pleaded should make quite clear to the other side what measure of damage is being relied on. If the plaintiff wishes to say that the goods are valueless, the special damage will be pleaded in the way in which it was done in this case, but, if he also wishes to say that, if they are not valueless, they have depreciated substantially in value, then it is his duty, I think, to plead in the alternative
- H that they have depreciated in value and to set out the method of calculation by which he arrives at the figure claimed in the alternative, so as to enable the defendant to know what is the case against him and to obtain evidence for his defence. If, on the other hand, the goods have depreciated so little that the measure of damage is to be arrived at by ascertaining what would be the small cost of putting them right, still more is it necessary to put that in as a further alternative. Accordingly, when I allowed the amendment, had I been invited to allow it only on the term that it should not affect my

order as to costs, I should have made that term. It has, however, become general, and it is, I think, convenient, when an application is made for leave to amend, to leave over questions of costs to be discussed afterwards, the defendant not prejudicing his right to rely on whatever flows from the effect of the amendment. That is what was done in this case, and I think, therefore, that the success on the amendment ought not to make any difference to the order which I would have made if the pleadings had stayed as they were originally and judgment had been entered accordingly.

With regard to the first point with which I have dealt, *viz.*, the question of costs where a plaintiff has recovered merely nominal damages, I wish to make a further observation. Where a defendant thinks that nominal damages may be recovered and pays into court one shilling, or 20s., or 40s. (which the plaintiff, normally, does not take out), and only nominal damages are in fact recovered, the defendant is entitled to his costs. If the contention of counsel for the plaintiffs were right, *viz.*, that a plaintiff who has recovered nominal damages has a *prima facie* right to obtain his costs, or, at any rate, not to pay the defendant's costs, it would be putting a premium, so to speak, on what is in the case of a nominal payment into court, hardly more than a mere matter of ritual. Accordingly, I shall accept the application of the defendants in this case. There will be judgment for the plaintiffs for the sum which I have awarded, but the costs of the action will be paid by the plaintiffs to the defendants.

Order accordingly.

Solicitors: *Joynson-Hicks & Co.* (for the plaintiffs); *Bischoff & Co.* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

NOTE.

THE GEE-WHIZ.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Willmer, J.), January 29, 1951.]
Shipping—Maritime lien—Wages and disbursements—National insurance contributions—Agreement by employer to pay—Inclusion in wages.

MOTION for judgment in default of appearance.

The plaintiff, Edwin William Skeldon, claimed from the defendant, the owner of the motor vessel *Gee-Whiz*, the sum of £121 12s. 8d. for wages due from, and disbursements made on behalf of, the defendant while the plaintiff was acting as master of the *Gee-Whiz*. At the hearing, the plaintiff alleged that the defendant had agreed to pay the plaintiff's national insurance contributions and that a sum of £14 1s. 7d. remained unpaid in respect thereof. He contended that these contributions should be regarded as part of his wages and asked for leave to amend the writ without re-service, so as to add this sum to the sum claimed.

S. K. Cunningham for the plaintiff.

The defendant was not represented.

WILLMER, J.: In all the circumstances, and particularly having regard to the small amount involved, I am prepared to give leave to amend without re-service of the writ so as to include the cost of the insurance contributions as part of the wages. I accept the contention of counsel for the plaintiff that the arrears of insurance contributions are, in effect, part of the man's wages, and that, therefore, he has the same maritime lien in respect of them as he has in respect of the rest of his wages.

Judgment for the plaintiff for £135 14s. 3d.

Solicitors: *Corbin, Greener & Cook* (for the plaintiff).

R.H.W.

PRICE v. PRICE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Pilcher, J.), March 15, 16, 1951.]

Divorce—Desertion—Termination—Offer by deserting spouse to resume cohabitation—No expression of repentance—No evidence of violence by deserting against deserted spouse.

- A The parties were married in 1942. In 1949, after a long history of quarrels, the wife left the matrimonial home and filed a petition for divorce on the ground of the husband's cruelty. By his answer the husband denied the charges and cross-petitioned for divorce on the ground of the wife's cruelty. On May 18, 1950, both petitions were dismissed, the commissioner finding that both parties were equally to blame for the various acts alleged as
- B cruelty on either side. On June 7, 1950, the wife's solicitors wrote to the husband's solicitors stating that she felt that "good will and a *bona fide* desire by both parties to forget and forgive might save this marriage yet," and offered to return to the matrimonial home provided that both mothers-in-law stayed away from it. In reply, the husband's solicitors indicated that, as the offer did not contain any suggestion of repentance, it was
- C not *bona fide* and must be refused. On an application for maintenance by the wife under s. 23 (1) of the Matrimonial Causes Act, 1950,

HELD: the wife's offer was *bona fide* in the sense that she was willing to implement it; there was no obligation on her to express repentance for her desertion since the need for such an expression was confined to cases where there had been violent conduct by the deserting spouse and the deserted spouse had reason to suppose that there was likely to be a repetition of it if the desertion was terminated without such an expression; and, therefore, the husband was not justified in refusing the wife's offer and, as he refused to permit her to resume cohabitation, he must pay her maintenance.

- D
- E *Thomas v. Thomas* ([1924] P. 194) and *Everitt v. Everitt* ([1949] 1 All E.R. 908), distinguished.

AS TO OFFER TO RETURN, see HALSBURY, Hailsham Edn., Vol. 10, p. 657, para. 967, and 1950 Supplement; and FOR CASES, see DIGEST, Vol. 27, pp. 312-315, Nos. 2901-2929.

Cases referred to:

- F (1) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 2nd Digest Supp.
- (2) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest 315, 2925.
- (3) *Thomas v. Thomas*, [1946] 1 All E.R. 170; 115 L.J.P. 75; 110 J.P. 203; 2nd Digest Supp.

- G APPLICATION FOR MAINTENANCE under s. 23 (1) of the Matrimonial Causes Act, 1950.

- The wife left the matrimonial home and petitioned for divorce on the ground of her husband's cruelty. The husband denied the charges and cross-petitioned for divorce on the ground of cruelty. The learned commissioner dismissed
- H both petitions, taking the view that the parties were equally to blame for the incidents which were alleged by one or other of them to constitute cruelty. The wife then offered to return to the husband, but without expressing any repentance for her conduct. For the husband it was contended that the offer was not *bona fide* and, that, since the wife was in desertion, he was under no obligation either to take her back or to maintain her.

Levene for the wife.

Ruttle for the husband.

PILCHER, J.: This is an application by originating summons under s. 23 (1) of the Matrimonial Causes Act, 1950, by a wife, Mrs. Valerie Cennen Price, against her husband, Mr. Alun Even Gerwyn Price, in which she claims that he has wilfully neglected to provide reasonable maintenance for her and for the two infant children of the marriage.

The parties were married in 1942. In March, 1949, the wife, after a long history of quarrels, left the matrimonial home, taking with her the children, and filed a petition for divorce against her husband on the ground of cruelty. The husband at first put in an answer denying the cruelty, but in January, 1950, he amended his answer and cross-prayed for dissolution of the marriage on the ground of his wife's cruelty. On May 18, 1950, Mr. Commissioner BUSH JAMES rejected both petitions. It is clear that he accepted the wife's story that there had been occasions when her husband had offered her physical violence. He also probably took the view that the wife had provoked the husband. There was one occasion when the husband injured the wife's jaw, but the commissioner was uncertain whether she had not been the author of her own misfortunes by irritating her husband. In the result, he came to the conclusion that neither of this ill-assorted couple had succeeded in establishing a case of cruelty against the other.

After the wife left the husband the husband made a voluntary payment to her of 35s. a week in respect of the children, which, in addition to the 5s. family allowance she received, gave her the sum of £2 for the children. He never offered to pay her anything for herself. When she started the proceedings for divorce she received 32s. or 33s. net by way of alimony. When her petition was dismissed she, no doubt, realised that the payment of 33s. from her husband would cease, and, accordingly, before she and her husband had even left the court, she instructed her solicitor to tell him and his advisers that she was willing to return to him. The husband's solicitors, however, either refused to consider the matter or no answer was given. On June 7, 1950, the wife's solicitors wrote to the husband's solicitors in the following terms:

"We have been instructed by Mrs. Price in regard to the position between herself and Mr. Price. Many unpleasant things were said by both parties during the divorce proceedings which have just been concluded. Having regard to the decision in that case, Mrs. Price feels that in the interest of the children both she and your client should make an effort to start afresh. She feels that good will and a *bona fide* desire by both parties to forget and forgive might save this marriage yet. However, it is quite clear that neither spouse can live with the mother of the other spouse. Our client is prepared and hereby offers to return to the matrimonial home in the spirit above mentioned, provided that your client is willing to co-operate in the same manner. She agrees that her mother should not visit the matrimonial home provided your client agrees that his mother should also stay away therefrom. We realise that this involves a sacrifice on the part of both parties, but it does give them an opportunity to adjust any differences and difficulties that may occur after this long estrangement without the intervention of other people, however well meaning they may be . . . Our client is prepared to return to the matrimonial home immediately Mrs. Price senior leaves, and you intimate that she is able to return."

Since the wife's departure her husband's mother had been keeping house for him. On July 10 the husband's solicitors replied, pointing out that the wife's offer was conditional on the withdrawal of both mothers-in-law and indicating that they did not consider the offer to be *bona fide*. The letter concludes with this paragraph:

"Your letter contains no hint of repentance on the part of your client and Mr. Price finds nothing in it to indicate that his wife genuinely and

sincerely desires to mend what has been broken. The very fact that proposals of this nature should be made in a solicitor's letter is, we think, unusual and not best calculated to achieve the object which your client says she entertains."

A There was further correspondence between the solicitors, the husband and wife both maintained the same attitude, and, finally, on Jan. 8, 1951, the present application was made to the court by the wife. After the judgment of Mr. Commissioner BUSH JAMES the husband voluntarily paid to his wife 35s. for the support of the two children, but paid her nothing for herself. The wife now asks for an order providing not only for her own support, but also for that of the two children because she desires to get that matter regularised and not to be dependent on voluntary payments.

B The wife contends that in the circumstances of the case she is entitled to periodical payments on the ground of her husband's wilful neglect to maintain her. It is urged on her behalf that the finding of Mr. Commissioner BUSH JAMES dismissing both cruelty petitions leaves them in the same position as they were immediately before she left the house. It is true that before the wife filed her petition she had left the house, and it is contended by the husband that in so doing she was technically guilty of desertion. In view of the learned commissioner's findings that neither of them had been guilty of cruelty it would be difficult to resist the conclusion that the wife was technically guilty of desertion in leaving the house in the way she did. She had been absent from the house for more than a year before the case was tried by the learned commissioner, and during most of that period she had been in receipt of alimony

C which ceased as soon as the petitions were dismissed. In court she made a verbal offer to return and through her solicitors expressed her willingness to return. It is not in dispute, however, that she hates her husband, and had hated him for some time before she left him. She says, however, that, hating him as she does, she is willing to go back and live with him as his wife. She agreed that the reason why she wanted to return to him was that her financial

D situation was such that either she must be maintained by her husband under his roof or else paid something to maintain herself. It may well be that in making the offer in court and in instructing her solicitors to write the letter which they did she may have hoped that her husband would be prepared to agree to make her some allowance. The alternative was to implement her offer and go back to live with him.

E I am satisfied that the wife did not want to go back to live with her husband, and that, if she had had whatever the appropriate sum might be by way of allowance from him, she would much have preferred to have had that allowance than to return to him. On the other hand, after listening to her evidence, I was satisfied that she was willing to return. She may have entertained some faint hope that, if they got together again, things might be happier than they

F had been in the past, but she was, I think, sacrificing herself to some extent in making this offer. I find, none the less, that it was a genuine offer in the sense that she was prepared to return to her husband if he would have her. It is clear that he was not willing to have her back.

The question now arises whether in the circumstances it is proper to say that the wife's offer to return was a *bona fide* offer. I am satisfied that it was in the sense that she was willing to implement it, although not anxious to do so, if her husband had been prepared to take her back. It is, however, said by counsel for the husband that it is not sufficient for a spouse who is in desertion merely by word of mouth or by letter to offer to return. He says that that offer must be accompanied by expressions of repentance and contrition or else there is no obligation on the deserted party to treat the offer seriously. I recognise that there may be cases in which that situation exists and I think that the matter is put very clearly by LORD MERRIMAN, P., in *Everitt v.*

H

Everitt (1) where, dealing with *Thomas v. Thomas* (2), he said ([1949] 1 All E.R. 916):

"The only possible conclusion from the judgment of WARRINGTON, L.J., in *Thomas v. Thomas* (2) is that the unjustified refusal by the spouse who has been deserted to resume cohabitation not merely terminates the desertion but also reverses the process; it 'turns the tables,' or 'puts the boot on the other leg' . . . and it is immaterial whether the case is one of mere desertion which is terminable by a simple offer on the part of the deserter to return or is a case of constructive desertion terminable, with more difficulty no doubt, but terminable by appropriate repentance and appropriate assurance of amendment of such a kind, according to the individual circumstances, as the aggrieved spouse is not justified in refusing."

The learned President there seems to me to be drawing a clear distinction between cases of simple desertion such as is alleged in the present case and cases of constructive desertion. What I conceive there to be referred to is the type of case where a husband has been guilty of physical violence to his wife, and the wife, having left the house in fear, thereafter petitions on the ground of constructive desertion or takes out a summons against him in respect of constructive desertion. In those circumstances one can well understand that it is not enough for the husband to say: "Come back to my home." He must accompany his request to her to return by some words of repentance or contrition in respect of his cruel conduct. That is not the case here.

I have not had the advantage of hearing the witnesses who gave evidence before Mr. Commissioner BUSH JAMES and I have not read their evidence, but I have before me his clear summary of the characters of the parties and the facts as he found them and his conclusion that, while this was a tragic case of an ill-assorted pair, neither of the parties had been guilty of legal cruelty. He concluded, I think, that there was not a lot to choose between the two of them. In those circumstances I ask myself why should a wife express contrition and repentance when she has, perhaps foolishly, left the house after, as she says, her husband had ill-treated her—and I have no doubt that there were many occasions on which she did suffer some physical violence at the hands of her husband, she being at least as much at fault as he. All she did, at a time when both parties were equally in the wrong or equally in the right, was to leave the house, and what she now asks is to be taken back again. If repentance and contrition are required it seems to me that the wife's solicitors' letter of June 7, 1950, is couched in reasonably conciliatory terms when it says:

"She feels that good will and a *bona fide* desire by both parties to forget and forgive might save this marriage yet."

I do not think that this is a case in which one can expect more than that from a woman who, no doubt, still regarded her husband as being principally at fault for the break-up of the marriage although he probably felt that the guilty party was really his wife. That being so, I am well satisfied that the wife's offer was *bona fide*, and the circumstances of the case were not such that there was any obligation on her to express repentance and contrition. If there was, I think that her solicitors, in the letter to which I have referred, went quite as far as was necessary.

A further point that is urged by counsel for the husband is that in the circumstances of this case—the character of the wife, her admitted hatred of her husband, and her bitterness towards him—no husband ought to be compelled to take his wife back. There is little fault to be found with that proposition as a moral one, but I rest myself on this, that, so far as matrimonial conduct or misconduct is concerned, there is nothing to pick between these two parties. If the development of their respective characters and temperaments has been such that the wife has now this hatred for her husband, it augurs ill for any

resumption of cohabitation, and it seems unlikely that they can ever live happily together for any length of time, but, none the less, she is still his wife. Neither has been guilty of any matrimonial offence against the other except that the wife left the house and is, thereby, technically in desertion. She has, however, made a *bona fide* offer to return and, in the circumstances, I am well satisfied that in law there are only two alternatives open to the husband—either he must take her back and maintain her under his own roof as his wife or he must support her under another roof.

Counsel for the husband relied on *Thomas v. Thomas* (2) for the proposition that repentance was required. I have said what I wish to say on that and I do not propose to say any more. He also relied on the later case of *Thomas v. Thomas* (3), in support of the proposition that in the particular circumstances of this case the husband was entitled to refuse to have his wife back. In the first case of *Thomas v. Thomas* (2) the husband, before constructively deserting his wife, had frequently ill-treated her, and the justices, the Divisional Court, and the Court of Appeal all came to the conclusion that the wife was not compelled to return to him on a request accompanied by expressions of repentance about which she may well have entertained doubts. That is not the present case, and I am satisfied that cases in which a deserted spouse has been held justified in refusing an offer by the deserting spouse to resume cohabitation unaccompanied by any expression of contrition must be confined to cases of established ill-treatment in which the previous conduct of the deserting party has been such as to leave the deserted spouse to suppose that, if he or she resumes cohabitation without some expression of repentance, there is likely to be a repetition of the conduct previously complained of. The principle is, in my view, not applicable to a case of this kind where the faults, apart from the wife's one fault in going out of the house, are equally divided between the two spouses. I accordingly find that the wife has made a sufficient and *bona fide* offer to return and that the husband is not justified in refusing to accept it.

Order for maintenance.

Solicitors: *Holland & Co.* (for the wife); *Edwin Coe & Calder Woods* (for the husband).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

Ex parte WESTBURN SUGAR REFINERIES, LTD.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Radcliffe), March 15, April 5, 1951.]

Company—Reduction of capital—Paid-up share capital in excess of company's wants—Transfer of certain assets to newly formed investment holding company—Part of share capital of old company to be paid off by reducing nominal amount of each share by 2s., and transferring to shareholder a 2s. share of new company—Present value of assets to be transferred exceeding amount by which share capital reduced—Possibility of nationalisation of industry—Companies Act, 1948 (c. 38), s. 66 (1) (c).

The appellant company had a capital of £609,000, divided into shares of £1 each, all of one class and fully paid up, and represented at present by £609,000 ordinary stock. Wishing to reduce its share capital under the Companies Act, 1948, s. 66 (1) (c), by paying off paid-up share capital which was in excess of its wants, it had formed an investment holding

company, L.I., Ltd., and subscribed for one thousand 2s. shares therein, and had provisionally agreed to transfer to L.I., Ltd. (a) certain shares and debentures in private companies which stood in the books of the appellant company at the aggregate amount of £45,192 and were to be transferred at that figure, and (b) a sum of three per cent. funding stock. In exchange L.I., Ltd., was to pay £100 in cash and to issue to the appellant company, or its nominees, 608,000 shares of 2s. each in the capital of L.I., Ltd., credited as fully paid. The appellant company proposed, after re-converting the £609,000 stock into shares, to reduce its capital from £609,000, divided into 609,000 shares of £1 each, to £548,100, divided into the same number of shares of 18s. each, by returning paid-up capital to the extent of 2s. on each share, this 2s. being satisfied by the transfer to the shareholder concerned of one fully paid 2s. share in L.I., Ltd. The articles of the appellant company authorised the reduction of capital subject to the approval of the court, and the necessary resolutions had been passed by the company. The petition asking for the sanction of the court to the proposed reduction made it clear that the capital to be returned was in excess of the company's wants, but did not state by how much it was surplus. The value of the assets to be transferred to L.I., Ltd. was considered by expert opinion to be far in excess of the book value and was estimated at £197,768, but these assets formed only a comparatively small part of the total assets of the appellant company, the value of the assets to be retained by the company (as shown in its last balance sheet) exceeding £1,400,000, while its liabilities were less than £500,000.

HELD: (i) in consideration of the reduction of share capital shareholders might decide to accept a transfer of assets to a holding company the shares of which were to be held by them according to their respective interests in the capital of the transferor company, and they could also decide that the transfer should be of such investments as were, according to their value in the company's balance sheet, the equivalent of the amount of the proposed reduction of share capital; such a transaction was not rendered incompetent by the fact that the value of the transferred assets exceeded the amount by which the share capital of the transferor company was to be reduced, though in such a case it would be right for the court closely to scrutinise the facts so as to insure that the rights of creditors of the transferor company, the shareholders, and the investing public should not be defeated or injured; in the present case the appellant company was in a strong position as regards its retained liabilities and assets and so the rights of the creditors and the interests of the shareholders, actual and prospective, were amply protected; and, therefore, the proposed reduction should be confirmed.

British & American Trustee & Finance Corp'n. v. Couper ([1894] A.C. 399) and *Poole v. National Bank of China, Ltd.* ([1907] A.C. 229), applied.

(ii) the possibility that the industry in which the company was engaged might be nationalised as the result of future legislation was not a ground on which the court should refuse to confirm the reduction, though it might be a good reason for making quite certain that the existing law was complied with in every respect.

(iii) how much of the paid-up share capital the company could dispense with for the future was a domestic matter which the shareholders and their managers must decide among themselves. If the amount which they had decided on worked no injustice to creditors or to shareholders, the court should not be concerned to know the precise figure by which the company's capital was surplus to its requirements.

AS TO REDUCTION OF CAPITAL, see HALSBURY, 1949 Edn., Vol. 5, pp.

173-181, paras. 309-322; and FOR CASES, see DIGEST, Vol. 9, pp. 148-150, Nos. 833-849.

FOR THE COMPANIES ACT, 1948, s. 66, see HALSBURY'S STATUTES, Second Edn., Vol. 3, p. 515.

Cases referred to:

- A (1) *British & American Trustee & Finance Corpn. v. Couper*, [1894] A.C. 399; 63 L.J.Ch. 425; 70 L.T. 882; 9 Digest 149, 840.
- (2) *Poole v. National Bank of China, Ltd.*, [1907] A.C. 229; 76 L.J.Ch. 458; 96 L.T. 889; 9 Digest 149, 842.
- (3) *Caldwell & Co., Ltd. v. Caldwell*, 1916 S.C. (H.L.) 120; *sub nom. Caldwell v. Caldwell & Co., Ltd.*, [1916] W.N. 70; 9 Digest 166, 991.
- B (4) *Re de la Rue (Thomas) & Co., Ltd. & Reduced*, [1911] 2 Ch. 361; 81 L.J.Ch. 59; 105 L.T. 542; 9 Digest 160, 931.

APPEAL from an interlocutor of the First Division of the Court of Session (LORD COOPER (Lord President) and LORD CARMONT, LORD RUSSELL *dissenting*), dated Dec. 8, 1950, dismissing an unopposed petition by the company for confirmation of reduction of capital under the Companies Act, 1948, s. 66 (1) (c).

- C The appellant company was incorporated in 1897 under the Companies Acts, 1862 to 1890, its main object being to carry on the business of sugar refining. In 1927 it became a public company. Its present share capital was £609,000, divided into 609,000 ordinary shares of £1 each, fully paid. By art. 50 of its articles of association it had power to reduce its capital subject to the approval of the court. It being considered by the directors that the capital of the company
- D was in excess of its requirements, and, in particular, that certain assets were not essential to its main business of sugar refining and should be segregated, the company proposed to pay off part of its share capital by reducing the nominal amount of each share by 2s. and transferring to the shareholder concerned a 2s. share in an investment holding company which it had formed on Feb. 27, 1950, and to which it proposed to transfer some of its unrequired
- E assets. These assets, with one exception, consisted of holdings in private limited companies and their aggregate value, as shown consistently in the books of the company and in the company's balance sheet as at Oct. 1, 1949, corresponded exactly with the amount by which the share capital was to be reduced, but it was estimated that their actual values were probably more than three
- F times the values entered in the balance sheet. At an extraordinary general meeting of the company, held on June 12, 1950, special resolutions (a) for reduction of capital in the manner proposed, and (b) approving and confirming the agreement with the holding company were passed unanimously. The First Division of the Court of Session dismissed the petition on the grounds (a) that it was against public policy to aid a company threatened with nationalisation to part with valuable assets, and (b) that the company had failed to show by
- G how much its capital was surplus to its requirements.

J. L. Clyde, K.C. (of the Scottish Bar), *Philip Sykes* and *R. H. M'Donald* (of the Scottish Bar) for the appellant company.

The House took time for consideration.

- H Apr. 5. LORD PORTER: My Lords, I have had the opportunity in this case of reading the opinion of my noble and learned friend, LORD RADCLIFFE, and find myself wholly in agreement with it. I, therefore, move that the appeal be allowed.

The following opinions were then read.

LORD NORMAND: My Lords, I agree with my noble and learned friend on the Woolsack that the appeal should be allowed. The general rule is that the prescribed majority of the shareholders are entitled to decide whether

there should be a reduction of capital, and, if so, in what manner and to what extent it should be carried into effect. When the reduction is consequent on a change in the method of carrying on the company's business it is for the shareholders to decide to what extent its capital is in excess of its wants and on the adequacy of the consideration for the reduction of their share capital, but the powers of the shareholders must be exercised so as to safeguard the rights of creditors, the just and equitable treatment of shareholders, and the interests of the investing public. These principles are affirmed in *British & American Trustee & Finance Corp'n. v. Couper* (1), *Poole v. National Bank of China, Ltd.* (2), *Caldwell & Co., Ltd. v. Caldwell* (3), and *Re de la Rue (Thomas) & Co., Ltd. & Reduced* (4).

To come to the present case, I think it is clear, according to the foregoing principles, that in consideration of the reduction of share capital the shareholders may decide to accept a transfer of assets to a holding company the shares of which are to be held by them according to their respective interests in the capital of the transferor company, and that the shareholders can also decide that the transfer shall be of such investments as are, according to their value in the company's balance sheet, the equivalent of the amount of the proposed reduction of share capital. But in an arrangement in which assets are taken at balance sheet values there is the possibility that the scheme of reduction may be used as a means of defeating or injuring the rights of creditors or deceiving future investors. If the retained assets are entered in the company's balance sheet at a figure in excess of their real value, creditors may be prejudicially affected, and it may also be possible by adjustments in the balance sheet after the reduction takes effect to return paid-up capital to shareholders. The suspicion that a manoeuvre to milk the company of its capital is on foot may reasonably be aroused when the company's business is threatened by proposals to nationalise it. The First Division were, therefore, in my opinion, only performing the duty cast on them by the Companies Act, 1948, when they scrutinised the proposed reduction with special attention. They had to be satisfied that the rights of creditors and the interests of shareholders, actual and prospective, were not being sacrificed or injured. The material matter is not the value of the investments which the company proposes to transfer, but the value of those assets which it will retain, and on this the court had the advantage of a careful and lucid report by the experienced reporter to whom it had remitted the petition for confirmation. The report bears out that the company is in a strong position as regards its retained assets and its liabilities, that the creditors are amply provided for, and that it is clear that the company's capital is in excess of its requirements. The reporter says also that the shareholders are certainly not prejudiced by the proposals. If there had been any doubt on any aspect of the proposals, I think that the proper course would have been to make a further remit to the reporter with specific directions to investigate and report on the points in doubt, but the reporter in this instance had already shown himself alive to the kind of objection that might be taken, and in addition to his report we have before us the balance sheet from which it appears that the valued assets retained are entered at figures ascertained by a recent re-valuation. I have, therefore, no hesitation in holding that the proposed reduction is not open to objection and may properly be confirmed. I think that the proper course is to allow the appeal and to send the case back for the Court of Session to dispose of it in accordance with the judgment of this House.

LORD OAKSEY: My Lords, I agree.

LORD REID: My Lords, the Companies Act, 1948, s. 66 (1) (c), authorises a company, subject to confirmation by the court and if certain conditions have been satisfied, to "... pay off any paid-up share capital which is in excess

of the wants of the company." In this case the statutory conditions have been satisfied. The question is whether the court should confirm the reduction of capital proposed. The only unusual features of this case are that the appellants propose to pay off part of their share capital, not with money, but by transferring to the shareholders shares of another company, and that the value of the shares proposed to be so transferred greatly exceeds the amount by which the appellant's share capital is to be reduced. There is, however, nothing novel in paying off share capital otherwise than with money. It has long been recognised that this is not incompetent. The real questions in this case are whether it is competent in a reduction of capital to pay off share capital by transferring assets whose value clearly exceeds the amount by which the share capital of the company is reduced, and, if this is competent, whether it is proper in this case to allow it to be done. As regards competency, as LORD HERSCHELL, L.C., said ([1894] A.C. 405) in *British & American Trustee & Finance Corp'n. v. Couper* (1):

" . . . the statute [the Companies Act, 1867] has not prescribed the manner in which the reduction is to be carried out, nor has it prohibited any method of effecting that object."

C In the same case LORD WATSON said (*ibid.*, 410):

" . . . I do not find a single expression in the Act [of 1867] tending to indicate that the discretion of the court to grant or refuse such an application does not extend to every possible mode of reducing capital."

D The terms of the Act of 1948 are as wide as those of the Acts of 1867 and 1877. At first sight it may seem strange that the appellants' proposal should be competent, but, once it has been recognised that paying off capital can be done otherwise than by payment of money, there cannot be any requirement of exact correspondence between the amount of capital paid off and the value of the assets used to pay it off, because in many cases it is impossible to make any exact valuation of such assets. Therefore, the most that could be required would be an approximate correspondence, but I can see no reason why it must be held that the statute has imposed any such vague or difficult limitation.

E I, therefore, turn to the second question. Are the circumstances of this case such that the court ought to confirm the appellants' proposal? In effect, what is proposed is to transfer to the shareholders assets which are valued in the appellants' balance sheet at sums which in total correspond exactly with the amount by which the share capital is to be reduced, but which may be worth rather more than three times the balance sheet values. I say "may be" because the nature of most of these assets is such that any close estimate of their value is impossible. What then is the duty of the court in considering a matter of this kind? In the first place, the interests of creditors must be safeguarded, but here that has been done. Secondly, the interests of shareholders may have to be considered, but in this case there has been no opposition by any shareholder at any time and it is difficult to see how there could be any prejudice to any single shareholder. Thirdly, there is the public interest to consider. That this is a relevant consideration was clearly recognised by LORD MACNAGHTEN in *Poole v. National Bank of China, Ltd.* (2). I would not be disposed, by attempting to define the public interest, to narrow in any way the discretion of the court in any future case, but in a case like the present I think that it is right to scrutinise the facts somewhat closely, having in mind the position of those who may, in future, form connections with the company as creditors or shareholders. It appears to me to be proper to consider what assets the company will retain if the proposed reduction of capital is confirmed. In the present case the assets to be distributed, taken at their real value, form only a comparatively small part of the total assets of the company. The value of the assets to be distributed has been estimated at £197,768,

and the value of the assets to be retained by the company as shown in the balance sheet [as at Oct. 1, 1949] exceeds £1,400,000. It seems clear that the true value of these assets cannot be substantially less than that amount. The total capital of the company before reduction is £609,000 and liabilities to creditors and others did not exceed £500,000 at the time of the last balance sheet. In my opinion, these facts are amply sufficient to remove any apprehension that the future conduct of the company may be adversely affected by confirmation of the present proposal.

It has been said that there are other matters concerning the public interest to be taken into account in this case. LORD CARMONT took the view that there is or may be an ulterior object behind the present petition, *viz.*, to avoid in part the consequences of possible future legislation. The fact that the appellants may have such an ulterior object may be a good reason for making quite certain that the existing law is complied with in every respect, but it cannot, in my judgment, be by itself a ground for dismissing the petition. The petition must be judged by the law as it exists today. Finally, I should notice the fear expressed by the Lord President (LORD COOPER) that the decision of this case in favour of the appellants may "open a wide door to the most dangerous possibilities." The case does not strike me in that way. The powers of the court to deal with cases of this kind are wide and are, I think, adequate to enable new difficulties which may emerge to be dealt with justly when they arise.

LORD RADCLIFFE: My Lords, this appeal raises what is to me a novel point in connection with the reduction of the share capital of a limited company. Consideration of it has led the First Division of the Court of Session, by a majority, to dismiss the appellant company's petition for the court's sanction of the reduction proposed. I think that this refusal arises from some misapprehension of the relevant law governing the reduction of a company's share capital and that the court's sanction ought not in the circumstances to have been withheld.

The point that has caused this difficulty relates to the value of the assets with which the appellant company proposes to satisfy its obligation to return to its shareholders a portion of the paid-up share capital. The scheme itself is simple. The appellant company has formed, and subscribed for one thousand 2s. shares in, a new company, styled Lynedoch Investments, Ltd. (which I will hereafter refer to as "Lynedoch"), and has provisionally agreed to transfer to that company (a) certain shares and debentures which form part of the assets of the appellant company, and (b), a sum of three per cent. funding stock. In exchange Lynedoch is to pay £100 in cash and to issue to the appellant company or its nominees 608,000 shares of 2s. each in the capital of Lynedoch, credited as fully paid. The appellant company has only one class of shares, represented by £609,000 ordinary stock, issued and fully paid up, and the scheme is that, the ordinary stock having been re-converted into shares, a return of paid-up capital to the extent of 2s. per share is to be made to the ordinary shareholders and that each 2s. is to be satisfied by the transfer or allotment to the shareholder concerned of one of the Lynedoch shares which the appellant company holds or is to receive. This operation involves, of course, a reduction of the appellant company's paid-up share capital from £609,000, divided into shares of £1 each, to £548,100, divided into the same number of shares of 18s. each, and the necessary resolutions of the appellant company have been passed for this purpose. There is no doubt that the appellant company is competent to proceed in this way. Its articles authorise the reduction of capital, subject to the approval of the court. The Companies Act, 1948, s. 66 (1) gives to the court the statutory power of confirmation. The return of capital is to be effected by a distribution of assets, not by tender of money, but I think that it is settled that money's worth may be resolved on as the

means of repayment as validly as money itself. Nor, indeed, has the competency of the company been questioned in the Court of Session. What has been questioned is the propriety of a reduction by virtue of which there is returned, not merely money's worth, but such an amount of the company's assets as may well be worth in money a good deal more than the £60,900 which is the basis of repayment, for Mr. Hugh Spens, to whom, in accordance with procedure, the petition was remitted for inquiry and report, has brought to the attention of the court certain facts which bear on the value of the 2s. Lynedoch shares and which suggest that their value at the present date is in excess of par.

My Lords, I do not think it necessary to investigate these facts in detail for the purposes of this appeal. All that it is necessary to notice about them is this. The shares and debentures which the appellant company is to transfer to Lynedoch are shares and debentures in private companies, which are categorised in the appellant company's balance sheet under the heading of "Trade investments," "Subsidiary company" or "Unquoted investments." There is, therefore, no market valuation available for them and any monetary equivalent which is allotted to them is, at best, a matter of expert opinion. They stand in the appellant company's books at a figure which, in the aggregate, amounts to £45,192, and it is at this figure that they are being transferred to Lynedoch by the sale agreement, but Mr. Spens obtained information from the company's auditors for the purposes of his report which led him to suppose that the value of the transferred investments was far in excess of the book value of £60,900 and he has explicitly stated in his report that the Lynedoch shares are "clearly worth more than par."

It is not, at first sight, apparent why this opinion should constitute any obstacle to the success of the appellant company's application. What is in question is a reduction of capital by re-paying some paid-up share capital. If the transaction is itself competent, the court should only refuse its confirmation if what is proposed to be done is somehow unfair or inequitable, and the consideration of what is unfair and inequitable cannot well extend beyond consideration of the interests of creditors, shareholders and the general public, by which term is, I think, meant persons who may in the future have dealings with the company or may be minded to invest in its securities. The report, however, finds that, if the reduction of capital proposed is confirmed, the appellant company's creditors are amply provided for and recommends that the provisions of s. 67 (2) of the Act of 1948 be dispensed with. Therefore, the creditors need no protection. As to shareholders, the resolutions in favour of the reduction proposed were passed unanimously and no shareholder has given notice of any objection. Their position is summed up in para. 12 of the report:

" . . . it does not matter whether the assets transferred to Lynedoch by Westburn are worth more than £60,900. If only assets to the value of £60,900 are transferred, each 18s. of stock in Westburn is worth more, and a 2s. share is worth 2s. If assets to a greater value than £60,900 are transferred, the 2s. share in Lynedoch is worth more than 2s., and each 18s. of stock is worth less by the equivalent amount."

Therefore, the shareholders need no protection. That leaves outstanding the interests of the public, and it is the fear that their interests may be prejudiced by this proceeding that has led the majority of the Court of Session, as I read their opinions, to refuse their approval of the company's petition.

Two reasons are advanced by LORD CARMONT for his view. One is that on general grounds of public policy the court ought not to aid a company threatened with nationalisation to "eviscerate" itself by parting with valuable assets. My Lords, I do not think that the contingency of nationalisation has any relevance to the public policy which courts of justice should support. If the reduction is objectionable on other grounds, it will not become the more

acceptable because it may have been proposed in view of a pending measure of nationalisation. Conversely, the threat of nationalisation cannot render improper what is otherwise unobjectionable. I pass, therefore, to the second, and, indeed, the main, reason which weighed with the learned judge. In his view it was essential for the appellant company, which showed by its petition that the ground of the proposed reduction was that the share capital to be returned was in excess of its wants, to demonstrate to the court by how much its capital was in fact surplus, and, since the evidence presented to the court was deficient in this respect, a material fact had not been made out. Whether this conclusion would on any view have justified a dismissal of the petition rather than its remitter for further inquiry I do not think it necessary to discuss, for I think that the conclusion itself is based on a misunderstanding. I cannot find any good reason why the court should be concerned to know what is the extent by which the company's capital is surplus to its requirements. If by that phrase, itself susceptible of ambiguity, is meant the extent by which the whole of the company's assets, at the best contemporary valuation that can be placed on them, exceeds what is required for the future conduct of its business, precise information on this would do nothing to aid the task of the court, for it would throw no light on the sole point which is here in question, *viz.*: How much of the paid-up share capital is to be returned as being surplus? Nor do I think that evidence of this kind is usually required in cases of this sort. In truth this, which is the real question, answers itself by the company's own resolution. When a company has come to employ in its business, as this company has, a volume of assets very much greater in value than the amount of its paid-up share capital, there is no obvious answer to the question how much of that capital it needs for future trading. How much of the paid-up share capital the company can dispense with for the future is a domestic matter which the shareholders and their managers must decide among themselves. If the amount which they have decided on works no injustice to creditors or to shareholders, I see no purpose which can be served by the court's insisting on a precise figure of the company's wants or the striking of an exact balance between that figure and the total available resources in hand.

I am not indifferent to the possibility of danger which attends a scheme to return share capital in the form of assets which are of a value substantially greater than the amount of share capital. It is the apprehension of such dangers, I think, that led the Lord President (LORD COOPER) to join with LORD CARMONT in dismissing this petition, but where I respectfully differ from his opinion is that, in my view, those dangers are wholly absent from this case. First, I do not think that your Lordships should treat the Lymedoch shares as having any certain value which is substantially greater than par. Their value depends on the value of the investments transferred to Lymedoch and these shares and debentures, in their turn, can only be valued in terms of their underlying assets. The investments themselves are transferred to Lymedoch at the same values as that at which they stand in the appellant company's books—in most cases, at cost. It is no disrespect to the report of Mr. Spens to say that, while his opinion that the Lymedoch shares are worth more than par must, of course, be accepted, he was not in a position, on the material before him, to say what in fact their value ought to be taken to be, nor did he essay to do so. There are many kinds of property of which the value cannot be ascertained on any certain principle. There is no kind of property to which value cannot, if it must, be assigned, but in such cases the value accepted depends on the weighing of individual, though expert, judgments and not on an appeal to any fixed standard. The investments in private companies which we are dealing with here seem to me to be within this class, and I do not think that the appellant company's figure of cost, which is, after all, one form of valuation, should be taken as something markedly different from the true value. That is one consideration. Secondly, the court should not dismiss a petition on a merely

theoretical fear of evil consequences. What are the actual circumstances of this case? The appellant company is parting with these investments at the same value as that at which they stand in its books. If the reduction is effected, £45,192 (I ignore the funding loan for this purpose) disappears from one side of the balance sheet and the same amount from the other, in the form of issued share capital. There is nothing in this which, at first sight at all events, appears to threaten to confuse or mislead future traders or investors. I can imagine that there may be companies as to which there might be a reasonable fear that a reduction by way of re-paying paid-up share capital by the distribution of assets suspected to be worth more than the monetary equivalent involved would achieve or facilitate the thing which the court must be concerned to prevent, *viz.*, a withdrawal of some part of the fund of capital which the company is committed by its constitution to retain. That, however, depends on what is left in the company's assets, not on what is taken away from them. It might be that other parts of the assets had suffered substantial depreciation below their book values, so that, after the withdrawal proposed, it would be plain that there was not "enough to go round." It might be that the withdrawal would be followed by large distributions of dividend from reserve or profit and loss, so that before long the "capital fund" might have been raided for the provision of dividends. I am bound to say that I regard these as dangers more theoretical than practical. I do not see how, in any ordinary case, they would present themselves as actuality to the mind of the court, at any rate in a case such as this, in which the assets withdrawn are withdrawn at their book value. At most, they might lead a court to call for further evidence to show that others of the retained assets had not depreciated substantially below their book values. I can only say that I think that such a precaution would be quite unnecessary in this case. Of the other assets in the company's balance sheet as at Oct. 1, 1949, the fixed assets (excluding a negligible amount of house property) are entered at a valuation "as at June 30, 1948," plus some subsequent additions at cost and minus depreciation for the whole intervening period. This gives a figure of £442,948. The current assets stand at £1,014,889 and consist of stocks "as certified by the company's officials," debtors and payments in advance, together with large sums of British government securities and cash at bankers and in hand. It seems to me demonstrable on that state of affairs that there is no interest of the public that can be prejudiced by the reduction proposed, and that is the only point that is now in question. I think that the appeal should be allowed and the case remitted to the Court of Session with a direction that the reduction mentioned in the petition ought to be confirmed and the consequent formalities completed.

Appeal allowed.

Solicitors: *Slaughter & May*, agents for *Davidson & Syme*, Edinburgh (for the appellant company).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

COATES AND OTHERS *v.* DIMENT.

[DORSET WINTER ASSIZES (Streatfeild, J.), March 9, 19, 1951.]

Agriculture—Agricultural holding—Right to compensation for disturbance—Limitation of right by lease—Limiting provision void under Agricultural Holdings Act, 1923, s. 50—Repeal of s. 50 by Agriculture Act, 1947, s. 33 (3)—Provision in lease not rendered valid—Effect of Agricultural Holdings Act, 1948, s. 65 (1)—Effect of notice requiring arbitration to determine question arising out of notice to quit—Interpretation Act, 1889 (c. 63), s. 38 (2) (a), (b), (c)—Agricultural Holdings Act, 1923 (c. 9), s. 50—Agricultural Holdings Act, 1948 (c. 63), s. 65—Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190), reg. 7.

Landlord and Tenant—Lease—Right to re-enter—Land required for “building sites or planting or other purposes”—Ejusdem generis rule—Right to re-enter for purpose of building sports stadium.

By a lease, dated Mar. 27, 1939, J. let to the defendant an agricultural holding on a yearly tenancy from Sept. 29, 1938, subject to twelve months' notice to quit on either side. By cl. 1 of the lease the landlord reserved “the right to re-enter at any time without notice upon such land as he may require for building sites or planting or other purposes paying compensation for growing crops and making a fair abatement in rent thereon.” In 1950 J. sold the land to the plaintiffs, and on June 5, 1950 (before completion of the sale), the plaintiffs obtained permission from the local planning authority to construct a sports stadium on part of the land. On June 13, 1950, J. sent to the defendant a notice to quit in the following terms: “I . . . hereby give you one month's notice from the date hereof . . . to quit [the land which was the subject of the planning permission] as I wish to allow the new landlords . . . to enter upon the said lands for the purpose of effecting preparatory works for which permission has been granted to them . . .” The sale to the plaintiffs was completed on Sept. 21, 1950.

HELD: (i) clause 1 of the lease “limited” the defendant's right to compensation within the meaning of the Agricultural Holdings Act, 1923, s. 50, and under that section was void *ab initio*; in the repeal of s. 50 generally by s. 110 and sched. XIII and specifically by s. 33 (3) of the Agriculture Act, 1947, no “contrary intention” appeared, within the meaning of the Interpretation Act, 1889, s. 38 (2), so as to preclude the operation of paras. (a) or (b) or (c) of s. 38 (2); and, therefore, cl. 1 of the agreement had not been rendered valid by the repeal of s. 50 of the Act of 1923.

Re Disraeli Agreement ([1938] 4 All E.R. 658) and *dictum* of SIR RAYMOND EVERSHED, M.R., in *Boddington v. Wisson* ([1951] 1 All E.R. 169), applied.

(ii) if cl. 1 had been rendered valid by the Act of 1947, it would have prevented the defendant from setting in motion the statutory machinery to obtain higher compensation under the Agricultural Holdings Act, 1948, s. 34 (2), or compensation under s. 56 (1) thereof; such operation of the clause would be inconsistent with s. 65 (1) of the Act of 1948; and, therefore, under that sub-section the clause would be rendered void.

(iii) the words “or other purposes” in cl. 1 of the lease ought to be construed *ejusdem generis* with the preceding words, the absence of a common *genus* between “building sites” and “planting” not preventing the application of that rule of construction; on construction of the clause the intention of the parties was that there should be a right of re-entry for purposes connected with the normal user of land of the character concerned; and, therefore, the building of a sports stadium was not one of the purposes for which the landlord was entitled to give notice to quit under that clause.

Johnson v. Edgware, etc., Ry. Co. (1866) (35 Beav. 480) and *dictum* of DEVLIN, J., in *Chandris v. Isbrandtsen-Moller Co. Inc.* ([1950] 1 All E.R. 773), applied.

(iv) the defendant having given notice to J. requiring a question arising out of the reason stated in the notice to quit to be determined by arbitration, the operation of the notice to quit was suspended by the Agriculture (Control of Notices to Quit) Regulations, 1948, reg. 7, until the termination of the arbitration; and, therefore, in so far as the plaintiffs' claim was based on the notice to quit, their cause of action was also suspended.

AS TO AGREEMENTS AS TO COMPENSATION, see HALSBURY, Hailsham Edn., Vol. 1, p. 353, para. 575; and FOR CASES, see DIGEST, Vol. 2, pp. 44, 45, Nos. 238-243.

B Cases referred to:

(1) *Re Disraeli Agreement*, [1938] 4 All E.R. 658; [1939] Ch. 382; 108 L.J.Ch. 100; 160 L.T. 156; Digest Supp.

(2) *Lewis v. Hughes*, [1916] 1 K.B. 831; 85 L.J.K.B. 1019; 114 L.T. 643; 80 J.P. 265; 31 Digest 272, 4165.

(3) *Boddington v. Wisson*, [1951] 1 All E.R. 166.

(4) *Magnhild (Owners) v. McIntyre Brothers & Co.*, [1920] 3 K.B. 321; 89 L.J.K.B. 1110; 124 L.T. 160; *on appeal*, [1921] 2 K.B. 97; 90 L.J.K.B. 527; 124 L.T. 771; 17 Digest 275, 896.

(5) *Tillmanns & Co. v. S.S. Knutsford, Ltd.*, [1908] 2 K.B. 385; 77 L.J.K.B. 778; 99 L.T. 399; *on appeal, sub nom. S.S. Knutsford, Ltd. v. Tillmanns & Co.*, [1908] A.C. 406; 77 L.J.K.B. 977; 99 L.T. 399; 17 Digest 275, 895.

(6) *Chandris v. Isbrandtsen-Moller Co. Inc.*, [1950] 1 All E.R. 768.

(7) *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.*, (1887), 12 App. Cas. 484; 56 L.J.Q.B. 626; 57 L.T. 695; *revg. S.C. sub nom. Hamilton v. Thames & Mersey Marine Insurance Co.*, (1886), 17 Q.B.D. 195; 55 L.J.Q.B. 390; 17 Digest 257, 697.

(8) *Johnson v. Edgware, etc., Ry. Co.*, (1866), 35 Beav. 480; 35 L.J.Ch. 322; 14 L.T. 45; 55 E.R. 982; 31 Digest 535, 6809.

ACTION by the landlords for possession of part of an agricultural holding et to the defendant under a lease dated Mar. 27, 1939.

The plaintiffs claimed to be entitled to possession on the expiration of a notice to quit given by their predecessor in title pursuant to cl. 1 of the lease. The defendant contended, *inter alia*, that cl. 1 was rendered void by the Agricultural Holdings Act, 1923, s. 50 (notwithstanding the repeal of that section by the Agriculture Act, 1947, s. 33 (3)), or, alternatively, that the clause was avoided by the Agricultural Holdings Act, 1948, s. 65.

Robert Hughes and D. H. Stansfeld for the plaintiffs.

A. C. Goodall for the defendant.

Cur. adv. vult.

Mar. 19. STREATFEILD, J., read the following judgment. By a lease, dated Mar. 27, 1939, Harry Jesty let to the defendant an agricultural holding known as East Chickerell Farm, near Weymouth, comprising about 298 acres, on a yearly tenancy from Sept. 29, 1938, at a yearly rental of £550, subject to twelve months' notice to quit on either side. By cl. 1 the landlord reserved

"the right to re-enter at any time without notice upon such land as he may require for building sites or planting or other purposes paying compensation for growing crops and making a fair abatement in rent thereon."

The material statute in force at the date of the lease was the Agricultural Holdings Act, 1923 (which was repealed in part by the Agriculture Act, 1947, and in whole by the Agricultural Holdings Act, 1948).

In the summer of 1950 Jesty sold the land to the plaintiffs, completion taking place on Sept. 21, 1950, on which date the plaintiffs became the defendant's new landlords. In the meanwhile, on June 5, 1950, the plaintiffs' solicitor obtained the written permission of the Dorchester Rural District Council, acting for the Dorset County Council as the local planning authority under the Town and Country Planning Act, 1947, to use approximately seventeen acres of the said land for the construction of a sports stadium to provide facilities for speedway and greyhound racing, football, and other athletic activities, and parking accommodation for the plaintiffs. One of the conditions of the permit was that the use of public address equipment and the noise from motor cycles used in connection with the speedway should be restricted and controlled by the applicants to the extent that under normal conditions any music, announcements, or noise should be reasonably inaudible at any distance greater than one-quarter of a mile from the site. (Measurement of the scale plan attached to the lease shows that the farm-house where the defendant lives is about one-quarter of a mile or very little over from the two fields in question).

The plaintiffs, having obtained this permit and not yet being the owners, instructed Jesty to give notice to the defendant to deliver up the two fields, and on June 13, 1950, Jesty posted to the defendant a notice to quit reading as follows:

"I, the undersigned, hereby give you one month's notice from the date hereof, in accordance with cl. 1 of the tenancy agreement made between myself, of the one part, and yourself, of the other part, dated Mar. 27, 1939, to quit and deliver up to me the two fields numbered 202 and 201 and the withy bed numbered 209 on the ordnance survey map, as I wish to allow the new landlords Messrs. J. W. Coates and Frank Crew to enter upon the said lands for the purpose of effecting preparatory works for which permission has been granted to them under the Town and Country Planning Act, 1947, and the Town and Country Planning (General Development) Order, 1948 [S.I., 1948, No. 958]. Dated June 13, 1950. (Sgd.) H. Jesty, Landlord."

On July 7, 1950, within one month of receiving that notice, the defendant wrote a letter which reads as follows:

"I have received your letter of June 13 with the notice to quit certain fields of East Chickerell Court Farm which you sent me with your letter. I have taken legal advice on my position and am advised that your notice to quit is not valid or effective to terminate my tenancy for various reasons, which shortly are that the clause in the tenancy agreement which you mention is void and that in any case it would not justify the notice you have given, and, accordingly, that I should not comply with it. Further, that without prejudice to the above position, I should demand arbitration on all questions arising and claim the protection of the Act against operation of notices to quit without the consent of the Minister of Agriculture and Fisheries, and so I enclose herewith the necessary formal notices above mentioned. Would you please let me know that you have received this letter and these notices."

With that letter he enclosed the notice under s. 24 (1) of the Act of 1948, and a notice requiring arbitration as to the reasons stated in the notice to quit under the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I., 1948, No. 190). No such arbitration has taken place, and the writ was issued on Oct. 6, 1950, claiming possession by virtue of cl. 1 of the agreement. It appears that in the meanwhile the plaintiffs have given the defendant twelve months' notice to quit the entire farm at Michaelmas, 1951, so that, subject to any questions to be determined by arbitration, and payment of compensation under the Act of 1948, the plaintiffs may in due course recover possession of the entire

farm to deal with as they will. I have now to determine their rights, if any, under cl. 1 of the agreement.

Counsel for the defendant has made two main submissions:—(i) that the Act of 1948 renders cl. 1 void, so far as it reserves a right of re-entry; and (ii) alternatively, cl. 1 was to that extent rendered void *ab initio* by the Act of 1923, and, by virtue of the Interpretation Act, 1889, the repeal of the Act of 1923 does not give life to cl. 1 or affect the tenant's privilege from being ejected under it. It will, I think, be more logical if I deal with these two submissions chronologically in the reverse order, since counsel's argument under the Act of 1948 involves comparison with the provisions of the Act of 1923.

The Act of 1923 was, as stated, the statute in force when the agreement came into being. The argument is based on s. 50 of the Act, which provides:

“ Subject to the provisions of this Act, any contract (whether under seal or not) made by a tenant of a holding by virtue of which his right to claim compensation under this Act is taken away or limited, shall to that extent be void.”

Great reliance is placed by counsel for the defendant on *Re Disraeli Agreement* (1) where CROSSMAN, J., considered the validity of a clause somewhat

similar to cl. 1 of the agreement in the present case. In that case the agreement, made in 1936, provided that the landlord should be entitled to resume possession, in case it were required for building or otherwise, of any portion of the demised premises without payment of compensation to the tenant, but with proportionate reduction in the rent as attributable to the area of the portion re-possessed.

In 1938 notice was given of the landlord's intention to resume possession forthwith of a portion of the holding, with an abatement of the rent. CROSSMAN, J., held that, on a proper construction, the clause gave the landlord power to resume possession without notice. He then referred to s. 27 (2) and (1) (b) of the Act of 1923 under which, where a landlord, in fact, gives notice of his intention to resume possession of part of a holding (even though he is not obliged to do so under the agreement), the provisions of the Act respecting compensation

to the tenant apply to the part so taken as though it were a separate holding, and pointed out that under s. 12 the tenant in such case would be entitled to claim compensation for disturbance, provided that under s. 12 (7) (b) he has, not less than one month before the termination of the tenancy, given notice in writing to the landlord of his intention to claim such compensation. He then referred to s. 50, and held that, inasmuch as the clause in the agreement gave the landlord power to resume possession without notice and without compensation, the exercise of it would prevent the tenant from giving the requisite notice under s. 12 (7) (b) in order to claim compensation for disturbance under the Act, and that, since the tenant's right to such compensation was thereby “ taken away,” the clause was to that extent void under s. 50.

In expressing my respectful agreement with his judgment, I would only add one matter, which may be material to the present case, *viz.*, that CROSSMAN, J., might also have referred to the tenant's rights under s. 9 of the Act of 1923 whereby a tenant on quitting a holding might have been entitled to claim compensation in respect of the increased value of the land due to his continuous adoption of a special standard of farming, but by proviso (b) to s. 9 (1) such compensation would not have been payable unless the tenant had, before the termination of the tenancy, given notice in writing of his intention so to do. It had not to be one month's notice, but it had to be in writing, and given before the termination of the tenancy. If, then, under the agreement a landlord had power to resume possession of the whole or a part of the holding forthwith, the tenant could not possibly give notice in writing under s. 9 (1), proviso (b), and to that extent also his right to claim compensation under the Act was taken away, and on this ground, too, the clause was void under s. 50. Applying the *Disraeli* case (1) to the present case, cl. 1 of the agreement in

terms gives the landlord power to re-enter at any time without notice, thus corresponding with the first finding of CROSSMAN, J., on the construction of the clause, but cl. 1 does provide for the landlord paying some compensation, though only for growing crops. Compensation for disturbance under s. 12, and compensation under s. 9 are not included. The tenant's right to compensation, if not entirely taken away as in *Disraeli's* case (1), is, therefore, certainly "limited" within the meaning of s. 50, and, in my judgment, on the same grounds as those given in *Disraeli's* case (1), the clause was void under that section, and void *ab initio*. The moment the agreement was made, s. 50 of the then existing Act rendered cl. 1 void to the extent indicated. A

Whereas, however, in *Disraeli's* case (1) the landlord served the notice while the Act of 1923 was still in force, in the present case the notice was not served until 1950, by which time s. 50 of the Act of 1923 had been repealed by the Agriculture Act, 1947. What is the effect of such repeal on a clause which was void *ab initio* in 1939 when the agreement was made? Does the death of the slayer bring to life a provision which has never thitherto been legally alive? Counsel for the defendant relies on the Interpretation Act, 1889, s. 38 (2), under which, where any Act repeals any other enactment, unless the contrary intention appears, the repeal shall not: B

"(a) revive anything not in force or existing at the time at which the repeal takes effect; or (b) affect the previous operation of any enactment so repealed . . . ; or (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed . . ."

Section 50 of the Act of 1923 is repealed in general terms by s. 110 and sched. XIII of the Act of 1947, but the more material and specific repeal is by s. 33 (3). Section 33 is an important new section, and provides: D

"(1) Save as expressly provided in the provisions of the Act of 1923, of this Part of this Act and of the schedules therein referred to, in any case for which apart from this section those provisions provide for compensation, a tenant or landlord shall be entitled to compensation in accordance with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary. (2) Nothing in the said provisions, apart from this section, shall be construed as disentitling a tenant or landlord to compensation in any case for which the said provisions do not provide for compensation, but a claim for compensation in any such case as aforesaid shall not be enforceable except under an agreement in writing. (3) Section 50 of the Act of 1923 (which provides for avoiding certain contracts not in accordance with the provisions of that Act) shall cease to have effect." E F

Counsel for the defendant submits that that section contains nothing showing a contrary intention that the repeal of s. 50 of the Act of 1923 should not have any of the consequences enumerated in paras. (a), (b) and (c) of s. 38 (2) of the Interpretation Act, 1889, and he relies by way of comparison on *Lewis v. Hughes* (2), where it was held that the words "shall cease to have effect" do not indicate a contrary intention so as to exclude the provisions of s. 38 of the Interpretation Act. Counsel for the plaintiffs forcefully submits that s. 33 contains entirely new provisions, and that s. 33 (3), repealing s. 50 of the Act of 1923, is an integral part of those provisions which must have been drafted with *Disraeli's* case (1) in mind. He, therefore, argues that a contrary intention is indicated, and that s. 38 (2) of the Interpretation Act does not prevent the application of the common law rule that, after repeal, a statutory provision is to be treated as though it had never existed, except as to matters and transactions past and closed. G H

In my judgment, the submission of counsel for the defendant is the correct one. I do not consider that s. 33 (3) of the Act of 1947 means more than that

s. 50 of the Act of 1923 is to cease to have effect with respect to any future contracts. In future the tenant's rights are to be governed by s. 33 (1) and (2) notwithstanding any agreement to the contrary, but no contrary intention is indicated with regard to earlier contracts which have already been rendered void by the repealed section, and I am unable to accept that a clause in an agreement long ago rendered void at the moment of its inception springs into life when the statutory provision declaring it void is itself repealed. By virtue of s. 50 of the Act of 1923 declaring cl. 1 void in part, the tenant had long ago acquired a right or privilege from being ejected without notice from the whole or part of his holding under cl. 1, and, in my opinion, s. 38 (2) of the Interpretation Act, 1889, preserved that right or privilege notwithstanding the repeal of s. 50 of the Act of 1923.

I am, I think, fortified in this view by certain passages in the judgment of the Court of Appeal in *Boddington v. Wisson* (3), although the actual decision in that case was on a different point. The Court of Appeal was there considering the effect of the repeal of reg. 62 (4A) of the Defence (General) Regulations, 1939, which provided that in the case of agricultural holdings sold since September, 1939, any notice to quit given to the tenant so as to expire at any time after the end of 1941 should be null and void, provided that the paragraph should not apply to any notice if (whether before or after the giving thereof) the Minister of Agriculture and Fisheries consented in writing thereto. Notice was given to the tenant in October, 1947, to quit in October, 1948. In the meanwhile, in March, 1948, reg. 62 (4A) requiring the consent of the Minister was revoked by Defence Regulation (No. 3) Order, 1948 (S.I., 1948, No. 336). Consequently, although the Minister's consent had been necessary until March, 1948, to make the notice to quit effective, it ceased to be necessary between March and October, 1948, when the notice was to take effect. The Court of Appeal held that the words "null and void" in the earlier part of the regulation were not appropriate in the case of a notice to quit which was good on the face of it when given but effective only on the consent of the Minister being given at any time before its expiry, and held that s. 38 (2) of the Interpretation Act, 1889, did not preserve the effect of reg. 62 (4A) in relation to the notice in question. In other words, the notice, when given, was perfectly good and remained good although unenforceable unless the Minister gave his consent before its expiry, and the revocation of the requirement of the Minister's consent during the currency of the notice left it still what it always had been, a good notice. SIR RAYMOND EVERSHED, M.R., contrasted the words of reg. 62 (4A) with those of its original predecessor which were to the effect that a notice to quit would be null and void unless, prior to the giving of it, a consent had been obtained. If it had remained in that form the words "null and void" would have been appropriate. Then, after quoting the common law rule as to the effect of the repeal of a statute, to which I have already referred, and the Interpretation Act, 1889, s. 38 (2) (a), the Master of the Rolls said these words, which, in my opinion, are particularly applicable to the present case ([1951] 1 All E.R. 169):

"If reg. 62 (4A) had retained its original form so that the notice in question would have been wholly inoperative or 'null and void' from the moment of its service because of the non-fulfilment of the condition precedent, then I think that the effect of s. 38 (2) (a) of the Act of 1889 would have been that the common law rule to which I have alluded would not have applied so as again to give life to this notice to quit, but, as I have pointed out, the effect of reg. 62 (4A) was not so destructive."

In my opinion, just as the original version of reg. 62 (4A) would have rendered a notice to quit given without the Minister's prior consent void in its inception and incapable of revival on repeal of the regulation, so in the present case s. 50

of the Act of 1923 effectively avoided cl. 1 of the agreement *ab initio*, and the repeal of s. 50 breathed no new life into a clause which was already dead.

The submission of counsel for the defendant that cl. 1 was void under the Act of 1923 and remained void at all material times, therefore, prevails, and the defendant is entitled to my judgment on that ground alone. If, however, I am wrong as to the effect of the repeal of s. 50 of the Act of 1923 and the applicability of the Interpretation Act, 1889, s. 38 (2), it remains to consider the first submission made by counsel for the defendant, that cl. 1 was rendered void, so far as it gives a right of re-entry, by the Act of 1948. Counsel's argument takes the form of demonstrating that all of the provisions of the Act of 1923 (save one) which forged the essential links of the judgment of CROSSMAN, J., in *Disraeli's* case (1), have their corresponding reproductions in the Act of 1948, and, although the Act of 1948 has nothing actually to correspond to s. 50 of the Act of 1923, he submits that the effect of s. 65 can only be to avoid any provision of an existing contract which is inconsistent with it, and is, therefore, tantamount to the same thing. He thus still relies on the principle of *Disraeli's* case (1). Counsel for the plaintiffs replies that *Disraeli's* case (1) is rooted in s. 50 of the Act of 1923, and, when once that section was repealed, *Disraeli's* case (1) could no longer be relied on.

It is true that in the Act of 1923 there was to be found in s. 50 an express declaration of avoidance of agreements in so far as they took away or limited a tenant's right to claim compensation, but, in my opinion, the true approach to this question is to inquire whether the Act of 1948 confers any statutory rights on a tenant with which any contractual rights of the landlord cannot consistently walk hand in hand. If so, the latter must give place to the former, and the result is the equivalent of a statutory avoidance. Counsel for the defendant lays the foundation for his argument by making the following comparisons: (i) Section 60 of the Act of 1948 corresponds to s. 27 (2) and (1) (b) of the Act of 1923, and applies the provisions of the Act of 1948 with respect to compensation to part of a holding re-possessed by a landlord under a contract of tenancy as if it were a separate holding. (ii) Section 34 (1) of the Act of 1948 corresponds to s. 12 (1) of the Act of 1923 and gives the quitting tenant a right to claim compensation for disturbance, subject to the provisions of the section, *viz.*, s. 34 (2) and provisos (a) and (c) under which (as in s. 12 (6) and (7) (b) of the Act of 1923) the compensation for disturbance shall be the amount of loss directly attributable to the quitting of the holding unavoidably incurred by the tenant through the sale or removal of his household goods, farm live and dead stock, etc., but limited to one year's rent of the holding unless not less than one month before the termination of the tenancy he has given the landlord notice in writing of his claim to a greater amount, limited to two years' rent. Thus, whereas the tenant could not claim compensation for disturbance at all under the Act of 1923 unless he had given one month's notice, he is now entitled at any rate to one year's rent (if he can prove loss and expense) without giving prior notice, but, if he desires to claim more than one year's rent, he must still have given one month's notice before the termination of the tenancy. He is obviously deprived of that right if his landlord can eject him without notice. (iii) Section 56 of the Act of 1948 is the successor of s. 9 of the Act of 1923 and gives the tenant a similar right to compensation in respect of the increased value of the land due to his continuous adoption of a special system of farming, provided, again, that he gives notice in writing of his intention to make such claim not later than one month before the termination of the tenancy. One month's notice is now essential, whereas under the Act of 1923 a lesser notice would have sufficed. If he can be ejected without notice by the landlord he is likewise disarmed from making claim for this special compensation. (iv) Then comes the all-important s. 65 of the Act of 1948, which has no specific fellow in the Act of 1923, though it substantially reproduces

s. 33 of the Act of 1947, without, however, unnecessarily repeating the repeal of s. 50 of the Act of 1923.

Section 65 (1) provides:

“Save as expressly provided in this Act, in any case for which apart from this section the provisions of this Act provide for compensation, a tenant or landlord shall be entitled to compensation in accordance with those provisions and not otherwise, and shall be so entitled notwithstanding any agreement to the contrary . . .”

- A That sub-section is substantially the same as s. 33 of the Act of 1947. It is intended to prevent contracting out of the Act. Notwithstanding any agreement to the contrary, a tenant is to be entitled to compensation in accordance with the provisions of the Act (including compensation under s. 34 and s. 56), but not otherwise. Any provision of an agreement which deprives or even curtails, or which necessarily results in deprivation or curtailment of, any right to compensation under the Act must, so it seems to me, be unenforceable. Here cl. 1 of the agreement, by giving the landlord power to re-enter at any time without notice, would prevent the tenant from setting in motion the statutory machinery to obtain higher compensation under s. 34 (2) or compensation under s. 56 by giving one month's notice in writing before the termination of the tenancy, by virtue of which, “and not otherwise”, he is entitled to claim such compensation, but by s. 65 he is entitled to it as of statutory right if he gives the requisite notices notwithstanding any agreement to the contrary. Counsel for the defendant points out that there are only four conceivable results of s. 65 in relation to cl. 1: (i) That the section renders the clause void, as the defendant contends. (ii) That the landlord is entitled to possession without notice, and the tenant cannot get compensation. This is in accordance with the clause, but directly contrary to the section. (iii) That the landlord is entitled to possession without notice, and the tenant can get compensation without serving notices. This is contrary to both the clause and the section. (iv) That the landlord is entitled to possession on giving more than one month's notice. This is in accordance with the section, but contrary to the clause, and, in any event, more than one month's notice was not given. The notice was one month less one day, thus depriving the tenant of his rights under s. 34 (2) and s. 56.

- E In my judgment, therefore, the first alternative is correct, and the clause is void in law by virtue of s. 65 of the Act of 1948. It is impossible to give effect to it without invading the tenant's rights under the Act to some extent, and the landlord's contractual right must give place to the tenant's statutory right. This view is, I think, strengthened by s. 23 (1) (b) of the Act of 1948, which recognises the validity of a provision of a contract for resuming possession of part of a holding for a specific purpose on giving a notice to quit in pursuance of such provision which need not be the ordinary minimum twelve months' notice, but, in view of s. 65, it must clearly be more than one month's notice.
- F Again, s. 24, which by sub-s. (2) specially exempts from the necessity of ministerial consent land required for a use for which permission has been granted under the Town and Country Planning Acts, none the less refers to a notice to quit given by the landlord. But under these sections a provision in a contract authorising the immediate resumption without notice of part of a holding for such special purpose would clearly be void, since the tenant must have sufficient notice to enable him to serve his one month's notice claiming compensation under the Act. The defendant, therefore, is also entitled to succeed on the ground that cl. 1 of the agreement was rendered void by the Act of 1948.

- H Counsel for the defendant also took the point that the words in cl. 1 “or other purposes” are to be construed *ejusdem generis* with the preceding words “building sites or planting,” and do not cover the use of the land as a sports stadium for speedway and greyhound racing, football and other athletics. My attention has been drawn to a number of cases dealing with charterparties,

notably, *Magnhild (Owners) v. McIntyre Brothers & Co.* (4), where McCARDIE, J., made an exhaustive review of the *ejusdem generis* rule and its application; *Tillmanns & Co. v. S.S. Knutsford, Ltd.* (5); and the recent decision of DEVLIN, J., in *Chandris v. Isbrandtsen-Moller Co. Inc.* (6). I agree with DEVLIN, J., when he says ([1950] 1 All E.R. 773):

"If the *ejusdem generis* principle is a rule of automatic application, it becomes of the first importance to determine exactly what the rule is. If it is merely, as I think, an aid to ascertaining the intention of the parties, no point of controversy need arise. If there is something to show that the literal meaning of the words is too wide, then they will be given such other meaning as seems best to consort with the intention of the parties. In some cases it may be that they will seem to indicate a *genus*; in others that they perform the simpler office of expanding the meaning of each enumerated item. If a *genus* cannot be found, doubtless that is one factor indicating that the parties did not intend to restrict the meaning of the words, but I do not take it to be universally true that, whenever a *genus* cannot be found, the words must have been intended to have their literal meaning, whatever other indications there may be to the contrary."

I do not think that the application of the rule to the construction of charter-parties is necessarily conclusive in construing such a contract as the present. I refer to the words of LORD MACNAGHTEN in *S.S. Knutsford, Ltd. v. Tillmanns & Co.* (5) ([1908] A.C. 409):

"... I think the rule of *ejusdem generis* applies as laid down in *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (7), and I prefer to take the rule on a point of that sort from a case which did deal with bills of lading and shipping documents rather than from cases that dealt with real property and settlements."

I think that not only does the converse hold good, but that like must be compared with like. For this reason, in construing cl. 1 it is more appropriate to follow the authority of a case such as *Johnson v. Edgware, etc., Ry. Co.* (8), which was a decision on the lease of an agricultural holding, where the landlord reserved the right to resume possession, on giving three months' notice, of any portion of the demised lands required for the purpose of "building, planting accommodation or otherwise." It was held that the words "or otherwise" must be construed *ejusdem generis* with the preceding words, and did not enable the landlord to resume possession of land required by a railway company so as to defeat the tenant's right to compensation. These words are to be compared with the words "building sites or planting or other purposes" in the present case. I do not think that the omission of the word "accommodation" from the phrase is material. I do not think that there is any substantial difference between "building" and "building sites." If anything the latter has, perhaps, a narrower meaning, and I do not think, as counsel for the plaintiffs contends, that the absence of a common *genus* between "building sites" and "planting" prevents the application of the rule any more than it did in *Johnson v. Edgware, etc., Ry. Co.* (8). I have to construe the words to give effect to the intention of the parties, and use the rule as an aid to that end. In so far as a *genus* is to be found in the words, I think it is the normal user of land of the character concerned, and I cannot think that it was ever the intention of the parties to this contract that part of the land within a quarter of a mile of the farm-house should be used for building a sports stadium, intended to be used, incidentally, for such noisy activities that a special condition for minimising noise is attached to the planning authority's permit. I do not think that this was the kind of "building site" contemplated, nor that the words "or other purposes," construed *ejusdem generis* with the earlier words, cover such buildings as a sports stadium and other buildings purely ancillary

to the main purpose of providing a sports ground. I, therefore, decide this point in the defendant's favour also.

Finally, counsel for the defendant submits that, in so far as the plaintiffs have to rely on the notice to quit it is invalid or suspended in its operation—invalid because, *inter alia*, as I have already stated, it was of insufficient length to enable the tenant to avail himself of certain provisions of the Act of 1948 as to claiming compensation; suspended, because under reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948, made under the Act of 1947, but which it is agreed are also applicable to the Act of 1948, the tenant has within one month of the notice to quit served on the landlord a notice in writing requiring a question arising out of the reason stated in the notice to quit to be determined by arbitration, and by reg. 7 until the termination of such arbitration the operation of the notice to quit is suspended. No such arbitration has taken place, and as the plaintiffs' statement of claim is based on the notice to quit, which is thus suspended, the plaintiffs' cause of action must, in my judgment, suffer the same fate. I would add that this reference to arbitration appears to be not without substance, for it is questionable whether cl. 1 covers the reason stated in the plaintiffs' notice to quit, *viz.*, that Jesty wishes to allow the new landlords, the plaintiffs, to enter on the lands to do preparatory work for which permission has been granted to them. Clause 1 reserves to the landlord the right to re-enter on such land as he may require for specific purposes. It appears that the landlord at the date of the notice (Jesty) did not require it for himself, but for the benefit of the plaintiffs, to whom he had sold the land. The fact that the landlord did not require the land for himself but for the benefit of the railway company was one of the grounds for the decision unfavourable to the landlord in *Johnson v. Edgware, etc., Ry. Co.* (8). It would seem, therefore, that the defendant had sound reasons for demanding arbitration on this question. For all of the above reasons, in my view, the plaintiffs' action must fail, and there will be judgment for the defendant, with costs.

Judgment for defendant.

Solicitors: *J. R. Tudor Griffith*, Weymouth (for the plaintiffs); *Burges, Salmon & Co.*, Bristol (for the defendant).

[Reported by CONRAD OLDHAM, ESQ., Barrister-at-Law.]

BOB KEATS, LTD. v. FARRANT.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 6, 1951.]

Building Control—Licence—Failure to obtain—Prosecution by local authority—Information laid by clerk to council—No resolution by council authorising clerk to take proceedings—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (2) (as amended)—Control of Building Operations (Proceedings by Local Authorities) (No. 1) Order, 1947 (S.R. & O., 1947, No. 75), art. 1.

A local authority resolved to institute proceedings against a firm of builders for an offence against reg. 56A (2) of the Defence (General) Regulations, 1939, but no resolution was passed authorising their clerk to prosecute on their behalf. The clerk preferred an information against the builders who were convicted.

HELD: the Control of Building Operations (Proceedings by Local Authorities) (No. 1) Order, 1947, art. 1, contemplated a formal appointment

to prosecute by resolution under s. 277 of the Local Government Act, 1933, and, as there was no such resolution, the clerk was acting without authority and the conviction must be quashed.

FOR THE CONTROL OF BUILDING OPERATIONS (PROCEEDINGS BY LOCAL AUTHORITIES) (No. 1) ORDER, 1947 (S.R. & O., 1947, No. 75), see BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Sixth Binder, Title Supply (Industrial) [39], p. 209.

CASE STATED by Rutland justices.

On Sept. 6, 1950, at a court of summary jurisdiction sitting at Oakham, an information was preferred by the respondent, the clerk to the Oakham Rural District Council, that the appellants had unlawfully carried out work relating to the construction of a swimming pool without there being in force in respect thereof a licence granted by the Minister of Works, contrary to reg. 56A (2) of the Defence (General) Regulations, 1939. On May 30, 1950, a resolution had been passed by the council to prosecute the appellants, and a firm of solicitors had been instructed to act for the council, but no other resolution was passed by the council with reference to these proceedings. For the appellants it was contended that, in the absence of a resolution appointing the respondent, either generally or specifically, to undertake proceedings, the prosecution was incompetent and the appellants were entitled to acquittal. For the respondent it was contended that under the Control of Building Operations (Proceedings by Local Authorities) (No. 1) Order, 1947, art. 1, without any specific appointment he could, by virtue of his office of clerk, coupled with the resolution of May 30, 1950, institute proceedings. The justices being of the opinion that the submission of the respondent was correct, convicted the appellants, and fined them £50.

F. D. L. McIntyre for the appellants.

Wingate-Saul for the respondent.

LORD GODDARD, C.J.: When the Control of Building Operations (Proceedings by Local Authorities) (No. 1) Order, 1947 (S.R. & O., 1947, No. 75), art 1, refers to the appointment of an officer, either generally or specifically, for the purpose of taking proceedings, it contemplates that there will be a formal appointment made by resolution under s. 277 of the Local Government Act, 1933. If a resolution had been passed by the council in the present case authorising the respondent to take proceedings, the prosecution would have been in order; but they omitted to pass that resolution; and, therefore, there was no authority in the clerk to take the proceedings, and the justices ought to have dismissed the information. Accordingly, this appeal must succeed.

OLIVER, J.: I agree.

CASSELLS, J.: I agree.

Conviction quashed.

Solicitors: *Vizard, Oldham, Crowder & Cash*, agents for *Oldham, Marsh & Son*, Melton Mowbray (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

COVENTRY PERMANENT ECONOMIC BUILDING SOCIETY
v. JONES AND OTHERS.

[CHANCERY DIVISION (Harman, J.), March 15, 1951.]

Mortgage.—Power of leasing.—Tenancy by estoppel.—Tenancy agreement entered into by mortgagor before completion of purchase by her of mortgaged property.—Mortgage granted to facilitate purchase.—Exclusion of mortgagor's power of leasing.

Land Charge.—Registration.—Estate contract.—Tenancy agreement.—Effect on subsequent mortgagees.—Law of Property Act, 1925 (c. 20), s. 199 (1).

On Feb. 15, 1949, J. purchased at an auction a dwelling-house known as No. 5, Bidston Avenue, with vacant possession of the ground floor. On Feb. 16, 1949, J. agreed in writing with A and B, in consideration of the surrender to J. by A and B of their tenancy of another dwelling-house owned by J., "(a) To grant to [A and B] for their own occupation a weekly tenancy of the ground floor flat at 5, Bidston Avenue. . . and such tenancy shall commence on the day [A and B] shall take possession of the said flat as provided in cl. 2 hereof.". Clause 2 provided that A and B would surrender their tenancy of the dwelling-house within fourteen days after certain repairs and decorations of the flat had been effected. J. subsequently arranged that a building society should advance money on a mortgage of No. 5, Bidston Avenue, so that she might be able to complete the purchase of that property. In her application to the building society she stated that she was securing vacant possession of the ground floor flat and did not disclose the agreement with A and B. On Mar. 16, 1949, J. let A and B into possession of the flat and gave them a rent book. On Mar. 18, 1949, the purchase of No. 5, Bidston Avenue, was completed, and on the same day the property was mortgaged to the building society by demise for a term of years to secure an advance of £1,440 repayable by instalments. J. attorned tenant to the building society of such parts of the property as were in her occupation, and her statutory right to create leases was excluded. The building society now sought possession of the ground floor flat.

HELD: (i) the effecting of the conveyance and the mortgage must be regarded as one transaction; it could not be predicated that there was a *scintilla temporis* between the time of the conveyance to J. and that of the granting of the mortgage by her during which she had acquired sufficient estate to be able to perfect the purported grant of the tenancy to A and B; and, therefore, A and B had not acquired a tenancy by estoppel.

(ii) the agreement of Feb. 16, 1949, was an estate contract capable of registration under the Land Charges Act, 1925, s. 10 (1) C (iv), and, as it was not so registered, the building society could not, having regard to the Law of Property Act, 1925, s. 199, be affected prejudicially by constructive notice thereof.

AS TO MORTGAGEE'S RIGHT TO POSSESSION, see HALSBURY, Hailsham Edn., Vol. 23, pp. 358-361, paras. 535-539; and FOR CASES, see DIGEST, Vol. 35, pp. 394-398, Nos. 1370-1404.

Case referred to:

(1) *Dudley & District Benefit Building Society v. Emerson*, [1949] 2 All E.R. 252; [1949] Ch. 707; [1949] L.J.R. 1441; 2nd Digest Supp.

ADJOURNED SUMMONS.

The plaintiff, Coventry Permanent Economic Building Society, as mortgagee, claimed possession of part of the mortgaged property against the mortgagor

and the occupants of that part. The occupants claimed to be entitled to possession as tenants of the mortgagor.

J. Turner for the plaintiff.

The first defendant, the mortgagor, was not represented.

Blease for the second and third defendants, the occupants of the ground floor.

HARMAN, J.: On Feb. 15, 1949, the first defendant, Mrs. Jones, purchased at auction for £1,800 freehold property known as No. 5, Bidston Avenue, Wallasey. She had, as her tenants in another house of hers, *viz.*, 20, Lymington Road, Wallasey, the second and third defendants, two spinsters of the name of Mason. On Feb. 16, 1949, the day following her purchase, Mrs. Jones appears to have entered into an agreement with her tenants. It is not clear whether the agreement is under seal or under hand. It is stamped 15s. and expressed to be made by Mrs. Jones, of the one part, and the two Misses Mason, of the other. It recites that the tenants (the Misses Mason) have agreed with the landlord (Mrs. Jones) to surrender to her their tenancy of the dwelling-house in Lymington Road, and the landlord, in consideration of that, agreed as follows:

“(a) To grant to the tenants for their own occupation a weekly tenancy of the ground floor flat at 5, Bidston Avenue, Wallasey, aforesaid at the weekly rental of £1 5s. (inclusive of general rate and water rate which the landlord will pay) and such tenancy shall commence on the day the tenants shall take possession of the said flat as provided in cl. 2 hereof.”

The landlord also covenanted to do various repairs and to pay certain monies to the tenants for removal expenses. By cl. 2, the tenants agree with the landlord

“that they will within fourteen days after the landlord shall have so repaired and re-decorated the said flat surrender to the landlord the tenancy of the said dwelling-house and yield up the same to her.”

The landlord, of course, only had an equitable interest in 5 Bidston Avenue at that time. She had contracted to purchase it and her agreement with the tenants created only a tenancy in the future, which was to begin “on the day the tenants shall take possession of the flat.” Having made that agreement, she made a proposal to the building society (who is the plaintiff in this suit) for an advance, and a mortgage application form, which is before me, shows that she represented that she was getting vacant possession—as in a sense she was—of the bottom flat. She was, therefore, not disclosing to the building society the agreement she had already made to let the flat to the two Misses Mason. The building society agreed to make her an advance of £1,440, which was the amount she needed. Apparently, she got possession from the vendor before she completed her purchase and did some re-decorations, as the agreement to admit the Misses Mason provided, and on Mar. 16, 1949, she let them into possession and gave them a rent book which shows that their rent was £1 5s. a week, the amount mentioned in the tenancy agreement. It is said that that put an end to the tenancy agreement—which was exhausted when the tenancy commenced by the taking possession by the tenants. On Mar. 16, 1949, there was only an equitable interest vested in the landlord, and, therefore, she could not create a legal tenancy.

The purchase was completed on Mar. 18, 1949, when the property was conveyed to the landlord by the vendor in consideration of a sum of £1,800 expressed to be paid by her. At the same time she mortgaged the property by demise to the building society for the usual term of three thousand years subject to redemption to secure the £1,440, the obligation being to pay it back by instalments partly of principal and partly of interest over a term of twenty years, and she attorned tenant to the plaintiffs of such parts as were in her occupation. The statutory right of the mortgagor to create leases was excluded by that

document. After that, therefore, she could create no lease without the leave of the mortgagees which would be binding against them. That is shown, if authority for it be needed, by *Dudley & District Benefit Building Society v. Emerson* (1). It is said, however, that the tenancy of the Misses Mason preceded the rights of the mortgagees in this way. There is an old doctrine (none the worse for being old) that if A purports to create a lease in B's favour, A having no estate sufficient to support the lease, then, if A afterwards acquires a sufficient estate, he will be bound not to deny that he always had a good right to create the tenancy and the lease is said to take effect by estoppel. That doctrine, it is argued, applies here. The giving of a rent book to the tenants on Mar. 16, 1949, created, it is said, a tenancy by estoppel which was immediately effective when the grantor acquired the legal estate in fee simple, which she did by the conveyance to her on Mar. 18, 1949, and there must be predicated a *scintilla temporis* between the conveyance to her and the mortgage by her into which the tenancy by estoppel can be inserted so as to get precedence to the mortgage of the building society.

The question is whether I must assume the *scintilla temporis* and assume that because of the obligations of the landlord she must be held to have defrauded her mortgagee by creating a tenancy which is good against the society although it was not willing to lend the money except on the footing that she had no such right. I do not see why I need postulate this. The whole transaction was one transaction. The vendor would not sell without receiving his purchase money, and the mortgagee would not provide the purchase money without receiving the term of years. The money, in fact, went straight—as is the universal practice—from the mortgagee to the vendor, and not until it was in the vendor's hands would a legal state be created either in favour of the landlord or of the mortgagee. It seems to me that the whole thing is one transaction in substance, and I am not constrained to introduce an artificiality so as to affect the rights of the building society. Consequently, I reject the argument that the doctrine of estoppel must have created in the tenants an estate in priority to that of the building society. The grantor of the so-called tenancy would never have acquired the estate which she did acquire but for that mortgage money, and it would not be right, therefore, to introduce a fiction in the manner suggested.

Secondly, it is said that the tenants went into possession on Mar. 16, 1949 (two days before completion), and were in occupation at the date of completion, and that, therefore, according to the well-known conveyancing doctrine, the building society had notice of their equitable rights as persons in occupation of the property. If, it is argued, the society had inquired between Mar. 16 and Mar. 18 it would have found the tenants in possession, holding a rent book, and claiming to be entitled to a tenancy; and, therefore, the building society cannot be heard to say now that it is a purchaser for value without notice of the rights of the tenants. The test seems to me to be what was the nature of the rights which the tenants had if they had not a legal right—which I have held they had not. It seems to me their rights were equitable rights depending on the agreement which they made with the landlord on Feb. 16, 1949. That is a document, so it seems to me, which comes within the Land Charges Act, 1925, as being what is commonly known as "an estate contract" under s. 10 (1) C (iv) of that Act, viz., a contract

" . . . by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate . . . "

The landlord was, by virtue of her bid at the auction, entitled to have a legal estate conveyed to her and this was a contract by her to create a legal tenancy. It could, therefore, have been registered under the Land Charges Act, 1925. By s. 13 (2) it is provided:

" A land charge of . . . Class C . . . created or arising after the commencement of this Act, shall (except as hereinafter provided) be void as against

a purchaser of the land charged therewith, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase . . .”

It is said that these provisions do not apply so as to affect the rights of anybody in occupation. I am referred to the Law of Property Act, 1925, s. 14, for that purpose, but that section (which is obscure enough) only provides that the first part of that Act (*i.e.*, the first thirty-nine sections of the Law of Property Act, 1925) shall not prejudicially affect the interests of any person in possession. The material section, as it seems to me and as has been pointed out, is s. 199 (1) of that Act, which provides:

“A purchaser shall not be prejudicially affected by notice of—(i) any instrument or matter capable of registration under the provisions of the Land Charges Act, 1925 . . . which is void or not enforceable as against him under that Act . . . by reason of the non-registration thereof.”

The title of the tenants should have been registered under the Land Charges Act, 1925, and, therefore, under the Law of Property Act, 1925, s. 199, even though the building society had constructive notice of it, it is not to be prejudicially affected by such notice. The tenant's title was not registered, and is, therefore, void against the building society. In my judgment, therefore, the building society is justified in its claim and there should be an order for possession.

Order accordingly.

Solicitors: *Cuff, Roberts & Co.*, Liverpool (for the plaintiff); *Alsop, Stevens & Co.*, Liverpool (for the defendants).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

RHODES *v.* HERITAGE.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 6, 1951.]

Animal—Dog—Destruction—Order made on summons for non-compliance with order to keep under control—Validity—Dogs Act, 1871 (c. 56), s. 2.

On Dec. 19, 1949, an order was made by justices that a dog of which the appellant was the owner was a dangerous dog and that he should keep it under proper control. On Oct. 16, 1950, a further information was laid charging him with not having complied with the order, and the justices ordered that the dog be destroyed.

HELD: on the charge against the appellant the justices had no power to order the destruction of the dog, but were confined to imposing on the appellant the penalty of a fine provided by s. 2 of the Dogs Act, 1871.

AS TO DANGEROUS DOGS, see HALSBURY, Hailsham Edn., Vol. 1, p. 570, para. 978; and FOR CASES, see DIGEST, Vol. 2, pp. 247, 248, Nos. 314-319 and Digest Supps.

CASE STATED by Aylesbury justices.

On Oct. 16, 1950, at a court of summary jurisdiction sitting at Princes Risborough, an information was laid by the respondent, a superintendent of police, that the appellant had failed to comply with an order of the court, dated Dec. 19, 1949, adjudging that his dog was dangerous and directing that he should keep it under proper control. It was proved that the appellant had failed

to comply with the order of Dec. 19, 1949, and the justices found that the dog was dangerous and made an order for its destruction.

Paul Curtis-Bennett for the appellant.

The respondent did not appear and was not represented.

LORD GODDARD, C.J., delivered the following judgment of the court.

A This is a Case stated by justices for the county of Buckingham, before whom the appellant was charged with failing to comply with an order made at Princes Risborough on Dec. 19, 1949, that a dog of which he was the owner was dangerous and that he should keep it under proper control. He did not keep it under proper control, because the justices found that it was not under proper control on June 30 and July 1, 1950. In the circumstances I am not surprised that they made an order for its destruction. That would have been a proper order B to make if they had had power to make it, but they had not. Section 2 of the Dogs Act, 1871, provides:

C "Any court of summary jurisdiction may take cognisance of a complaint that a dog is dangerous, and not kept under proper control, and if it appears to the court having cognisance of such complaint that such dog is dangerous, the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding 20s. for every day during which he fails to comply with such order."

D That does not give the justices power to make an order that a dog should be destroyed when its owner is summoned, not on the ground that the dog is dangerous or that it is not kept under proper control, but on the ground that he has failed to comply with a previous order. If the informant had laid a complaint that on June 30 and July 1, 1950, this dog was dangerous or not kept under proper control, the justices, notwithstanding their previous order, could have made an order for the dog's destruction, but, as the appellant was summoned for failing to comply with the order to keep the dog under proper control, the only penalty which the justices could impose was a fine not exceeding 20s. a day for every day's default. The case must go back to the justices with an intimation to this effect.

Case remitted.

Solicitors: *Burton, Yeates & Hart*, agents for *Lightfoot and Lowndes*, Princes Risborough (for the appellant).

F [Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

G *Re McARDLE (deceased). McARDLE v. McARDLE.*

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), March 13, 14, 15, 16, 1951.]

Equitable Assignment—Absence of consideration—Validity—Need to be complete and perfect.

H A voluntary equitable assignment of a sum of money, to be valid, must be in all respects complete and perfect, so that the assignee is entitled to demand payment from the holder of the fund, and the holder is bound to make payment to the assignee, with no further act on the part of the assignor remaining necessary to perfect the assignee's title.

M. and his wife lived in a dwelling-house forming part of the estate of M.'s father, in which M. and his brothers and sister were beneficially interested expectant on the death of the tenant for life. In 1943 and 1944

M. and Mrs. M. carried out certain improvements and decorations in and on the house, the cost of which, amounting to £488, was borne by Mrs. M. In April, 1945, M. and his brothers and sister signed a document addressed to Mrs. M., which provided: "In consideration of your carrying out certain alterations and improvements to [the dwelling-house] at present occupied by you, we the beneficiaries under the will of [the father] hereby agree that the executors . . . shall repay to you from the said estate when so distributed the sum of £488 in settlement of the amount spent on such improvements. Dated Apr. 30, 1945." The document bore stamps to the value of sixpence. In 1948 the tenant for life died, and Mrs. M. claimed payment of £488. A

HELD: the consideration for the execution of the document of Apr. 30, 1945, being past, the document was *nudum pactum*, and it could not operate as an equitable assignment for valuable consideration, and, while an equitable assignment could be valid without consideration, the document did not constitute such an assignment because, as it contemplated future action by Mrs. M. to the satisfaction of the signatories, it did not render her title complete and so was not complete and perfect. B

AS TO EQUITABLE ASSIGNMENT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 303-307, paras. 421-428 and Vol. 13, pp. 129-131, paras. 112-115; and FOR CASES, see DIGEST, Vol. 8, pp. 445-448, Nos. 205-228. C

Cases referred to:

- (1) *Fisher v. Calvert*, (1879), 27 W.R. 301; 8 Digest 447, 225.
- (2) *Harding v. Harding*, (1886), 17 Q.B.D. 442; 55 L.J.Q.B. 462; 8 Digest 442, 191. D
- (3) *German v. Yates*, (1915), 32 T.L.R. 52; 8 Digest 456, 293.
- (4) *Tweddle v. Atkinson*, (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 121 E.R. 762; 12 Digest 42, 218.
- (5) *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 12 Digest 207, 1662. E

APPEAL by certain respondents from an order of DANCKWERTS, J., dated Nov. 17, 1950, and made on an originating summons taken out by the applicant, Mrs. Marjorie McArdle. DANCKWERTS, J., held that a document dated Apr. 30, 1945, signed by the respondents and addressed to the applicant, constituted a valid equitable assignment of a right to receive £488 from the estate of William Edward McArdle, deceased. F

Strangman, K.C., and *Dillon* for the respondents, other than Mr. Montague McArdle and the National Provincial Bank, Ltd.

Astell Burt for the applicant, Mrs. Montague McArdle, and Mr. Montague McArdle.

Wilfrid Hunt for the National Provincial Bank, Ltd. G

SIR RAYMOND EVERSLED, M.R.: William Edward McArdle died in February, 1935, having by his will left his estate for equal division among his five children, subject to a life interest in favour of his widow, Mrs. Holly McArdle. He appointed the National Provincial Bank, Ltd., as his executor and trustee. Mrs. Holly McArdle died in 1948. In 1943 one of the children, Montague McArdle, and his wife, Mrs. Marjorie McArdle, were living in a bungalow at Gravel Hill Farm, Wimborne, which formed part of the father's estate. It was war time and building and decorating operations were severely restricted, but Mr. and Mrs. Montague McArdle embarked on certain works of improvement and repair. It is said, and I dare say truly said, that these improvements and decorations were such as suited Mr. and Mrs. Montague McArdle, who were living there. It is not disputed that they did improve the property. They were paid for by Mrs. Montague McArdle, the total sum paid by her being H

£488, a figure which includes £80 paid to her husband for his work and labour done, he being by trade a builder or decorator. In April, 1945, after the work had been done, Montague McArdle presented to each of his three brothers and his sister a document which is in the following terms, as executed:

A "To Mrs. Marjorie McArdle, Gravel Hill, Wimborne. IN CONSIDERATION of your carrying out certain alterations and improvements to the property known as Gravel Hill Poultry Farm, Wimborne, at present occupied by you, we the beneficiaries under the will of William Edward McArdle hereby agree that the executors, the N.P. Bank, Ltd., of 1, Princes Street, London, E.C.2, shall repay to you from the said estate when so distributed the sum of £488 in settlement of the amount spent on such improvements. Dated Apr. 30, 1945. Signed . . ."

B There follow the five signatures, and the document bears two threepenny stamps. That document shows plainly that when it was executed the signatories intended that in the event stated, viz., when the estate came to be distributed, the bank should "repay" a sum of money to Mrs. Montague McArdle. It has been pointed out that at the time it was executed all the work had been done, and that fact was well-known to everybody who signed it. Nevertheless, leaving C aside for the moment the form which the document took (which was not in accordance with the facts), when these people signed the document it could not be doubted that they intended that Mrs. Montague McArdle should be repaid when the estate was distributed on Mrs. Holly McArdle's death, and they, of course, would get the advantage of any increase in value which the improvements had done to the property when it came to be sold and the proceeds to be distributed. D But, in 1950, when Mrs. Montague McArdle asked that effect should be given to this arrangement her three brothers-in-law and her sister-in-law had changed their minds. Mrs. McArdle's claim having been made, the bank paid the sum in question into court and Mrs. McArdle then applied by originating summons under the Trustee Act, 1925, s. 63, for payment out to her.

[HIS LORDSHIP referred to the evidence and continued:] The learned judge E held that the document of April, 1945, amounted to an equitable assignment or was otherwise effective to give Mrs. Montague McArdle a right to recover. The question for our determination is whether this document is effective to pass to Mrs. Montague McArdle an indefeasible interest in a proportionate part of the residuary estate. If it is not, I think it is clear that it must fail to give her a claim which she can litigate owing to the fact that there was and is no F consideration passing from her to support her claim. The learned judge held that on the authorities it was unnecessary in a case in which the subject-matter was existing property for such an equitable assignment to be supported by valuable consideration. The problem is vexed and difficult. I think it is accurately stated in SNELL'S PRINCIPLES OF EQUITY, 22nd ed., at p. 57:

G "Whether value is necessary for an equitable assignment is not clearly settled. It has been held that value is not necessary for an assignment of a legal thing in action which complies with the statutory provisions, and it would seem to be unnecessary also for an assignment of an equitable thing in action, such as a legacy or an interest in trust funds, provided that the assignment is complete and perfect; there is no reason why a man H should not be able to give away an equitable interest as freely as he can give away a legal interest. But value appears to be necessary for an equitable assignment of a legal thing in action; such an assignment being inoperative at law, the assistance of equity is needed to make it effective, and equity will not assist to make perfect an imperfect gift. Value is certainly necessary for the assignment of rights of property not yet in existence."

For the latter purpose value is necessary because where the property is not in existence at the time something else has to be done by the giver to give

effect to the gift. It can operate only in contract if there is no subject-matter then capable of being given. From the passage I have read I think the important matter to bear in mind is contained in the phrase, "provided that the assignment is complete and perfect," and in the sentence,

"there is no reason why a man should not be able to give away an equitable interest."

What the writer is saying there, and I accept it, is that, if what is done amounts to a gift, complete and perfect, of a subject-matter which is an equitable chose in action, there is no reason in principle or in authority why the donee should not take the benefit just as much as he would if the giver gave him a pound note which he put into his hand. Since the transaction is thus perfect, the question of consideration becomes irrelevant, for consideration is only necessary to support the assertion of a right to have made perfect something which is not yet perfect, for example, a contractual right. I, therefore, am prepared to accept for the purposes of this judgment the view that, if what was done on Apr. 30, 1945, was to assign, to make over, something completely and perfectly to Mrs. Montague McArdle, she is entitled to succeed notwithstanding the absence of consideration. But it seems to me equally clear that whether the transaction had that effect is a matter of the intention to be derived from the transaction itself and the evidence of it. As is said in WHITE AND TUDOR'S LEADING CASES IN EQUITY, 9th ed., vol. 1, p. 105:

"The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear."

I conceive that Mrs. Montague McArdle must be treated as coming here as a plaintiff and she must make out her case. She attempts to make it out by producing this document, and the question is: What is the proper inference of intention to be drawn from this document in the light of any other properly admissible evidence? There are certain very marked features about the document. It is quite plain that it is drawn (and I should say deliberately drawn—certainly I do not think Mrs. McArdle can be heard to say otherwise) so as to be on the face of it a valid contract. The draftsman, whether he was Montague McArdle or Montague McArdle's solicitors acting on his instructions, has been particularly careful in that respect:

"IN CONSIDERATION of your carrying out certain alterations and improvements . . . we . . . hereby agree . . ."

It is pointed out by counsel for Mr. and Mrs. McArdle that, although that form of words indicates in the plainest terms which it is possible to imagine that Mrs. McArdle is promising that she will carry out certain works, the truth was, as everybody knew, that the works had been carried out some time before. It has been suggested by counsel that the reason for putting the document in that form was that it was drawn up a long time before when the work had not been completed. Indeed, when this document was sent to the bank, as executor, with a covering letter which, singularly enough, bears date two days earlier, Montague McArdle, who sent it, stated that there had been great delay in getting it signed, but intimated that the real bargain had been made long before. In the affidavit in reply sworn by Montague McArdle he says that, although the document was prepared some little time before April, 1945, it was prepared after the work had been completed. We, however, must take this document as we see it, and I am bound to say that if the draftsman stated the facts contrary to what they were in truth, one is not only entitled, but is bound, to ask, why he did so. I find it very difficult to avoid the conclusion that the document was not intended to be other than a contract. I agree that the mere fact that it is in some sense contractual may not prevent its being an assignment.

The agreement, then, is

" . . . that the executors [the bank] shall repay to you from the said

estate when so distributed the sum of £488 in settlement of the amount spent on such improvements."

- The word "spent" there, as a matter of English, can only mean "that shall have been spent." As a matter of English, therefore, the document can only produce the result that the parties are agreed that, in return for Mrs. Montague McArdle's promise to do certain work, the bank will pay her a fixed sum.
- A The document reached the bank *via* Montague McArdle. When Mrs. Holly McArdle died, if counsel for Mrs. Montague McArdle is right, Mrs. Montague McArdle must have been entitled to say to the bank: "I have got an indefeasible right to recover this £488 from you," and the bank must have paid it, but, as I construe the document, I think it is plain that the bank, reading it according to the ordinary sense of the language, could not have accepted that view, but
- B must have said: "We are told we are to pay you this sum in settlement of the amount which, after the execution of this document will have become due in respect of work done by you. We are bound to ask the donors whether the work promised has been done and whether it is in order now for us to make this payment." In other words, it seems to me plain from the form that this document took that the transaction was neither
- C complete nor perfect, which it is essential that a voluntary equitable assignment should be. In other words, I do not think that it was a gift. The whole tenor of the document (not forgetting the stamp on it) is contrary to the form which would have been appropriate to a gift. I agree with counsel that there are cases showing clearly (see, *e.g.*, *Fisher v. Calvert* (1)) that, if one entitled to a share, either immediately ascertained or to be later ascertained,
- D in the residue of an estate directs and authorises the trustee to hand over that share or a part of it to another person, that may well, and I will assume *prima facie* that it will, be treated by the court as operating as an equitable assignment, *i.e.*, as a voluntary gift of the share or the proportionate part as the case may be. But it does so because (and this is, indeed, counsel's own test) the alleged donor has done everything that lies in his power to make it complete and
- E perfect. If this document had taken that form or had that effect, or if the intention that it should have that effect was clear (referring to the language in *WHITE AND TUDOR*), that result would follow. I regret that it is not so. I am sorry that the other parties to these proceedings have been able to evade the obligation they imposed on themselves in 1945, but I think this appeal must be allowed.
- F **JENKINS, L.J.:** I agree that this appeal should be allowed. I accept the proposition that a direction by a debtor to a trustee to pay a debt out of a specified trust fund may be a good equitable assignment of the trust fund to the extent of the debt. For that I need only refer by way of illustration to the last of the cases cited by counsel for Mr. and Mrs. McArdle, *Fisher v. Calvert* (1). I am further prepared to accept the proposition that an equitable
- G assignment of an existing interest in property of a character capable of being assigned may be a valid and binding assignment notwithstanding that it is made voluntarily, *i.e.*, notwithstanding that it has no consideration to support it and is in the nature of a mere gift. For that proposition reference may be made to two of the cases referred to, *Harding v. Harding* (2) and *German v. Yates* (3). But I accept that last proposition with this reservation. A voluntary
- H equitable assignment, to be valid, must be in all respects complete and perfect so that the assignee is entitled to demand payment from the trustee or holder of the fund, and the trustee is bound to make payment to the assignee, with no further act on the part of the assignor remaining to be done to perfect the assignee's title. Failing these conditions the voluntary assignment suffers the fate of other incomplete gifts. The donor has a *locus poenitentiae* and can change his mind at any time. No question of conscience enters into the matter, for there is no consideration and there is nothing dishonest on the part of an

intending donor if he chooses to change his mind at any time before the gift is complete.

Applying these considerations to the present case, the document which is said to operate as an equitable assignment is the document of Apr. 30, 1945, signed by the five children of the testator. That document on the face of it purports to be an agreement for valuable consideration under which, when Mrs. Montague McArdle has carried out certain alterations and improvements to the property known as Gravel Hill Poultry Farm, and in consideration of her so doing, the five children undertake that she is to be paid £488, representing the cost of the work, out of the testator's estate when distributed. Notwithstanding the argument to the contrary, it is plain, so far as the construction of the document is concerned, that it contemplates the doing by Mrs. Montague McArdle of work yet to be done and that her doing that work is to form the consideration by virtue of which she is to be entitled to receive £488 from the estate. If the document had correctly represented the facts, I have no doubt that it would have operated as a valid equitable assignment of £488 subject to Mrs. Montague McArdle performing her part of the bargain by providing the consideration she had contracted to provide in the form of doing the work. There might have been room for difficulty and argument whether the work had been properly done or not, but those matters could have been resolved one way or the other, if necessary by an action, and ultimately, if Mrs. McArdle showed she had done the work contracted for, her title to the £488 would have been complete, and, the agreement being for valuable consideration, it would not have mattered that further steps had to be taken to perfect her title. The true position, however, was that, as the work had all been done and nothing remained to be done by Mrs. McArdle at all, the consideration was wholly past, and, therefore, the beneficiaries' agreement for the repayment to her of the £488 out of the estate was *nudum pactum*—a promise with no consideration to support it. That being so, it is impossible for Mrs. McArdle to rely on this document as constituting an equitable assignment for valuable consideration. It is said that that does not matter, for it will serve its turn equally well as an equitable assignment voluntarily made, since, as appears from the second proposition I have accepted for the purposes of this case, absence of consideration is not a fatal objection to an equitable assignment.

I return to the reservation subject to which I accepted the general proposition that a voluntary equitable assignment may be valid and binding. It is essential that such an assignment should be perfect and complete. Applying that test, it seems to me that Mrs. McArdle's claim necessarily fails. It could not be said, in my view, that this document, presented to the bank, would give Mrs. Montague McArdle a complete and perfect title to the £488. The bank, in my view, would not have been obliged to pay that sum without taking proper steps to verify that the work which purported to form the consideration for the payment had been done. That would inevitably have involved reference to the beneficiaries. The bank would ask the beneficiaries: "Are you prepared to release this sum of £488? Mrs. McArdle says the work has been done. Do you agree?" If that had happened, it would, according to the evidence, have appeared that the work had all been done before the document was signed. The bank might then well have asked: "That being so, what effect did you intend this document to have? It purports to be a document for valuable consideration. Now it looks as though there was no consideration at all." It seems to me that, when they were thus referred to, the beneficiaries might well have said: "Well, we had it in mind to make a gift of the £488 to Mrs. McArdle, but what we, in fact, did was to execute this document, which is not appropriate for that purpose, and now we have changed our minds and we do not intend to make a gift of this £488 at all." It seems to me that in the hypothetical circumstances I have put the beneficiaries would, owing to the necessity for the bank to refer to them to confirm Mrs. McArdle's title to

the £488, have had a *locus poenitentiae*, and would have been entitled to resile from the gift, and, as I have said, questions of conscience do not enter into the matter where donors choose to change their minds with respect to incomplete gifts. Accordingly, in my judgment, this document, relied on as constituting, when communicated to the bank, a complete voluntary equitable assignment to Mrs. McArdle of a sum of £488 out of the testator's estate, fails to have that effect because it would not operate, and could not operate, to make a complete gift. It is a purported agreement for valuable consideration which is sought to be used for a different purpose, and, in my judgment, it is not available for that purpose.

HODSON, L.J.: The learned judge decided the dispute in favour of Mrs. Montague McArdle on the footing that there was an equitable assignment to her of £488, there being no contract between her and the signatories of the document of Apr. 30, 1945, since there was no consideration moving from her. Mrs. McArdle in this court has relied on the document of Apr. 30, 1945, admitting that it was not valid as a contract for the reason that there was no consideration. Counsel on her behalf has said that a direction to a debtor to pay out of a particular fund may be a good equitable assignment to the extent of the debt apart altogether from the question of consideration, but he is faced with the difficulty, which, I think, he is unable to overcome, that the evidence on which he relies in support of his case that there is here a valid equitable assignment is the document of Apr. 30, 1945, which is not expressed as a clean direction of the kind I have indicated, but is expressed as a contract to repay the sum of £488 in consideration of the carrying out of certain alterations and improvements. It is, therefore, in my judgment, not open to him, having abandoned his case on contract, to read the document as if the contractual words did not appear therein. Counsel for Mr. and Mrs. McArdle has been compelled to read this document as if it began: "We the beneficiaries hereby agree that the National Provincial Bank, Ltd., shall repay from the estate when so distributed the sum of £488 in settlement of the amount spent on such improvements," ignoring the previous words. I think that the omission of the words I have suggested is fatal because on the face of the document on which the bank would have to act there would be something further to be done by the donors to perfect the gift. The bank would have to refer back to the donors to ascertain whether the donors were satisfied that the work referred to in the contract had been carried out. So the gift or equitable assignment, whichever way it is described (an equitable assignment without consideration being a gift) would be on the face of it incomplete. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors: *Walmsley & Stansbury*, agents for *E. W. Marshall Harvey & Dalton*, Bournemouth (for the respondents other than Mr. Montague McArdle and the National Provincial Bank, Ltd.); *Eric P. Fullbrook & Co.* (for the applicant and Mr. Montague McArdle); *Routh, Stacey, Hancock & Willis* (for the National Provincial Bank, Ltd.).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re L——— (Infants).

[CHANCERY DIVISION (Roxburgh, J.), March 7, 1951.]

Infant—Maintenance—Application to vary order—Reference to High Court—Competency—Guardianship of Infants Act, 1925 (c. 45), s. 7 (3).

On June 10, 1948, a court of summary jurisdiction made an order under the Guardianship of Infants Act, 1886, s. 5, as amended by the Guardianship of Infants Act, 1925, s. 3, giving to the mother the custody of her two infant children and ordering the father to pay to her 15s. a week for the maintenance of each of the infants while under the age of sixteen. On Jan. 25, 1951, the mother applied to the justices to vary the order of June 10, 1948, by ordering the father to pay an increased amount. Considering that the matter was one which would more conveniently be dealt with by the High Court, within the proviso to s. 7 (3) of the Act of 1925, the justices refused to make the order. On an appeal by the mother to the High Court,

HELD: "application" in the proviso to s. 7 (3) included an application to vary an order and "order" included an order varying an order; under the proviso the justices were entitled to consider that the mother's application was "one which would more conveniently be dealt with by the High Court," and no appeal lay from their decision; and the application would be determined by the High Court.

FOR THE GUARDIANSHIP OF INFANTS ACT, 1925, s. 3 and s. 7, see HALSBURY'S STATUTES, Second Edn., Vol. 12, pp. 955 and 958.

APPEAL by the mother from an order of justices of the petty sessional division of Tisbury and Mere, Wiltshire, made on Jan. 25, 1951, refusing to make an order varying an order made by them on June 10, 1948, under the Guardianship of Infants Act, 1886, s. 5, as amended by the Guardianship of Infants Act, 1925, s. 3. The justices considered that the application to vary the order of June 10, 1948, was a matter which would more conveniently be dealt with by the High Court, and, as this was the ground for their refusal to make an order varying their original order, it was contended by the father that, under the proviso to s. 7 (3) of the Act of 1925, no appeal lay from their decision. The appeal was heard in chambers, but ROXBURGH, J., thought it desirable to give his judgment in open court.

G. G. MacDonald for the mother.

T. A. C. Burgess for the father.

ROXBURGH, J.: On June 10, 1948, before a court of summary jurisdiction at Tisbury and Mere, Wiltshire, an order was made that the legal custody of the two infants (namely, Adrienne L— and Alan L—), of whom the defendant was the father, should be committed to the complainant, the mother, and that the father should thenceforth pay to her, under the Criminal Justice Administration Act, 1914, s. 30 (1), the weekly sum of 15s. for the maintenance of each of the infants while under the age of sixteen years. On Jan. 25, 1951, the mother applied to the same court for an order requiring the father to pay an increased amount on the ground that the children were more expensive to keep. The justices considered that the matter was one which would more conveniently be dealt with by the High Court and refused to make an order. The mother has endeavoured to appeal against that refusal.

The original order was made under the Guardianship of Infants Act, 1886, s. 5, as extended by the Guardianship of Infants Act, 1925, s. 3. It could not have been made under the Act of 1886 alone. Section 3 (2) of the Act of 1925 says:

"Where the court under [s. 5 of the Act of 1886 as amended by s. 3 (1) of the Act of 1925] makes an order giving the custody of the infant to the

mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

Section 3 (4) provides:

- A "Any order so made may, on the application either of the father or the mother of the infant, be varied or discharged by a subsequent order."

Section 7 (3) of the Act of 1925 provides:

- B "Where on an application to a court of summary jurisdiction under the Guardianship of Infants Act, 1886, as amended by this Act, the court makes or refuses to make an order, an appeal shall, in accordance with rules of court, lie to the High Court: Provided that, where any such application is made to a court of summary jurisdiction, and the court considers that the matter is one which would more conveniently be dealt with by the High Court, the court of summary jurisdiction may refuse to make an order, and in such case no appeal shall lie to the High Court."

- C It was contended by counsel for the mother that "any such application" in that proviso means any application for an original order, but, in my judgment, it cannot mean that. The word "application," as used in the body of s. 7 (3), must include an application to vary an order, and the word "order," as there used, must include an order varying an original order, otherwise there would be no appeal from an order varying an original order and counsel for the mother does not contend that that is the position. Accordingly, his argument could only succeed if the court were prepared to give to the words "application" and "order" a different meaning in the proviso from that which they must bear in the sub-section to which the proviso is attached. That would be very difficult. I do not say it would be impossible, but there is, in my judgment, nothing at all to suggest that the proviso is limited to original orders.

- E Counsel for the mother further contended that this is a matter over which the High Court has no jurisdiction, but I cannot accept that submission. If the justices, acting under the proviso to s. 7 (3), refused to make an order varying or discharging their original order because they considered that the matter would be more conveniently dealt with by the High Court, it seems to me clear that the Chancery Division would have power under s. 3 (4) of the Act to vary or discharge, by a subsequent order, the original order for custody and maintenance which had been made by the justices. That being so, the effect of the proviso to s. 7 (3) is, in my judgment, plain. The justices were entitled to consider that the "matter," *i.e.*, the application to vary the original order, was one "which would more conveniently be dealt with by the High Court." They did so consider, and, accordingly, having refused to vary the order of June 10, 1948, they refused to make an order within the meaning of the proviso to s. 7 (3) of the Act of 1925. That being so, "no appeal shall lie to the High Court." I cannot consider whether the grounds which led the justices to their conclusion were good or bad. As they reached that conclusion, that, in my judgment, is the end of the matter. This matter can well be determined in the Chancery Division. An originating summons will be more expensive than an application to a court of summary jurisdiction, but that is, doubtless, a matter which the justices did not think sufficiently serious to lead them to a different conclusion. In the circumstances, I have no option but to dismiss this appeal.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, agents for *Farnfield & Nicholls*, Warminster, Wilts. (for the mother); *Kingsford, Dorman & Co.*, agents for *S. A. L. Weeden*, Brighton (for the father).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

LLOYDS BANK, LTD. v. EAGLE STAR INSURANCE CO., LTD.

[KING'S BENCH DIVISION (Jones, J.), March 19, 1951.]

Insurance—Accident insurance—Exclusion of personal injuries sustained by insured if over the age of sixty-five years—"Personal injuries"—Insured aged sixty-five years, seven months.

A clause in a policy of insurance against, *inter alia*, personal accidents, provided for the payment by the insurance company of compensation in the event of the insured receiving personal injury resulting either in death or disablement while riding in a private motor car. By a proviso to the clause: "The company shall not be liable to pay compensation in respect of personal injuries sustained by or happening to the insured if under the age of sixteen years or over the age of sixty-five years." When the insured was aged sixty-five years, seven months, he died of injuries sustained in a motor car accident in circumstances falling within the terms of the clause. The plaintiffs, his executors, sought to recover under the policy, contending (a) that the proviso did not defeat their claim under the main part of the clause since the "personal injuries" referred to in the proviso did not include personal injuries resulting in death, and (b) that the insured, not having attained the age of sixty-six years, was not "over the age of sixty-five years" within the meaning of the proviso.

HELD: (i) the words "personal injuries" in the proviso included personal injuries resulting in death;

(ii) the insured was "over the age of sixty-five years" within the meaning of the proviso having become so immediately after attaining the age of sixty-five, and, therefore, the company were not liable on the policy.

AS TO INJURIES IN PERSONAL ACCIDENT INSURANCE, see HALSBURY, *Hailsham Edn.*, Vol. 18, pp. 533-536, paras. 845-850; and FOR CASES, see DIGEST, Vol. 29, pp. 393-401, Nos. 3133-3180.

Cases referred to:

- (1) *R. v. Chapman*, [1931] 2 K.B. 606; 100 L.J.K.B. 562; 146 L.T. 120; 95 J.P. 205; Digest Supp.
- (2) *R. v. Scoffin*, [1930] 1 K.B. 741; 99 L.J.K.B. 521; 143 L.T. 121; Digest Supp.
- (3) *R. v. Clifford*, [1939] 1 All E.R. 352; Digest Supp.

ORIGINATING SUMMONS.

By a policy of insurance issued on Mar. 17, 1939, to the insured, Harry Rush, the defendants undertook to pay to him or his executors the compensation as stated in the following circumstances:

"Clause 4. Personal Accidents. If the insured shall sustain any personal injury caused by violent accidental external and visible means whilst mounting into whilst riding in or whilst alighting from any private motor car whilst such motor car is being used for private or business purposes (as defined in the schedule hereto) and if such injury shall be the sole direct and immediate cause within ninety days of the occurrence of such injury of:—(a) death of the insured, the sum of £1,000 . . . Provided always that under this clause (No. 4) the company shall not be liable to pay compensation in respect of personal injuries sustained by or happening to the insured if under the age of sixteen years or over the age of sixty-five years . . .

The plaintiffs sued as executors of the insured who, on Dec. 23, 1949, died as a result of injuries received the day before while riding in a private motor car. The defendants denied liability under the policy by virtue of the proviso to cl. 4. The plaintiffs contended (i) that the proviso applied only to injuries which did not result in death, and (ii) that the insured, who at the time of his death

was aged sixty-five years, seven months, was not "over the age of sixty-five years" within the meaning of the proviso.

S. H. Noakes for the plaintiffs.

King Anningson for the defendants.

A **JONES, J.:** The court is asked to decide two questions, the answer to each of which depends on the construction of a policy of insurance. That policy, which is dated Mar. 17, 1939, was issued by the defendants to Mr. Harry Rush, was renewed each year for a number of years, and was in force on Dec. 22, 1949, when Mr. Rush, while travelling in a motor car, received personal injury which resulted in his death on Dec. 23, 1949.

B Clause 4 of the policy, which is headed "Personal Accidents," provides that the company will pay to the insured's executors:

C "If the insured shall sustain any personal injury caused by violent accidental external and visible means whilst mounting into whilst riding in or whilst alighting from any private motor car whilst such motor car is being used for private or business purposes (as defined in the schedule hereto) and if such injury shall be the sole direct and immediate cause within ninety days of the occurrence of such injury of:—(a) death of the insured, the sum of £1,000."

D It is agreed between the parties that the insured sustained personal injury by violent, accidental, external and visible means while riding in a private motor car which was being used for private or business purposes as defined in the schedule to the policy, and that, as the result of the personal injury then sustained, he died within ninety days. A proviso to cl. 4 reads:

"Provided always that under this clause (No. 4) the company shall not be liable to pay compensation in respect of personal injuries sustained by or happening to the insured if under the age of sixteen years or over the age of sixty-five years . . ."

E The proviso states, further, that the company shall not be liable to pay compensation in respect of death, injury or disablement of the insured in the event of suicide, or if he was under the influence of intoxicating liquor, or if the personal injury was caused directly or indirectly by war, civil commotion, riot, rebellion, and matters of that kind.

F The first question I have to decide is whether, on the true construction of that proviso, the words "personal injuries" in it include death resulting from such injuries. The plaintiffs argue that the proviso does not apply since it must be confined to cases of personal injury and not extended to cases where such injuries result in death. Counsel relied particularly on the distinction drawn between death and injury and disablement in the middle part of the proviso. On the other hand, under the heading "Personal Accidents" the clause renders **G** the defendants liable, subject to the proviso, to pay compensation in the event of the insured sustaining personal injury resulting either in death or in certain disablements. It seems to me that the true construction of this proviso is that the defendants are to be liable to pay compensation in respect of personal injuries whether they do or do not result in death unless the insured is under the age of sixteen or over the age of sixty-five.

H That brings me to the other question, namely, whether the words "over the age of sixty-five" include an insured person aged sixty-five years and seven months, which was the age of the insured at the time of his death. The headnote in *R. v. Chapman* (1) reads:

"By s. 2 of the Criminal Law Amendment Act, 1922, a certain defence is open to 'a man of twenty-three years of age.' The accused was twenty-three years and six months of age at the time the offence charged was committed. He contended that he was 'a man of twenty-three years of

age.' *Held*, that, the language of the section being ambiguous, the accused was entitled to the benefit of the doubt, and was entitled to rely on the said defence."

It is clear from the judgment of LORD HEWART, C.J., that the court considered that the language of the section was ambiguous. That case, therefore, does not give much help in deciding the present point.

In *R. v. Scoffin* (2) a young man was convicted at petty sessions and was committed to assizes for sentence under s. 10 (1) of the Criminal Justice Administration Act, 1914, as amended by s. 46 (1) of the Criminal Justice Act, 1925, where sentence of detention in a Borstal institution could be passed on him. The question was whether he was eligible for Borstal detention, he having attained the age of twenty-one years on Feb. 16, 1930, and been sentenced on Feb. 18, 1930. In giving the decision of the court LORD HEWART, C.J., said ([1930] 1 K.B. 743):

" . . . s. 10 (1) of the Criminal Justice Administration Act, 1914, provides that a person may be sent to Borstal if it appears to the court that he 'is' not more than twenty-one years of age. Counsel for the Crown had two difficulties in his way; firstly, to convince us that the words in the sub-section 'nor more than twenty-one years of age' mean 'not so much more than twenty-one years of age,' and, secondly, to convince us that in a proper case 'is' means 'was.' Could he have surmounted these difficulties no doubt our decision might have been different. There is much to be said for the view that the statute might have been differently worded, but that is not a question for this court. We have no doubt that the appellant was above the age mentioned in the statute, and he must therefore forego the benefits of Borstal treatment, and instead go to prison for six months in the second division."

That case was followed in *R. v. Clifford* (3), in which it was decided that a sentence of detention in a Borstal institution could not be imposed on a young offender who has attained his twenty-third birthday, the upper age limit having been raised to twenty-three by the Borstal (Extension of Age) Order, 1936 (S.R. & O., 1936, No. 839).

The last two cases are by no means conclusive of the point I have to decide, which is whether the words "over the age of sixty-five years" in the proviso mean a person who has reached his sixty-fifth birthday or a person who has reached his sixty-sixth birthday. It seems to me that they include a person aged sixty-five years and seven months, so that the proviso applies to anyone who has lived beyond the attainment of his sixty-fifth birthday. The result is that there will be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Pridmore & Nelson*, Coventry (for the plaintiffs); *Neil Maclean & Co.* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. BARNETT AND OTHERS.

[COURT OF CRIMINAL APPEAL (Oliver, Cassels and Sellers, JJ.), April 9, 10, 1951.]

Criminal Law—Conspiracy—Statutory offence punishable on summary conviction—Particulars of conspiracy in same terms as statutory offence—Charge of illegal agreement relating to bidding at auction—Competency of proceedings on indictment—Auctions (Bidding Agreements) Act, 1927 (c. 12), s. 1 (1).

A The appellants who were alleged to be “dealers” within s. 1 (2) of the Auctions (Bidding Agreements) Act, 1927, formed a “ring” and attended auction sales of government stores at which one or more of them bid on behalf of all. The stores thus acquired were subsequently disposed of at a “knock-out” between the members of the ring, and the difference between the price so obtained and the price paid at the auction was divided between the members of the “ring.” The appellants were indicted for conspiracy to contravene the provisions of s. 1 (1) of the Act, the particulars given of the offence charged being “by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.”

C HELD: the Act of 1927 created new offences and provided that they should be triable on summary conviction; the particulars given of the conspiracy charged related to matters which were in terms or substantially the offences which the Act prescribed; and, therefore, the charges against the appellants were not triable on indictment.

D *Eastern Archipelago Co. v. R.* (1853) (2 E. & B. 856); *R. v. Hall* ([1891] 1 Q.B. 747); and *R. v. Kakelo* ([1923] 2 K.B. 793), applied.

AS TO WHEN AN INDICTMENT LIES, see HALSBURY, Hailsham Edn., Vol. 9, p. 130, para. 168; and FOR CASES, see DIGEST, Vol. 14, pp. 204, 205, Nos. 1830-1862.

Cases referred to:

- E (1) *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635; 90 L.J.K.B. 404; 124 L.T. 562; Digest Supp.
 (2) *Eastern Archipelago Co. v. R.*, (1853), 2 E. & B. 856; 23 L.J.Q.B. 82; 22 L.T.O.S. 198; 118 E.R. 988; 11 Digest 575, 758.
 (3) *R. v. Hall*, [1891] 1 Q.B. 747; 60 L.J.M.C. 124; 64 L.T. 394; 14 Digest 206, 1867.
 F (4) *R. v. Kakelo*, [1923] 2 K.B. 793; 92 L.J.K.B. 997; 129 L.T. 477; 87 J.P. 184; Digest Supp.

APPEALS against conviction.

G The appellants were convicted before the Recorder of London at the Central Criminal Court on a count alleging a conspiracy to contravene the provisions of the Auctions (Bidding Agreements) Act, 1927, s. 1 (1), and were each fined £100 and ordered to pay £50 towards the costs of the prosecution, except the appellant Carmell who was fined £50. The ground of appeal was that the indictment was bad in law, the offence which, in substance, was charged in it being triable summarily only and not on indictment.

Roberts, K.C., and *S. A. Morton* for Barnett.

Diplock, K.C., and *J. C. G. Burge* for Lipton.

H *Levy, K.C.*, and *J. L. E. Rees* for Garnham and Tilly.

Marshall, K.C., and *Pollock, K.C.*, for Platt.

Howard, K.C., and *Hawser* for Low.

Lawrence, K.C., and *Streeter* for Seckel.

B. Finlay for Carmell.

R. E. Seaton and *M. J. H. Turner* for the Crown.

SELLERS, J., delivered the following judgment of the court. The appellants were convicted at the Central Criminal Court before the Recorder

of London on a count in an indictment which alleged a conspiracy to contravene the provisions of the Auctions (Bidding Agreements) Act, 1927. They were each fined £100, and most of them were ordered to contribute towards the costs of the prosecution. From that conviction each of them now appeals, contending that the count on which he was convicted was bad in law. That submission was common to all the appellants and was submitted to us by counsel for the appellant, Barnett.

The count on which the appellants were convicted charges that they

“between Sept. 26, 1949, and Jan. 5, 1950, in the county of London conspired together and with other persons unknown to contravene the provisions of s. 1 of the Auctions (Bidding Agreements) Act, 1927, by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.”

The Act of 1927, by s. 1 (1), provides:

“If any dealer agrees to give, or gives, or offers any gift or consideration to any other person as an inducement or reward for abstaining, or for having abstained, from bidding at a sale by auction either generally or for any particular lot, or if any person agrees to accept, or accepts, or attempts to obtain from any dealer any such gift or consideration as aforesaid, he shall be guilty of an offence under this Act, and shall be liable on summary conviction to a fine not exceeding £100, or to a term of imprisonment for any period not exceeding six months, or to both such fine and such imprisonment: Provided that, where it is proved that a dealer has previously to an auction entered into an agreement in writing with one or more persons to purchase goods at the auction *bona fide* on a joint account and has before the goods were purchased at the auction deposited a copy of the agreement with the auctioneer, such an agreement shall not be treated as an agreement made in contravention of this section.”

Then there is a definition of “dealer,” with which the court is not at the moment concerned, and also this provision in s. 1 (3):

“In England and Wales a prosecution for an offence under this section shall not be instituted without the consent of the Attorney-General or the Solicitor-General.”

It has been submitted in this case that the offence with which the appellants were charged and of which they have been convicted was not an indictable offence, but was in substance or in terms no more than the offence which was framed for the first time under the Act of 1927; that it was only triable summarily with the consent of one of the law officers; and that, being a matter within summary jurisdiction, in any event it was only triable within six months of the date of its alleged commission. The facts which it is necessary to consider under this submission are these. The eight appellants are all interested, in one capacity or another, in businesses—seven limited companies and one firm—which deal in scrap metal. Some of those are in a big way of business in this trade, and the appellants hold high offices, such as directors and so forth, in those concerns. The evidence was directed to establish that the appellants agreed to form a ring, that they attended sales where commodities, mainly cable and similar goods, were being sold on behalf of the Ministry of Supply, that some representative on behalf of the ring bid on behalf of all, that goods were thus acquired, and subsequently there was what has been described as a “knock-out,” whereby the purchased goods were put up for auction and then, on a system of bidding whereby the various parties bid up to a sum which they thought was within their power, finally reached the top “knock-out” price, the difference between the two prices being split up in accordance with some agreement between the parties so that each got a proportion of that profit in relation to the extent of their bids. It is that sort of agreement,

operating, it is said, on two occasions when sales took place, one at Weston-super-Mare and one at Todmorden, which gave rise to this charge. I need not go into the evidence more fully because this court is of opinion that this offence was not triable on indictment, and this count should have been quashed at the outset.

A The basis on which the submission on behalf of the appellants was made was this. It is said, and said rightly, that before the Act of 1927 the forming of a ring to bid at an auction in the way indicated was not an offence. *Rawlings v. General Trading Co.* (1) was relied on as the authority for this. That being so, it is submitted that there is a well-known principle of law which requires that the procedure laid down by the Act should be followed. That principle is to be found first clearly enunciated in the judgment of WILLIAMS, J., in *Eastern Archipelago Co. v. R.* (2) (2 E. & B. 879):

B "For example: it is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a specific remedy, that remedy must be pursued and no other, yet, where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, C that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute."

That principle has been followed and applied in a number of cases, and, so far as we know, has never been dissented from. It was applied in *R. v. Hall* (3), a decision of CHARLES, J., and more recently in this court in *R. v. Kakeko* (4). D That case was concerned with offences under the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, which were punishable only in the manner prescribed by the statute, namely, on summary conviction, unless, the offence being punishable by more than three months' imprisonment, the person charged claimed the right under s. 17 of the Summary Jurisdiction Act, 1879, to be tried by a jury. In giving the judgment of the court in that case, SANKEY, J., said ([1923] 2 K.B. 795):

E "It was contended, thirdly, that the offence under the Aliens Order was punishable by summary conviction, and that sessions had no jurisdiction to entertain the indictment. This depends upon the Aliens Restriction Act, 1914, s. 1 (2), and the Aliens Restriction (Amendment) Act, 1919, s. 13 (4). F The law upon the subject is elaborately dealt with in *R. v. Hall* (3), which was a motion to quash an indictment charging one Hall, an overseer of the poor for the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded upon the ground that an offence by an overseer within the meaning of s. 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. CHARLES, J., went at length through the cases bearing on the matter and referred to the passage in *HAWKINS' G PLEAS OF THE CROWN*, bk. 2, ch. 25, s. 4, which is as follows: 'Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods H of proceeding only, seems impliedly to exclude that of indictment'."

That being clearly the law applicable to this matter, the question then arises whether this count does allege the very offence contained in the Act of 1927, which is only triable according to the terms of the Act as a summary offence. The submission of counsel for the Crown was that the count alleges a conspiracy, which is something different from the offence which the Act prescribes, but, while it is clear that in appropriate circumstances it may be possible to frame a charge of conspiracy to contravene this Act, the court has to look

to see what is, in fact, alleged. In alleging the conspiracy to contravene the Act particulars are given, and those particulars are, "by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction." This court is of opinion that those particulars of the conspiracy alleged relate to matters which are in terms or substantially the offences which the Act prescribes. In those circumstances the well-known principle of law applied, and this indictment did not lie. It should have been quashed at the outset of the trial, and on those grounds the court allows all these appeals.

Convictions quashed.

Solicitors: *William Gordon Hill* (for Barnett); *Lucien Fior* (for Lipton); *Cameron, Kemm & Co.* (for Garnham and Tilly); *Kenneth Brown, Baker, Baker* (for Platt); *Lieberman, Leigh & Co.* (for Low); *Henry Hilbery & Son* (for Seckel); *J. L. Freedman & Co.* (for Carmell); *Director of Public Prosecutions* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

In the Estate of DAVIES. RUSSELL v. DELANEY.

[GLOUCESTER ASSIZES (Morris, J.), March 14, 1951.]

Will—Attestation—Acknowledgment of signature—Subscription by one witness before acknowledgment of signature by testatrix to second witness—Wills Act, 1837 (c. 26), s. 9.

Will—Revocation—Dependent relative revocation—Revocation clause in later will—Destruction of earlier will after execution of later will—Destruction in belief later will valid—Later will invalid.

On Feb. 9, 1949, the testatrix asked H.D. to assist her to make a will. After he had written out her instructions, she put her mark to the document in the presence of Mrs. B., one of the attesting witnesses, and it was then given to Mrs. B. to sign. While Mrs. B. was writing her name on the document, the second attesting witness, J., entered the room, and, after the testatrix had signified to him that the document was her will which she wished him to attest, and had acknowledged her mark thereon to him, he also signed it as a witness. By this document the testatrix expressly revoked all former wills. In the belief that the document constituted a valid will, she caused to be destroyed a will made in January, 1949, and then validly executed, saying that there was no longer any need for it. The testatrix died on Feb. 17, 1949.

HELD: (i) for the execution of the document of Feb. 9 to comply with the requirements of the Wills Act, 1837, s. 9, the testatrix should have signed it or acknowledged her signature in the presence of both of the witnesses before either of them had attested and subscribed the document, and, therefore, as the first witness had subscribed the document before the testatrix had acknowledged her signature to the second witness, it was not a valid will.

Moore v. King (1842) (3 Curt. 243), applied.

(ii) the earlier will having been destroyed in the belief that the later will was valid, the revocation of the earlier will was conditional on the validity of the later one, and, therefore, as the later one was held to be invalid, the doctrine of dependent relative revocation applied and the earlier will should be pronounced for, its contents having been established.

AS TO ATTESTATION, see HALSBURY, Hailsham Edn., Vol. 34, pp. 62-66, paras. 78-83; and FOR CASES, see DIGEST, Vol. 44, pp. 261, 262, Nos. 882-890.

AS TO DEPENDENT RELATIVE REVOCATION, see HALSBURY, Hailsham Edn., Vol. 34, p. 89, para. 127; and FOR CASES, see DIGEST, Vol. 44, pp. 361-365, Nos. 1944-1978.

Cases referred to:

- A (1) *Moore v. King*, (1842), 3 Curt. 243; 2 Notes of Cases 45; 163 E.R. 716; 44 Digest 261, 884.
(2) *Wyatt v. Berry*, [1893] P. 5; 62 L.J.P. 28; 68 L.T. 416; 44 Digest 262, 888.
(3) *Hindmarsh v. Charlton*, (1861), 8 H.L. Cas. 160; 4 L.T. 125; 25 J.P. 339; 11 E.R. 388; 44 Digest 261, 882.

B PROBATE ACTION.

- On or about Jan. 16, 1949, the testatrix, Mrs. Hannah Davies, who was ill at the time, asked her nephew, Mr. Hugh Davies, to assist her to make her will. Mr. Davies took down her instructions and put them on a will form which was signed by the testatrix and attested by Mr. Davies and a neighbour, Mr. Benfield. By that will the testatrix appointed the plaintiff, Mr. John Russell, as her executor, and directed that her residuary estate should be divided equally between (a) the plaintiff, (b) her brother, James Russell, (c) her great-granddaughter, the defendant, Gillian Delaney (an infant), and (d) her daughter-in-law, Lilian Burgwyn. MORRIS, J., found that this will was validly executed. On Feb. 9, 1949, the testatrix, who was still ill, asked Mr. Davies to help her to make a new will. He wrote out the second will on the second page of the will form which he had previously used. In this will the testatrix stated: "I hereby revoke all wills made by me heretofore." After appointing the plaintiff as her executor, the testatrix gave a legacy of £25 to a niece and directed that her residuary estate should be divided between (a) the plaintiff, (b) her brother, James Russell, (c) her great-granddaughter, Gillian Delaney, and (d) her nephew, Hugh Davies. The testatrix did not sign this will, but she made her mark on it in the presence of Mrs. Barnett, one of the attesting witnesses, and it was then given to Mrs. Barnett to sign. While Mrs. Barnett was writing her name on the will, the second attesting witness, Mr. Jones, a neighbour of the testatrix, came into the room, and, after Mr. Davies had explained to him what was required of him, the testatrix signified her assent to what had been said and indicated to Mr. Jones that the document was her will and that she wished him to act as a witness. Mr. Jones then signed the will as a witness. After the second will had been signed and, as the testatrix thought, duly attested, she said that there was no longer any need for the first will, and it might, therefore, be destroyed. The first will was then destroyed in the presence of the testatrix in her bedroom. The testatrix died on Feb. 17, 1949. The plaintiff, as executor, propounded the will of Feb. 9, 1949, and, in the alternative, he claimed that the will of January, 1949, should be pronounced for. Evidence of the contents of the first will was given by Mr. Davies and by the plaintiff, who was present when each of the wills was drawn up. The defendant, Gillian Delaney, who was the person entitled to the estate in the event of an intestacy, put the plaintiff to proof that the provisions of the Wills Act, 1837, had been complied with in regard to the execution of the will of Feb. 9, 1949.

P. E. Underwood for the plaintiff.

G. O. Heron for the defendant.

MORRIS, J., stated the facts, and continued: The question arises whether the second will was properly executed in accordance with the provisions of the Wills Act, 1837, s. 9, which says:

" . . . it shall be signed at the foot or end thereof by the testator, or by

some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

I am satisfied that the testatrix had put her mark on the will before Mrs. Barnett signed, and the evidence shows that, before Mrs. Barnett signed, there was a sufficient acknowledgment to her by the testatrix that the document was her (the testatrix's) will. After Mr. Jones came into the room, I think that there was an acknowledgment to him by the testatrix of the fact that the document was her will and that she wanted him to sign as a witness, but it does not seem to me that the attestation was such as to comply with the requirements of law.

In *Moore v. King* (1) SIR HERBERT JENNER FUST said (3 Curt. 253):

"I am inclined to think that the Act is not complied with, unless both witnesses shall attest and subscribe after the testator's signature shall have been made and acknowledged to them when both are actually present at the same time."

(See also *Wyatt v. Berry* (2), per GORELL BARNES, J.) It seems to me to follow from those decisions, and also from *Hindmarsh v. Charlton* (3), that, on the facts of the present case, the attestation of the will of Feb. 9, 1949, was not in the form required by the Wills Act, 1837, s. 9, as the testatrix should have acknowledged her signature in the presence of both of the attesting witnesses before either of them signed. I am satisfied that the testatrix knew what she was doing and desired that her wishes, as set out in the will of Feb. 9, 1949, should be carried out, but, as this point, which is merely a technical one, has been taken by the defendant, I am compelled to decide the case in accordance with law, even though my decision has the effect of defeating the purpose and intention of the testatrix. For the reasons which I have stated, I am satisfied that the will of Feb. 9, 1949, was not executed so as to satisfy the provisions of the Act, and, therefore, I cannot pronounce in its favour.

In the alternative, the plaintiff, as executor named in the will of January, 1949, claims to have the contents of that will pronounced for in solemn form. [HIS LORDSHIP referred to the evidence in regard to the attestation of that will, found that it was validly executed, and continued:] I am satisfied that the first will was destroyed only because the testatrix thought that she had made a valid second will. The revocation of the first will was not unequivocal. It was conditional on the second will being valid, as the testatrix thought it was. As I have been obliged to hold that the second will was not valid, it follows that the destruction of the first will as a document did not have the effect of revoking that will. Stated in other words, the doctrine commonly called the doctrine of dependent relative revocation applies to this case. Counsel for the defendant did not suggest that, if the facts were as I have found them to be, the doctrine would not apply. The result is, therefore, that I pronounce in favour of the earlier undated will, executed on or about Jan. 16, 1949, the terms of which are those recollected by Mr. Hugh Davies, and set out in a document recorded by him, and I pronounce accordingly.

Order accordingly.

Solicitors: *Vizard & Son*, Monmouth (for the plaintiff); *T. K. Evans*, Coleford (for the defendant).

[Reported by Miss GWYNEDD LEWIS, Barrister-at-Law.]

LAMB v. SUNDERLAND AND DISTRICT CREAMERY, LTD.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 5, 1951.]

Food and Drugs—Proceedings against third party—"Act or default" of wholesaler—Need to prove mens rea or negligence—Food and Drugs Act, 1938 (c. 56), s. 83 (3).

A Milk was bought by the respondents, wholesale milk dealers, under a warranty, and owing to shortage of laboratory staff it was not tested by them before being bottled and delivered to a retailer. Without tampering with it in any way, the retailer sold the milk to the appellant, and it was then found to be deficient in fat. Justices dismissed an information against the respondents under s. 83 (3) of the Food and Drugs Act, 1938, on the ground that there was no evidence of actual adulteration of the milk by them and that they had given a reasonable explanation of their failure to test the milk before selling it.

B HELD: to prove an offence under s. 83 (3) it was not necessary to prove *mens rea* or negligence; the mere selling of the milk when it was deficient in fat constituted an "act or default" within the sub-section; and, therefore, the respondents should have been convicted.

C FOR THE FOOD AND DRUGS ACT, 1938, s. 3 and s. 83, see HALSBURY'S STATUTES, Second Edn., Vol. 10, p. 386 and p. 458 respectively.

CASE STATED by justices for the county of Durham.

D At a court of summary jurisdiction sitting at Seaham on Sept. 22, 1950, the appellant, an inspector under the Food and Drugs Acts, preferred an information against the respondents, charging them with having, on June 15, 1950, caused certain milk bottled at their dairy to be delivered to one Albert Septimus Hunt, a milk vendor, who, in consequence, unlawfully sold to the appellant on the same day to his prejudice milk which was not of the quality demanded, but was deficient in fat, contrary to the Food and Drugs Act, 1938, s. 3 and s. 83. The justices found that the milk was deficient in fat judged by the standards in the Sale of Milk Regulations, 1939 (S.R. & O., 1939, No. 1417), that it had not been interfered with between delivery by the respondents and sale and was sold in the same state in which it was delivered by the respondents, and that it was obtained by the respondents under a warranty, but, owing to difficulty of getting laboratory staff, had not been tested by the respondents. For the respondents it was contended that they had not been guilty of an "act or default" within s. 83 (3) of the Act to which the contravention of s. 3 (1) was due since s. 83 (3) required the prosecution to adduce some affirmative evidence of a wrongful act or default and there was no such evidence here. The justices held that, as there was no evidence of actual adulteration of the milk by the respondents, and as they had given a reasonable explanation of their failure to test the milk before it was bottled, they had not acted negligently, and, therefore, there had been no act or default which rendered them liable to conviction, and they dismissed the information. The inspector appealed.

G *Vernon Gattie* for the appellant.

Cumming-Bruce for the respondents.

H LORD GODDARD, C.J.: In this case it was not necessary to prove *mens rea*. All that needed to be proved was that there was a sale to the prejudice of the purchaser of something which was not of the nature, substance, or quality demanded by him. The very fact of the article supplied being in that condition supplied the *mens rea* and constituted an offence. Section 3 (1) of the Act is very wide in its terms. It provides:

"If a person sells to the prejudice of the purchaser any food or drug which is not of the nature, or not of the substance, or not of the quality,

of the food or drug demanded by the purchaser, he shall, subject to the provisions of the next succeeding section, be guilty of an offence."

It is not a question whether he knowingly or negligently sells the article. He commits an offence if he sells it at all.

The Act provides for a variety of defences, including a defence available to the retailer, *i.e.*, the person from whom the article is actually bought by the purchaser, under s. 83 (1) which is designed to meet the case of a shopkeeper who buys goods in good faith from a wholesaler or a manufacturer, sells them as he receives them, and then finds that they are adulterated or do not come up to the standard required by law. In those circumstances the real responsibility is on the manufacturer or wholesaler who supplied the goods, and, accordingly, what is generally known as the third-party procedure is adopted, which enables the defendant who has actually sold the goods in certain circumstances to have the person who supplied him brought before the court. Section 83 (1) provides:

"A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence."

So, two people may be convicted in those circumstances—the person who supplied the goods to the retailer, if the contravention was due to his act or default, and the retailer himself if he has not used all due diligence to see that the goods are as they ought to be.

A local authority is allowed to proceed directly against the person who supplied the goods to the retailer. Section 83 (3) provides:

"Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person."

In other words, they can "short-circuit" the proceedings. They need not prosecute the person who actually sold, but can proceed against his supplier. The sub-section continues:

"In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged."

Counsel for the respondents argued that "act or default" must mean some tampering with the milk—something actually done to it. He pointed out that a person summoned under s. 83 (3) is in a difficulty because the defence that he bought the article under a warranty could only with difficulty become available to him by reason of the conditions laid down in s. 84 (2) and sched. III, para. (2) which must be observed before that defence is open. That may be a hardship, but if the Act has provided for a defence on conditions with which the wholesaler cannot comply, we cannot remedy it. The question we have to determine is whether the justices were right in dismissing the summons on

the ground that there had been no "act or default" by the respondents within s. 83 (3)

"because there was no evidence of actual adulteration of the milk by them and they had given a reasonable explanation of their failure to test the milk before it was bottled."

A In my opinion, that is not the correct view. I have no doubt the words "act or default" in s. 83, whether they are found in sub-s. (1) or in sub-s. (3) must mean that there was a wrongful act or default, but there was a wrongful act or default in this case. On the finding of the justices it is clear that when the milk was sold by the respondents to the retailer who sold it to the inspector it was deficient in fat, and, therefore, not of the nature, substance or quality demanded. The case must go back to the justices with an intimation that the offence was proved and there must be a conviction.

OLIVER, J.: I agree.

CASSELS, J.: I agree.

Appeal allowed.

C Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. K. Hope*, clerk of Durham County Council (for the appellant); *Wrinch & Fisher*, agents for *Freeman, Son & Curry*, Darlington (for the respondents).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

D

DANISH MERCANTILE CO., LTD. AND OTHERS v. BEAUMONT AND ANOTHER.

E [COURT OF APPEAL (Jenkins and Hodson, L.JJ.), April 4, 1951.]

Practice—Parties—Striking out party—Action instituted without proper authority—Ratification on behalf of plaintiff—Action in name of company without authority—Liquidation of company—Adoption of proceedings by liquidator.

F A solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to instruct him to continue them. When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority.

H So held where an action had been started in the name of a company without its authority, and later the company went into liquidation and the liquidator adopted the proceedings on behalf of the company.

Re Fitzgerald (Lord) (1914) (112 L.T. 86), distinguished.

Observations of ATKIN, L.J., in Adams v. London Improved Motor Coach Builders, Ltd. ([1921] 1 K.B. 503) and of BLACKBURN, J., in Reynolds v. Howell (1873) (L.R. 8 Q.B. 399), examined and explained.

AS TO PLAINTIFF MADE PARTY WITHOUT AUTHORITY, see HALSBURY, Hailsham Edn., Vol. 26, p. 20, para. 17, and ANNUAL PRACTICE, 1950 Edn., pp. 254, 255; and FOR CASES, see DIGEST, Practice, pp. 423-429, Nos. 1190-1242.

Cases referred to:

- (1) *Adams v. London Improved Motor Coach Builders, Ltd.*, [1921] 1 K.B. 495; 90 L.J.K.B. 685; 124 L.T. 587; Digest Supp. A
- (2) *Geilinger v. Gibbs*, [1897] 1 Ch. 479; 66 L.J.Ch. 230; 76 L.T. 111; 42 Digest 338, 3820.
- (3) *Cape Breton Co. v. Fenn*, (1881), 17 Ch.D. 198; 50 L.J.Ch. 321; 44 L.T. 445; 42 Digest 341, 3851.
- (4) *Re Fitzgerald (Lord)*, (1914), 112 L.T. 86; 42 Digest 344, 3892.
- (5) *Reynolds v. Howell*, (1873), L.R. 8 Q.B. 398; 42 L.J.Q.B. 181; 29 L.T. 209; 42 Digest 48, 391. B
- (6) *Robson v. Eaton*, (1785), 1 Term Rep. 62; 99 E.R. 973; 42 Digest 63, 559.
- (7) *London & Blackwall Ry. Co. v. Cross*, (1886), 31 Ch.D. 354; 55 L.J.Ch. 313; 54 L.T. 309; 28 Digest 365, 25.
- (8) *Foss v. Harbottle*, (1843), 2 Hare 461; 67 E.R. 189; 9 Digest 41, 42. C

INTERLOCUTORY APPEAL by the defendants from an order of ROXBURGH, J., dated Feb. 23, 1951, refusing a motion by the defendants to strike out the name of one of the plaintiffs, the Danish Mercantile Co., Ltd., on the ground that the action had been brought without the authority of the company. The facts are fully set out in the judgment of JENKINS, L.J. D

Shelley, K.C., and *H. E. Francis* for the defendants.

Aldous for the plaintiffs.

JENKINS, L.J.: This is an appeal from an order of ROXBURGH, J., dated Feb. 23, 1951, refusing a motion by the defendants in the action to strike out the name of one of the plaintiffs, the Danish Mercantile Co., Ltd., on the ground that the action had been brought without the authority of that company. Where an action is brought without the authority of the purported plaintiff it is well settled that the solicitor on the record for the purported plaintiff becomes personally liable to the defendants for the costs of the action. E

The Danish Mercantile Co., Ltd., was incorporated on Apr. 30, 1949. It had a share capital of £2,000, owned or controlled in equal portions by a Mr. Sheridan, a British subject, and a Mr. Hoyer, a Danish subject, who were the only two directors. The company was formed to import and sell in this country agricultural machinery manufactured in Denmark. After the business had been carried on for a year disputes broke out, the result of which was that the supply of machinery from Denmark was discontinued and other arrangements were made by Mr. Hoyer or his interests in Denmark for the marketing of these goods. F

The substantial parties to the dispute being the two shareholders, who were also the two directors, it was obvious that it might be difficult for the party aggrieved (that is to say, Mr. Sheridan) to start an action in the name of the company, for, if the matter had been put to the test at a meeting, the result might have been a mere deadlock. The position was not, however, so simple as that, because Mr. Sheridan had a managing director's agreement dated May 4, 1949, made between the Danish Mercantile Co., Ltd., Mr. Hoyer, and himself, under which he was given wide powers of management, the agreement including a provision that "Mr. Sheridan shall manage and conduct the affairs of the company as he in his sole discretion shall think fit," and a further provision that each of the parties thereto agreed and undertook "to do all acts and things and execute all documents necessary to carry this agreement into effect." In reliance on that agreement and without anything in the nature of a general G
H

meeting of the company or a meeting of the directors or a resolution of the board, Mr. Sheridan caused the present proceedings to be brought in the name, among other plaintiffs, of the Danish Mercantile Co., Ltd., and solicitors were instructed to conduct the proceedings on the footing that Mr. Sheridan was able validly to bring proceedings in the name of the company. That is challenged by the defendants who say that the agreement did not extend to authorise Mr. Sheridan to cause the proceedings to be brought in the name of the Danish Mercantile Co., Ltd., but, for reasons which will appear, I do not find it necessary to determine that question, and I assume, as did the learned judge, that Mr. Sheridan's agreement did not extend to authorise him to commence proceedings in the company's name.

The writ in the action was issued on Mar. 31, 1950. Interlocutory proceedings were taken and an interim injunction was granted in the action in April, 1950. On the hearing of that motion counsel for the defendants adverted to the possibility of contending that the proceedings had been brought without the authority of the Danish Mercantile Co., Ltd., so that the defendants were alive to that matter at that stage. On June 23, 1950, a petition was presented for the winding-up of the Danish Mercantile Co., Ltd., and the usual compulsory winding-up order was made on Nov. 4, 1950.

The grounds on which the present motion, which was launched on Feb. 19, 1951, was opposed before the learned judge were these. First, reliance was placed on Mr. Sheridan's agreement of May 4, 1949. I will say no more about that agreement, because I am, as I have said, proceeding on the assumption that it was not effective to give Mr. Sheridan authority. Secondly, it was said that a motion of this nature must be launched without delay, and that there was such a delay in the present case as put the defendants out of court. The learned judge was much impressed by the facts adduced in support of that argument, but, for reasons which will appear in a moment, I find it unnecessary to decide whether, if the defendants had otherwise been able to make out a case of want of authority, they would have been shut out from pursuing this remedy on account of their delay, though I am far from saying that the learned judge was wrong in the conclusion at which he arrived on that aspect of the case. Thirdly, it is said that, even if it is conceded for the purposes of argument that the proceedings were in the first instance brought without authority, the liquidator adopted the proceedings on behalf of the company and thus cured the original defect on the ground that such a ratification relates back and cures the want of authority in the original act of the purported agent, just as in any other case of ratification. The learned judge decided that point in favour of the plaintiffs and, in my judgment, he was clearly right in doing so.

Counsel for the defendants, however, while not disputing the purported adoption of the proceedings by the liquidator, has addressed to us a careful argument designed to show that, where an action is brought without the authority of the purported plaintiff, it is an utter and complete nullity, so that no amount of subsequent ratification can cure the defect, and he has referred us to a number of authorities. I might briefly mention the cases on which counsel has relied. The first was *Adams v. London Improved Motor Coach Builders, Ltd.* (1) which was cited for certain observations of ATKIN, L.J. It is unnecessary to go into the facts, which were somewhat special. In a passage quoted for the general proposition for which counsel contends, ATKIN, L.J., said ([1921] 1 K.B. 503):

"I should like to point out that it seems to follow that, if the defendants had been successful in their contention that there was no employment by the plaintiff of the solicitors, the result would be that the action would be a nullity; it would be brought in the name of a plaintiff who had given no authority to bring an action for him; and the defendants would have the right to have the proceedings stayed, and I presume to have the usual

order that the solicitors pay the costs of both parties. That is an application that can be made equally by the defendant or by the plaintiff: see *Geilinger v. Gibbs* (2); *Cape Breton Co. v. Fenn* (3). I do not stop to discuss those cases, but it seems to me to follow from the fact of the action being brought without the authority of the plaintiff that it is, so far as the defendants are concerned, a nullity."

Next there was *Re Fitzgerald* (Lord) (4), a case in bankruptcy in which the proceedings were brought in the name of the official receiver without his authority. A trustee in bankruptcy was subsequently appointed and he instructed the solicitors who had launched the proceedings to continue them in his name. The official receiver pointed out that he had never authorised the proceedings, and the person against whom the proceedings were brought thereupon applied for a stay of all proceedings under the motion and asked that it might be dismissed as having been launched and maintained without the consent of the official receiver. HORRIDGE, J., decided that the motion must be dismissed and the solicitors must pay the opposite party's costs of the motion and of the application to stay the proceedings as between party and party, and also the solicitor and client costs of the official receiver. Counsel for the defendants placed some reliance on that case, because it is to be observed that the proceedings were stayed, even although the trustee wanted to carry them on, but that affords no true parallel to the present case, because the official receiver had never, at any time, authorised the proceedings. The question in the present case is a question between the company and the defendants, and the question is whether the company has effectively adopted the proceedings brought in its name. It is not a case where some successor of the original plaintiff, the original plaintiff never having authorised the proceedings, seeks to adopt and carry them on. There is no change of party in the present case. Therefore, I cannot regard that case as supporting counsel's contention that the commencement of the action without authority is a matter which admits of no subsequent ratification by the party made plaintiff.

Then there was *Reynolds v. Howell* (5). The headnote to that case is:

"Where an attorney brings an action without the authority of the plaintiff, the plaintiff is entitled to have the proceedings stayed without payment of costs."

The question was whether the proceedings could be stayed unconditionally or stayed only on terms as to the costs. I think that the passage on which counsel principally relied is that where BLACKBURN, J., said (L.R. 8 Q.B. 399):

"How can we say that we ought to impose terms on staying these proceedings, which, if the action went on further, would be a nullity."

It is to be observed that there, again, appears the expression "a nullity," which was used by ARKIN, L.J., in *Adams'* case (1). Counsel seeks to support his argument by stretching the word "nullity" to its fullest extent so as to mean absolutely void *ab initio* without any possibility of subsequent validation, but I think that the most significant part of the judgment of BLACKBURN, J., in *Reynolds v. Howell* (5) is to be found in the passage where he said (*ibid.*, 400):

"In this case, as the action was brought without authority, on the authority of *Robson v. Eaton* (6), the plaintiffs are entitled to have the action stayed, and without payment of costs. I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act."

That passage seems to me to show clearly that, in the view of BLACKBURN, J., it was possible for a plaintiff to ratify the act of an attorney or solicitor in

bringing an action in the name of that plaintiff without previously obtaining that plaintiff's authority so to do.

Lastly, counsel referred to *London & Blackwall Ry. Co. v. Cross* (7). The question in that case was whether an injunction could be granted to restrain the unauthorised use of the complainant's name in certain other proceedings, and, reversing the judgment of CHITTY, J., it was held in this court that that was not a permissible remedy. In the course of the judgments a distinction was drawn between an application of that kind and an application of the kind which is now before this court, *i.e.*, an application in an action to stay the proceedings or strike out the plaintiffs on the ground that the proceedings were brought without the plaintiffs' authority. LINDLEY, L.J., said (31 Ch.D. 370):

"He [CHITTY, J.] put it on this ground, that Mr. Cross [the defendant] was proceeding without authority, and that, therefore, there was jurisdiction to restrain him from using the names of his alleged principals, and he referred to the doctrine that if an action is brought by a person without authority it can be stopped. That is, no doubt, quite true, but upon what principle is that done? It is upon the principle that the court can control the proceedings before itself, and if a person without authority is bringing an action in the name of another it is an abuse of the process of the court, and the court can stop it."

FRY, L.J., said in the same context (*ibid.*, 371):

"In that class of cases the court stays the proceedings because it finds that there has been an abuse of its own process, and because it has a duty to keep its records truthful and prevent proceedings taken before it from being other than what they are represented to be."

Then the learned lord justice contrasts that with the question of granting an injunction, which, he says, the court had no general jurisdiction to do in certain cases. LOPES, L.J., said to the same effect (*ibid.*, 373):

"It does not appear to me that the analogy is correct, for there the court would strike out the name of the plaintiff or defendant, or stay the proceedings, as the case might be, on the ground that it had full authority to prevent any abuse of its own proceedings."

I find nothing in any of those cases to constrain me to hold that the issue of a writ and the commencing of an action without the authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the solicitor concerned. So to hold would be to introduce, as I see it, an entirely novel doctrine into the ordinary law of principal and agent, and to make a new exception to the general rule that every ratification relates back, and is deemed equivalent, to an antecedent authority. In the absence of any decision compelling me to do so, I, speaking for myself, decline so to hold. I agree with what was said by the learned judge, and I think that he rightly took the view that to accede to counsel's contention would be inconsistent with the authorities in which questions of this kind have been dealt with, particularly in relation to companies. I would refer to a passage in *BUCKLEY ON THE COMPANIES ACTS*, 12th ed., at p. 169, where the relevant law is, in my view, correctly summarised. The passage occurs in the course of a discussion as to the circumstances in which a company's name can be used as plaintiff in an action and the exceptions to the general rule that a company is the only proper plaintiff in respect of a wrong done to the company—a discussion, in short, of the aspect of company law related to what is commonly called the rule in *Foss v. Harbottle* (8). The relevant passage for the present purpose is in these terms:

"6. If the case be one in which the company ought to be plaintiff, the fact that the seal is in the possession of the adverse party will not necessarily preclude the intending plaintiffs from using the company's name.

Neither will it be necessary to obtain the resolution of a general meeting in favour of the action before the writ is issued. In many cases the delay might amount to a denial of justice. In a case of urgency the intending plaintiffs may use the company's name, but at their peril, and subject to their being able to show that they have the support of the majority.) In an action so constituted, the court may give interlocutory relief, taking care that a meeting be called at the earliest possible date to determine whether the action really has the support of the majority or not."

That passage, where it refers to the calling of a meeting, accords with the well-settled practice of the court in cases in which, in proceedings brought by a company, a dispute arises as to the authority with which the company's name has been used as plaintiff. It is common practice in such cases to adjourn any motion brought to strike out the company's name with a view to a meeting being called to see whether the company desires the action to be brought or not. At first sight, that procedure is wholly inconsistent with counsel's contention that an action brought without authority is a nullity which cannot be validated by ratification, as it would be entirely idle, if counsel is right, to hold such a meeting at all. Counsel seeks to extricate himself, however, from that difficulty by an argument on these lines. He says that while it is true that it is the practice of the court in such cases to direct a meeting to be held, the meeting is called, not to find out whether the corporators desire the action to proceed at the date of the meeting, but to find out whether, at the date on which the writ was issued, the corporators, if consulted on the matter, would have agreed to the action being brought. That seems to me to introduce a wholly impracticable refinement into this branch of the law. If counsel's argument were right, then, for example, if shares had changed hands between the date when the writ was issued and the date when the meeting was held to decide whether the action was to proceed or not, such meeting, on the face of it, would be quite idle, because the only people whose views could be relevant in the matter would be those who held the shares at the date when the action was brought. I can see no justification for so understanding the law as summarised, correctly in my view, in the passage I have quoted from BUCKLEY ON THE COMPANIES ACTS.

I think the true position is simply that a solicitor who starts proceedings in the name of a company without verifying whether he has proper authority to do so, or under an erroneous assumption as to the authority, does so at his own peril, and, so long as the matter rests there, the action is not properly constituted. In that sense it is a nullity and can be stayed at any time, providing the aggrieved defendant does not unduly delay his application, but it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action, to adopt the proceedings, and to say: "I approve of all that has been done in the past and I instruct you to continue the action." When that has been done, then, in accordance with the ordinary law of principal and agent and the ordinary doctrine of ratification, the defect in the proceedings as originally constituted is cured, and it is no longer open to the defendant to object on the ground that the proceedings thus ratified and adopted were in the first instance brought without proper authority. For these reasons I am of the opinion that the learned judge came to a right conclusion and that this appeal fails and should be dismissed.

HODSON, L.J.: I am prepared to assume, as did my Lord and the learned judge, that the proceedings were instituted without authority, because there has been no argument addressed to this court as to the effect of the agreement of May, 1949. Similarly, I do not propose to say anything about the question whether the defendants are disabled by reason of the delay which has taken place, for the simple reason that counsel has not been called on to argue on that point. I, like my Lord, would rest my judgment on the presence

of ratification. If the law is correctly set out in the passage of BUCKLEY ON THE COMPANIES ACTS, 12th ed., at p. 169, para. 6, to which my Lord has referred, the present case is not, in essence, different from the ordinary case in which someone, purporting to act on behalf of a company, issues a writ at his peril and subsequently obtains the necessary support of the company to that action. In my view, it is impossible to argue that proceedings instituted without authority are, in the technical sense of the word, a nullity; and the cases referred to on that page of BUCKLEY indicate the contrary. Counsel for the defendants, however, has founded an argument particularly on two cases in which the word "nullity" was used. The question in the first case, *Adams v. London Improved Motor Coach Builders, Ltd.* (1), was whether a plaintiff who had not given a written retainer to his solicitors was entitled to judgment in the action against the defendant with costs. In that case ATKIN, L.J., said ([1921] 1 K.B. 503) that

" . . . if the defendants had been successful in their contention that there was no employment by the plaintiff of the solicitors, the result would be that the action would be a nullity; it would be brought in the name of a plaintiff who had given no authority to bring an action for him; and the defendants would have the right to have the proceedings stayed, and I presume to have the usual order that the solicitors pay the costs of both parties."

ATKIN, L.J., was clearly applying himself to the case before him and not considering whether the proceedings would be, in a technical sense, a nullity, because, if there was really a nullity, there would be nothing to stay. The same observation applies to *Reynolds v. Howell* (5), where BLACKBURN, J., used the language that has been quoted (L.R. 8 Q.B. 399):

"How can we say that we ought to impose terms on staying these proceedings, which, if the action went on further, would be a nullity."

That the learned judge did not regard the proceedings as, in the technical sense of the word, a nullity, is clear from the final passage in his judgment, in which he expressly adverted to the possibility of ratification of the attorney's act by the plaintiff after action brought. Counsel sought to confine that observation to the relationship between the plaintiff and his solicitor, as opposed to the relationship between the plaintiff and the defendants. I do not think that the observation can be properly so confined and I see no difficulty in the learned judge's view, which I think is perfectly correct, that the act of the liquidator in this case has been sufficient to ratify such defect, if any, as previously existed. For these reasons, as well as those given by my Lord, I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Payne, Hicks, Beach & Co.* (for the defendants); *Osmond, Bard & Westbrook* (for the plaintiffs).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re POWER'S SETTLEMENT TRUSTS. POWER *v.* POWER.

[CHANCERY DIVISION (Wynn-Parry, J.), April 4, 1951.]

Trust and Trustee—Additional trustee—Appointment—Appointment by appointor of himself—Trustee Act, 1925 (c. 19), s. 36 (6).

A
A settlement, dated Feb. 22, 1939, by cl. 16 provided: "The power of appointing a new trustee or new trustees hereof shall be vested in the settlor during his life and after his death in George during his life . . ." It was accepted that the power referred to was that contained in the Trustee Act, 1925, s. 36 (6), which provides: ". . . where, in the case of any trust, there are not more than three trustees . . . then and in any such case—(a) the person or persons nominated for the purpose of appointing new trustees by the instrument . . . creating the trust . . . may, by writing, appoint another person or other persons to be an additional trustee or additional trustees . . ." After the death of the settlor, George executed a deed of appointment dated Aug. 15, 1950, whereby he purported to appoint himself an additional trustee of the settlement. B

C
HELD: under s. 36 (6) an appointor had no power to appoint himself an additional trustee, and, therefore, the appointment by George was invalid.

Re Sampson ([1906] 1 Ch. 435), applied.

AS TO APPOINTMENT OF TRUSTEES UNDER STATUTORY POWER, see HALSBURY, Halsham Edn., Vol. 33, pp. 171-176, paras. 296-307; and FOR CASES, see DIGEST, Vol. 43, pp. 680-682, Nos. 1106-1123.

Cases referred to:

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E
(1) *Re Skeats' Settlement*, (1889), 42 Ch.D. 522; 58 L.J.Ch. 656; 61 L.T. 500; 43 Digest 678, 1084.
(2) *Re Newen*, [1894] 2 Ch. 297; 63 L.J.Ch. 763; 70 L.T. 653; 58 J.P. 767; 43 Digest 678, 1085.
(3) *Montefiore v. Guedalla*, [1903] 2 Ch. 723; 73 L.J.Ch. 13; 89 L.T. 472; 43 Digest 678, 1086.
(4) *Re Sampson*, [1906] 1 Ch. 435; 75 L.J.Ch. 302; 94 L.T. 241; 43 Digest 681, 1110.

F
ADJOURNED SUMMONS to determine whether a deed of appointment dated Aug. 15, 1950, whereby the defendant purported by virtue of the Trustee Act, 1925, s. 36 (6), to appoint himself an additional trustee of a settlement, was valid and effective.

Upjohn, K.C., and *A. F. M. Berkeley* for the plaintiffs, the trustees of the settlement.

Milner Holland, K.C., and *T. A. C. Burgess* for the defendant, the donee of the power of appointment.

G
H
WYNN-PARRY, J.: The only question I am asked to deal with today is whether or not a deed of appointment, dated Aug. 15, 1950, made by George Frederick Cecil Power, the defendant to this summons and the tenant for life under protective trusts under a settlement dated Feb. 22, 1939, and made between the late Sir John Cecil Power, of the one part, and Lady Power and Leonard Frederick Sutton, of the other part, is valid, having regard to the Trustee Act, 1925, s. 36 (6). The settlement, in cl. 16, provides:

"The power of appointing a new trustee or new trustees hereof shall be vested in the settlor [the late Sir John Cecil Power] during his life and after his death in George [the defendant] during his life . . ."

The defendant has exercised this power of appointment by appointing himself an additional trustee. It is common ground between the parties that the

"power" referred to is not any special power, but the statutory power now to be found in the Trustee Act, 1925, s. 36 (6), which provides:

- A "Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—(a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being; may, by writing, appoint another person or other persons to be an additional trustee or additional trustees . . ."
- B If the only relevant statutory provision to be considered were that provision and if the matter were *res integra*, then I should have construed it as a provision which did not exclude the donee of the power of appointing new trustees from the class of persons who could be appointed trustees, for I should have treated the phrase, "appoint another person or other persons," as pointing a contrast between the person or persons to be appointed to the particular office of trustee,
- C on the one hand, and those who were the existing trustees, on the other hand. It is urged that, on this view, the words "another" and "other" must be otiose. I think, for myself, that they merely add, if I may so put it, style to the language. The object of the provision is to appoint additional trustees. The step is to appoint an additional individual, or individuals, to the office of trustee, and it would seem to me, as I say, were the matter *res integra*,
- D straining the language to say that the persons referred to in the phrase I have quoted were persons other than the donee of the power or the person under the section exercising the power.
- The matter, however, is not free from authority. I must first turn back to sub-s. (1) of s. 36, which provides:

- E "Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees—(a)
- F the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee; may, by writing, appoint one or more other persons (whether or not being the persons
- G exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid."

- H It is to be observed, in the first place, as a matter of construction, that the effect of the words in brackets, "whether or not being the persons exercising the power," is necessarily that the word "other" in the immediately preceding phrase, "one or more other persons," must refer not to the person exercising the power, but to the trustee in whose place it is intended to appoint the one or more persons referred to. The words in brackets clearly were deliberately included by the legislature in view of the existing state of the authorities, the effect of which was to exclude the person exercising the power from the class of persons who could be appointed trustees.

The relevant cases start with *Re Skeats' Settlement* (1), which was a case

involving the construction of a special power of appointing new trustees. The relevant power was

"to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or going to reside abroad, or desiring to retire, or refusing, or becoming incapable, to act . . ."

KAY, J., held, first, that, the power of appointing new trustees being a fiduciary power, the donee of such a power could not appoint himself. With that aspect of the matter I am not concerned, but he also held that the terms of the power, with which I am concerned, required that the trustee or trustees to be appointed should be some person or persons other than the person or persons making the appointment. In the course of his judgment on this latter point, he read the terms of the power and proceeded as follows (42 Ch.D. 528):

"Now the question is what is the meaning of the word 'other.' Does it mean other than the trustee who is dead? If it does, it is admitted the word is superfluous. Does it mean other than the trustee who is retiring? There again it is quite superfluous, because the retiring trustee would not be appointed; it would not be necessary or possible that he should be appointed. Does it mean other than the trustee residing abroad or becoming incapable? It would have some meaning in those cases, no doubt; a better meaning than if you apply it only to the trustee who is dead or desires to retire. But why should it not mean other than the person making the appointment as well? I observe that the person making the appointment may be the continuing trustee. The continuing trustee may appoint 'any other, person or persons to be a trustee or trustees,' etc. In that case, 'other' must mean some other person than the trustee deceased, or going abroad, or retiring, or refusing, or becoming incapable to act; and also other than the trustee making the appointment, that is to say, other than the appointor himself. Or if continuing trustee only refers to the case of a trustee being dead, still 'other' must mean other than the continuing trustee himself. He cannot possibly appoint himself . . . take the case of the executors or administrators of the last acting trustee. Can this mean that the executors or administrators of the last acting trustee, who are to appoint any other person or persons to be trustee or trustees, may appoint themselves? The more natural meaning to give to the word 'other' is to say that it must be other than the trustee to be replaced, and the person who is replacing him by making the appointment."

From that passage it is clear that the type of wording which I have to consider in sub-s. (6) involves language, the construction of which is not free from authority. That case was followed by *Re Newen* (2), a decision of KEKEWICH, J., who dealt first with the general question, to which KAY, J., also addressed himself, and expressed a very definite opinion that, by reason of the fiduciary nature of the power, whatever might be the terms of its language, the donee must be excluded from the class of persons who can be appointed as trustee. He also dealt with the question of construction and in the course of his judgment said ([1894] 2 Ch. 308):

"In the present case a different point occurred. It seems that all the trustees appointed by the will are dead; and the last surviving trustee appointed an executor, who died in her lifetime. Then these two ladies were entitled to administer the estate, and they did so; they obtained letters of administration with the will annexed, the result being that, either under the Act or under the will, they had power to appoint new trustees. That power goes to the surviving or continuing trustee or trustees for the time being, or the executors or administrators of the last surviving trustee, which these ladies were. They are, according to the power, to appoint 'any other proper person or persons' to be a trustee or trustees.

A They appointed one of themselves, a lady, and the two others were gentlemen. That, to my mind, was entirely wrong. The case really comes within the decision of KAY, J., in *Re Skeats' Settlement* (1); but, quite apart from that, I have not myself the slightest doubt that it is wrong in principle. Mr. Warmington gave it up on the ground, amongst others, but sufficiently on the ground, that the power was to appoint 'any other proper person or persons,' and that you cannot yourself be another person than yourself; that is no doubt sufficient."

His LORDSHIP went on to deal with the broader aspect of the matter on the basis that the power was a fiduciary power.

B In *Montefiore v. Guedalla* (3), however, BUCKLEY, J., held that there is no rule that the donee of a power to appoint new trustees is unable to appoint himself. In the course of his judgment he discussed the two cases to which I have referred, but he put the matter in this way ([1903] 2 Ch. 725):

C "Mr. Jessel has cited a number of cases bearing on the point, and I have considered them with a view to seeing whether the court has ever laid it down that the donee of a power of appointing new trustees cannot appoint himself. I say emphatically 'cannot,' for the question is not whether it is improper for him to do so, but whether he cannot do so, in the sense that he is outside the class of persons who are capable of being appointed. I do not think the court has ever laid that down. The first step is to look at the language of the power. Where you find that the power is to appoint some 'other' person, the question may arise whether that means some person other than the appointor. In such a case the donee of the power may not be amongst the persons capable of being appointed. But in the present case the word 'other' does not appear. The words of the power are simply, 'to appoint a new trustee or trustees'; so that by the language of the instrument the executors who are the appointors are not excluded from the class."

E It is clear from that passage that BUCKLEY, J., took the view that it was first necessary to construe the language of the document in question and to see whether, as a matter of construction, the donee of the power was excluded from appointing himself.

F That case fell to be considered in *Re Sampson* (4), where KEKEWICH, J., had to construe the statutory power of appointing new trustees, conferred by the Trustee Act, 1893, s. 10 (1), which provides:

G "Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid."

H In the course of his judgment, KEKEWICH, J., having quoted part of the passage from the judgment of BUCKLEY, J., in *Montefiore v. Guedalla* (3), which I myself have quoted, said that he proposed to take what BUCKLEY, J., called the first step and look at the language of the power, which was contained in

the Trustee Act, 1893, s. 10 (1). He referred to the power and proceeded ([1906] 1 Ch. 438):

"What does 'another person or other persons' mean? Does it only mean some person or persons other than the trustees who are dead or are remaining out of the United Kingdom, or who desire to be discharged, or refuse, or are unfit or incapable? or does it also mean some person or persons other than the person exercising the power of appointment? Now let us go back. The power is given to the person nominated by the instrument, if any, creating the trust to make the new appointment, and he is to appoint 'another person or other persons' to be trustees. Surely that must mean that the person appointed trustee is to be another person different from the person or persons nominated for the purpose of appointing new trustees. If there is no such donee expressly nominated, then the surviving or continuing trustee—which latter includes a retiring or refusing trustee—is to appoint 'another person or other persons' to be trustees. It would be reducing it to an absurdity to say that they might appoint themselves, for in neither case could the person making the appointment possibly appoint himself, because in the one case he is already a trustee and in the other case he is a retiring or refusing trustee. So that it is clear that where the appointment is made by a continuing or surviving trustee or by a retiring or refusing trustee the words 'another person or other persons' must mean some person or persons other than the person exercising the power of appointment, and it follows that these words must bear the same meaning when the persons exercising the power are the personal representatives of the last surviving or continuing trustee, for, whatever the words mean, they must bear the same meaning throughout, whether the power is being exercised by the surviving or continuing trustee or by the personal representatives of the last surviving or continuing trustee."

That passage shows beyond doubt that the learned judge had given careful consideration to the question and careful reasons for his conclusion that, on the true construction of the power contained in the Trustee Act, 1893, s. 10 (1), the effect of the phrase, "may appoint another person or other persons to be a trustee or trustees" and the use of the words "another" and "other" was to exclude the donee of the power from the class of persons capable of being appointed trustees. That section, of course, dealt with the appointment of a new trustee or new trustees in place of an existing trustee and did not deal with appointing additional trustees. When one turns to s. 36 (1) of the Trustee Act, 1925, it now becomes clear, on that review of the authorities, why the words in brackets, "whether or not being the persons exercising the power," were inserted, for, having regard to that body of authority, but for the introduction of those words, no doubt this court, treating as binding the authorities which have stood for so long, would have been confined to giving to the word "other" the same effect as was given to the words "another person or other persons" in s. 10 (1) of the Act of 1893. It is, however, to be observed that the power to appoint is couched, in s. 36 (1) of the Act of 1925, in somewhat different language. It is a power to "appoint one or more other persons," in contradistinction to a power to "appoint another person or other persons," which appears both in s. 10 (1) of the Trustee Act, 1893, and s. 36 (6) of the Trustee Act, 1925.

I am faced with this difficulty. On the one hand, the force of the words in brackets in s. 36 (1) of the Act of 1925, drives one necessarily to the conclusion that the phrase "other persons" refers to persons other than the trustee or trustees in place of whom the proposed appointment is to be made, while, on the other hand, I have the express provision in the words in brackets making it clear that the donee of the power is not to be treated as excluded from the class of persons capable of taking the appointment. When I turn to sub-s. (6)

I have a slightly different phrase—"appoint another person or other persons," instead of "appoint one or more other persons," and I have a complete absence of any such provision as the words in brackets, "whether or not being the persons exercising the power," which appear in sub-s. (1). If I could regard myself as free to do so, I should incline to the view that sub-s. (6), which is dealing with a different subject-matter from sub-s. (1), should be construed in the way I indicated at the beginning of this judgment and I should be inclined to regard the words in brackets in sub-s. (1) as having been introduced there for the express purpose of displacing the rule which may be extracted from the authorities to which I have referred. On the other hand, I am faced with the difficulty that KAY, J., in *Re Skeats* (1) and KEKEWICH, J., in *Re Newen* (2) and *Re Sampson* (4) have taken a very definite view as to the effect which should be given to the phrase "another person or other persons," that being particularly in *Re Sampson* (4).

It was urged on me by counsel for the defendant that the decisive consideration should be that the words—though the same words as those in s. 10 (1) of the Trustee Act, 1893—appearing in s. 36 (6) of the Act of 1925 have an entirely different purpose from those which appear in s. 10 (1) of the Act of 1893. Much as I would like to accede to that argument, I cannot feel that it is sound. It is true that there is a different purpose—in the one case the appointment is to be made in substitution for a person ceasing to be a trustee for one or a number of reasons, while in the other case the appointment is that of an additional trustee. But in each case there is the previously existing position to be considered—in the first case the vacancy in the trust, and in the second the intention to appoint an additional trustee. So there exists, in each case, a position with which the phrase "another person or other persons" has to be contrasted. When I add to that the circumstance that in s. 36 (1) there is the express provision represented by the words in brackets to which I have referred, with the utmost reluctance I feel driven to the conclusion that, at any rate so far as this court is concerned, I ought not to give to the phrase

"appoint another person or other persons to be an additional trustee or additional trustees"

a meaning different from that which was given to the same words as they appeared in s. 10 (1) of the Act of 1893 by KEKEWICH, J., in *Re Sampson* (4), a decision which has stood since 1906 without any judicial criticism.

It may be said to be a capricious result that whereas when there is a vacancy the defendant in this case can appoint himself a trustee, but when there is not a vacancy he cannot do so. It appears to me, unfortunately, that that is the result of the language of the Act and that that result can only be avoided either by an amendment to the Trustee Act, 1925, or as a result of a review by a higher court of the reasoning underlying the cases to which I have referred, and, particularly, *Re Sampson* (4). For those reasons, I feel constrained to declare that the deed of appointment of Aug. 15, 1950, was invalid and ineffective on the ground that, on the true construction of the Trustee Act, 1925, s. 36 (6), the defendant had no power to appoint himself to be an additional trustee of the settlement.

Order accordingly.

Solicitors: Collyer-Bristow & Co. (for the plaintiff); Woodcock, Ryland & Co., agents for Preston & Redman, Bournemouth (for the defendant).

[Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.]

Re FRENCH PROTESTANT HOSPITAL. GOVERNOR AND DIRECTORS OF THE HOSPITAL FOR POOR FRENCH PROTESTANTS AND THEIR DESCENDANTS RESIDING IN GREAT BRITAIN *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Danckwerts, J.), April 5, 1951.]

Trust and Trustee—Profit from trust—Directors of charitable corporation—Directors empowered to make bye-laws—Validity of bye-law permitting directors to be paid for professional services.

The royal charter incorporating "The governor and directors of the hospital for poor French protestants and their descendants residing in Great Britain" provided that the governor, deputy governor and directors might make such bye-laws as they should think beneficial for the said hospital, and that they might from time to time alter, annul or make void the said bye-laws, "... provided always that the said bye-laws . . . be reasonable, and not repugnant to law." Of the bye-laws for the time being in force bye-law XI provided that no person should be eligible to be chosen or to continue a director who received any emolument from the corporation. A solicitor and a surveyor, who were directors of the corporation, received from the corporation fees for advice, and the directors proposed to amend bye-law XI by adding thereto: "But this bye-law shall not prevent any director holding or continuing to hold office by reason of the fact that the corporation employs in a professional capacity and pays fees to a firm of which such director is a member either as sole proprietor or a partner or otherwise."

HELD: the directors of the corporation were in a fiduciary position in relation to the corporation and its property, and, apart from any provision in the constitution of the corporation, they had no right to remuneration; it was improper for the directors to amend the bye-laws to enable payment to be made to themselves; and, therefore, the proposed amendment was repugnant to law and invalid.

AS TO DUTY OF TRUSTEE NOT TO OBTAIN PERSONAL ADVANTAGE, see HALSBURY, Hailsham Edn., Vol. 33, p. 20, para. 402; and FOR CASES, see DIGEST, Vol. 43, pp. 863-866, Nos. 3097-3117.

Cases referred to:

- (1) *Bray v. Ford*, [1896] A.C. 44; 65 L.J.Q.B. 213; 73 L.T. 609; 43 Digest 865, 3112.
- (2) *Re Macadam*, [1945] 2 All E.R. 664; [1946] Ch. 73; 115 L.J.Ch. 14; 173 L.T. 395; 2nd Digest Supp.
- (3) *Re Gee*, [1948] 1 All E.R. 498; [1948] Ch. 284; [1948] L.J.R. 1400; 2nd Digest Supp.

ADJOURNED SUMMONS for the determination of the question whether a proposed alteration to a bye-law of the French Protestant Hospital contained in a resolution passed by the governor, deputy governor and directors of the hospital on Oct. 1, 1949, and confirmed on Jan. 7, 1950, was valid and effective. The object of the amendment was to enable two of the directors who from time to time advised the hospital in professional capacities to be remunerated for their services. The facts appear in the judgment.

N. S. S. Warren for the applicants, the governor, deputy governor and directors of the hospital.

Denys B. Buckley for the Attorney-General.

DANCKWERTS, J.: The question which I have to decide in this case arises in regard to a charitable corporation which was incorporated by royal charter on July 20, 1718. The question is whether the persons who under the

terms of the charter are in control of the management and property of that charitable corporation can make an alteration to a bye-law, which alteration enables remuneration for services to be paid to themselves.

A The charter refers to a number of persons who are described as, "all French refugees naturalised," and are said to have petitioned the King on behalf of themselves and several other French refugees and to have begun the building of the hospital for lodging and subsisting a small number of the poorest sort of their nation. The charter incorporates those named persons and their successors by the name of: "The governor and directors of the hospital for poor French protestants and their descendants residing in Great Britain." The power to hold land and to acquire land is conferred, and it is provided by the charter that there shall be a governor, a deputy governor, and thirty-seven directors or more, of the said corporation, to be constituted in the manner B thereafter expressed in the charter. It is, of course, purely an accident that the persons referred to are described as directors, a term which is familiar in company law. I think it would be more common to find persons in this position described as governors, or by some similar name.

C Among the powers which are conferred on the governor, deputy governor, and directors of the said corporation is a power,

D "from time to time, as they shall think fit and necessary, to meet and assemble at the said hospital, and there to prepare, make, ordain, and constitute such and so many good and wholesome bye-laws, rules, orders, and ordinances, as they shall think beneficial for the said hospital. And that it shall and may be lawful to and for the governor, deputy governor, and directors of the said corporation from time to time to alter, annul, or make void the said bye-laws, rules, orders and ordinances as to them shall seem expedient. Provided always that the said bye-laws, rules, orders and ordinances so as aforesaid to be made be reasonable, and not repugnant to law."

Among the bye-laws which are in existence is one, No. XI, which provides:

E "No person shall be eligible to be chosen or to continue a director, who is an alien; or who receives any emolument from the corporation; or who is directly or indirectly interested in the supply or sale of any goods to, or in any work done for the hospital."

Bye-law XIX, which provides for alteration of the bye-laws, is in these terms:

F "None of the bye-laws hereinbefore or hereinafter contained shall be altered, or any new bye-law made, except by a general or extraordinary general court, and confirmed at the next general court, or at an extraordinary general court."

G It is under that power contained in bye-law XIX that the governor, deputy governor, and directors of the corporation have purported to alter the bye-law XI in a manner which I will mention in a moment.

H It appears that over a number of years a gentleman who acted as honorary solicitor to the corporation and another gentleman who acted as surveyor to the corporation were, or purported to be, directors of the hospital, although they received fees for advice and work which they did for the corporation, though on a much diminished scale, so that the fees did not really represent remuneration equivalent to the ordinary profit which those gentlemen would make in the course of their professional work. It is plain that they were disqualified for the office of director of the corporation under the words of bye-law XI which refer to "any work done for the hospital." Apparently, however, the directors of the corporation thought that it was desirable that persons in the position of the solicitor and the surveyor should be remunerated for work done, and, accordingly, on Oct. 1, 1949, they passed a resolution for an alteration to bye-law XI, and it is the validity of this alteration which is

in question. The resolution was passed on Oct. 1, 1949, and confirmed on Jan. 7, 1950. The alteration to bye-law XI consisted of the addition at the end of the bye-law of these words:

"But this bye-law shall not prevent any director holding or continuing to hold office by reason of the fact that the corporation employs in a professional capacity and pays fees to a firm of which such director is a member either as sole proprietor or a partner or otherwise."

The validity of that alteration has been called in question by one of the directors and by the charity commissioners, and as a result the originating summons in this case has been taken out. The point which I have to decide is whether that alteration is within the terms of the charter, *i.e.*, whether the alteration is reasonable and is not repugnant to law.

It is said by counsel for the applicants that it is the corporation which is trustee of the property of the charity in question, and that the applicants, the governor and directors, are not trustees. Technically that may be so. The property of the charity is, of course, vested in and held by the corporation. The corporation, however, exists only according to the rules of law, and it is not an actual person capable of acting on its own motion in any way whatever. It seems to me that in a case of this kind the court is bound to look at the real situation which exists. It is obvious that the corporation is completely controlled by the governor, deputy governor, and directors, and it is, therefore, those persons who, in fact, control the corporation and decide what shall be done. Those persons are as much in a fiduciary position as trustees in regard to any acts which are done in regard to the corporation and its property. It would be entirely illegal if they were simply to put the property, or the proceeds of the property of the corporation, in their pockets and make use of it for their own individual purposes or for their purposes as a whole, and not for the purposes of the charitable trust for which the property is held. Therefore, it seems to me plain that they are, to all intents and purposes, and for the purposes of this case, bound by the rules which affect trustees.

The duties of persons in such a fiduciary position were expressed by LORD HERSCHELL in *Bray v. Ford* (1). Having held that there was no power in the memorandum of association of the limited company in that case, which was a company existing for charitable purposes, entitling the vice-chairman of the Yorkshire College to receive remuneration for his services as solicitor, LORD HERSCHELL said ([1896] A.C. 51):

"It is not now in controversy that if this be so the respondent [the vice-chairman] was not warranted in making a charge for his professional services. It is an inflexible rule of a court of equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule. But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services."

It is clear, therefore, that without some provision in the constitution which controlled the governors and directors in what they did the directors had no

right to make any profit or claim any remuneration out of the property of the corporation. The question, however, assuming that such conduct would *prima facie* be repugnant to law, is whether an alteration of the bye-laws which permits these gentlemen to remain directors and yet also to receive payment for their services would be repugnant to law and unreasonable so as not to be validly made under the terms of the charter. LORD HERSCHELL clearly recognised that in some cases it may not be improper to have a provision, sometimes described as a charging clause, which enables trustees to be paid, and one is familiar with the clauses which are so often inserted in wills and settlements and which enable trustees to be paid for their services, but, while it is entirely proper for a settlor or testator to insert in his settlement or will a provision enabling the trustees of a trust constituted by him to obtain payment for their services, it seems to me a very different matter for persons who are already in the position of trustees, and, therefore, so far as they exercise their powers at all, bound to exercise them in a fiduciary manner on behalf of the charitable trusts in which they act, to empower themselves to be at the one time trustees and persons who are making a profit.

In settling schemes for the administration of charitable trusts the practice of this court has always been to exclude the trustees who administer the trusts from any power to make a profit or obtain remuneration. It seems to me, therefore, that it would be a great change if it were thought proper for such a general provision to be inserted in a document regulating charitable trusts, particularly on the motion of the trustees themselves. Counsel for the applicants said, no doubt with complete accuracy, that in the present case one is dealing with two entirely honourable gentlemen who would not abuse the powers which it is sought to confer on them, but it is plain that the terms of the proposed alteration to the bye-laws are sufficiently wide to enable the full amount of fees to be charged so that the persons in question would make a profit out of their offices for the services rendered by them. It does not seem to me that that is a proper and reasonable provision to insert in the bye-laws relative to a charitable trust at the instance of the trustees themselves or persons who are, to all intents and purposes, in the position of trustees, and, *prima facie*, any such bye-law would be repugnant to law. If it is said that it is not repugnant to law that there should be a charging clause inserted in the provisions regulating trusts, it seems to me that it is not reasonable to insert such a provision in trusts of the kind which I have to consider in the present case. Accordingly, I come to the conclusion that the proposed alteration to the bye-law is invalid and ineffective.

Order accordingly.

Solicitors: *Ouvry & Co.* (for the applicants); *Treasury Solicitor.*

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*

McKEE v. McKEE.

[PRIVY COUNCIL (Lord Merriman, Lord Simonds, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker), February 13, 14, 15, 16, 19, March 15, 1951.]

Infant—Custody—Previous order of foreign court—Variation of order—Welfare of infant paramount consideration.

The parties, who were American citizens, were married in Vermont in 1933 and lived in the United States of America until December, 1946. They separated in December, 1940. On Sept. 4, 1941, the parties executed an agreement which provided, *inter alia*, that, without the written permission of the other party, neither of them would remove their infant son from or out of the United States of America. On Dec. 17, 1942, a decree of divorce was granted to the father by the Superior Court of the State of California, and he was awarded custody of the child. Subsequently, the order as to custody was varied by the same court, and it was ordered that custody of the infant should be given to the mother. The father, who then resided with the child at Port Austin, Michigan, thereupon took him into Ontario, Canada. In February, 1947, *habeas corpus* proceedings were instituted by the mother in Canada, and a judge gave the sole custody of the infant son to the father. This order was confirmed by the Court of Appeal for Ontario, but on a further appeal by the mother the Supreme Court of Canada reversed the order and decided that the mother should have the custody of the child. In making this order the Supreme Court of Canada was of opinion that the father, in taking the infant with him from the United States of America into Ontario to avoid obedience to the order of the Californian court, whose jurisdiction he himself had invoked, had no right to have the whole question of custody re-tried by the Canadian courts.

HELD: in proceedings relating to custody the welfare and happiness of the infant was the paramount consideration; the order of a foreign court as to his custody must be given the weight which was due to it in the circumstances of the case, but such an order was only one of the facts which must be taken into consideration; and, therefore, it was the duty of the Canadian court to form an independent judgment on the merits of the matter.

Observations of MORTON, J., in Re B.'s Settlement ([1940] Ch. 63), applied.

AS TO GUARDIANSHIP AND CUSTODY OF INFANTS, see HALSBURY, Hails-
ham Edn., Vol. 17, pp. 658-669, paras. 1377-1386; and FOR CASES, see DIGEST,
Vol. 28, p. 288, Nos. 1403-1411.

Cases referred to:

- (1) *Re Laurin*, (1927), 60 O.L.R. 409; Digest Supp.
- (2) *Ward v. Laverly*, [1925] A.C. 101; 94 L.J.P.C. 17; 131 L.T. 614; 28 Digest 274, 1255.
- (3) *M'Lean v. Leftley* (or *M'Lean*), 1947, S.C. 79; 2nd Digest Supp.
- (4) *Johnstone v. Beattie*, (1843), 10 Cl. & Fin. 42; 1 L.T.O.S. 250; 8 E.R. 657; 28 Digest 286, 1397.
- (5) *Stuart v. Bute* (*Marquis*), *Stuart v. Moore*, (1861), 9 H.L. Cas. 440; 4 H.L.T. 382; 11 E.R. 799; 28 Digest 337, 2045.
- (6) *Re Davis* (*an Infant*), (1894), 25 O.L.R. 579; 28 Digest 265, 1182 n.
- (7) *Re Gay*, [1926] 3 D.L.R. 40; 59 O.L.R. 40; Digest Supp.
- (8) *Nugent v. Vetzera*, (1866), L.R. 2 Eq. 704; 35 L.J.Ch. 777; 15 T.L.R. 33; 30 J.P. 820; 28 Digest 288, 1410.
- (9) *Di Savini v. Lousada*, (1870), 18 W.R. 425; *sub nom. Re Savini, Savini v. Lousada*, (1870), 22 L.T. 61; 28 Digest 294, 1502.

(10) *Re B.'s Settlement*, [1940] Ch. 54; 109 L.J.Ch. 20; 2nd Digest Supp.

(11) *Re Thain*, [1926] Ch. 676; 95 L.J.Ch. 292; 135 L.T. 99; Digest Supp.

APPEAL by the father from an order, dated June 6, 1950, of the Supreme Court of Canada, allowing an appeal by the mother from an order, dated June 24, 1948, of the Court of Appeal for Ontario, affirming an order, dated Oct. 18, 1947, of WELLS, J., whereby sole custody of the infant son of the parties was given to the father.

The parties, who were American citizens, were married in Vermont in 1933 and lived in the United States of America until December, 1946. They separated in December, 1940, and on Sept. 4, 1941, by a written agreement they agreed, *inter alia*, that neither of them would remove their son, who was born in the State of California on July 14, 1940, from or out of the United States of America without the written permission of the other. On Sept. 18, 1941, the mother commenced an action for divorce at Los Angeles, and the father entered a cross-complaint for divorce. By an order, dated Dec. 17, 1942, the court dismissed the mother's complaint, but granted the father a divorce on his cross-complaint and awarded him the custody of the child. The order also affirmed the agreement made by the parties on Sept. 4, 1941. On applications by both parties to the Superior Court of the State of California for a modification of this order, full custody of the infant son was awarded to the mother. On or about Dec. 24, 1946, the father, who was then residing with the infant son in the State of Michigan, took the child into the province of Ontario without the permission or knowledge of the mother. The mother instituted *habeas corpus* proceedings in the Supreme Court of Ontario, and by an order, dated Oct. 18, 1947, WELLS, J., awarded sole custody of the infant son to the father. The mother appealed to the Court of Appeal for Ontario, who by a majority (HOGG and AYLESWORTH, JJ.A., ROBERTSON, C.J.O., *dissentiente*) affirmed the order of WELLS, J. On a further appeal by the mother, the Supreme Court of Canada, by a majority (KERWIN, ESTEY, LOCKE and CARTWRIGHT, JJ., TASCHEREAU, KELLOCK and FAUTEUX, JJ., *dissentiente*), reversed the order of the Court of Appeal for Ontario and ordered that the mother should have the custody of the child and that the father should deliver the child into her custody at the time and place mentioned in the order.

Gahan and *G. H. Lockhead* (of the Canadian Bar) for the husband.

Gage for the wife.

Mar. 15. LORD SIMONDS: This appeal is brought from a judgment of the Supreme Court of Canada dated June 6, 1950, whereby by a majority of four judges to three (KERWIN, ESTEY, LOCKE and CARTWRIGHT, JJ., TASCHEREAU, KELLOCK and FAUTEUX, JJ., *dissentiente*) an appeal by the present respondent, Evelyn McKee, from a judgment of the Court of Appeal for Ontario dated June 24, 1948, was allowed, and an order was made that the respondent, having undertaken forthwith to return with Terry Alexander McKee, the infant son of the appellant and respondent, to the United States of America and to keep the appellant fully advised as to the infant's whereabouts, should have the custody of the infant and that the appellant should deliver the infant into her custody at the time and place mentioned in the order. The order of the Court of Appeal for Ontario had by a majority (HOGG and AYLESWORTH, JJ.A., ROBERTSON, C.J.O., *dissentiente*) affirmed an order of WELLS, J., of Oct. 18, 1947, whereby sole custody of the infant son was given to the appellant. The appellant will be hereafter generally referred to as the father and the respondent as the mother.

The following statement of the relevant facts is taken with some slight modification from the judgment of CARTWRIGHT, J., in the Supreme Court. The father is an airlines executive and has been for more than thirty-three years an attorney of the State of Michigan. The mother and the father are American

citizens. They were both born in the United States of America, and, until the father came to Ontario in December, 1946, in the circumstances to be mentioned hereafter, had always lived there. They were married in Vermont in 1933. The infant was born in the State of California on July 14, 1940. The parties separated in December, 1940, and have not resided together since that date. Under date of Sept. 4, 1941, the parties executed an agreement which is referred to in the proceedings as a property settlement agreement. This agreement does not make specific reference to the question of the custody of the infant, but it contains the following paragraph:

"It is further understood and agreed that neither of the parties hereto shall remove Terry Alexander McKee, son of the parties hereto, from or out of the United States of America without the written permission of the party not so removing or wishing to remove said boy from the United States of America."

On Sept. 18, 1941, the mother commenced an action for divorce in the Superior Court of the State of California in and for the county of Los Angeles. The father entered a cross-complaint for divorce. After a trial which occupied sixteen days and concluded on Nov. 20, 1942, the HONOURABLE THURMOND CLARKE delivered judgment on Dec. 17, 1942, dismissing the mother's complaint and granting the father a divorce on his cross-complaint. This judgment awarded the custody of the infant to the father, but directed that the infant should spend three months each summer with the mother. The judgment also affirmed and approved the agreement above referred to. It was conceded that this judgment was valid, and that the court had jurisdiction to pronounce it. Subsequently, there were applications by both parties to the Superior Court of the State of California for modification of this order and certain minor modifications were made. In May, 1945, the father made an application to the same court in California in the proceedings in which the order of Dec. 17, 1942, as to custody had been pronounced, asking for a modification of the terms of that order as to custody. The mother delivered a cross-application and the two applications were heard together before the HONOURABLE RUBEN S. SCHMIDT in June, 1945. The hearing occupied five days. By order, dated Aug. 1, 1945, the previous orders of the court were modified to provide that full custody of the infant be awarded to the mother with the right of reasonable visitation allowed to the father. The infant was not in the State of California when the application for modification was heard or when oral judgment was pronounced, but was there when the formal order of Aug. 1, 1945, was made. That order permitted the father to have the infant in Port Austin, Michigan, until Sept. 1, 1945, on which date it was ordered that the infant be delivered to the mother in Los Angeles, California. From this order, the father appealed to the District Court of Appeals in California and the appeal was dismissed in November, 1946. The father applied for a re-hearing which was denied, and then applied for leave to appeal to the Supreme Court of California and this application was denied on Dec. 23, 1946. Evidence was given that under the laws of the State of California these appeals had the effect of staying the operation of the order of Aug. 1, 1945, until the filing of a remittitur, following their final disposition. In the result, the order of Aug. 1, 1945, did not become effective until Jan. 13, 1947, so that the infant continued to be in the custody of the father except that he spent three months with the mother during the summer of 1946.

On or about Dec. 24, 1946, the father, who was then residing with the infant at Port Austin, Michigan, received word that his final appeal had failed, and he thereupon proceeded with the child into the province of Ontario. He did this without the permission or knowledge of the mother, who was not able to discover the whereabouts of the father and the infant until some time in the month of February, 1947. She then instituted *habeas corpus* proceedings in

A the Supreme Court of Ontario seeking to have the infant delivered to her. Her application was supported by her own affidavit setting out the relationship of the parties, the place and date of the infant's birth, the delivery of the judgment of the HONOURABLE RUBEN S. SCHMIDT, and the denial of the father's appeal. The affidavit further stated that on or about Dec. 24, 1946, the father, without any knowledge or consent on the part of the mother and with intent to deprive her of the lawful custody of the infant, had brought him to the city of Kitchener and was there detaining him. A copy of the judgment of the HONOURABLE RUBEN S. SCHMIDT was made an exhibit to this affidavit.

B A writ of *habeas corpus* was issued on Mar. 21, 1947, pursuant to the order of TRELEAVEN, J., and the return came before SMILY, J., on Mar. 25, 1947. By way of return to the writ, the father filed a lengthy affidavit. In this he stated that at the date of his marriage to the mother he was domiciled and ordinarily resident in the State of Michigan and had continued to be domiciled and ordinarily resident there until December, 1946, when he had moved to Ontario, and that he intended to make his permanent home in Ontario. He made numerous allegations reflecting on the character of the mother. He questioned her fitness to have the custody of the infant and stated that, in his opinion, it was better for the infant to be in his custody than in that of the mother. He claimed that the order of the Californian court of Aug. 1, 1945, was made without jurisdiction, and would not be enforceable in the State of Michigan. The affidavit contained no denial of the statement in the mother's affidavit that he, without any knowledge or consent on her part and with intent to deprive her of the lawful custody of the infant, had brought him to the city of Kitchener. SMILY, J., reserved the matter and on Apr. 2, 1947, gave judgment directing the trial of an issue. The question directed to be tried was: "Who is to have the custody of the infant, Terry Alexander McKee, as between the said Evelyn McKee and the said Mark T. McKee?" This order did not in terms refer the final disposition of the proceedings on the writ of *habeas corpus* to the judge trying the issue as it might have done under the provisions of r. 233, but WELLS, J., before whom the issue came on for trial, proceeded as if the final determination of the whole matter had been referred to him. It is not necessary to decide whether the practice which was followed was technically correct, for it is now common ground that, the matters in dispute having been fully investigated on their merits, no technical defect in procedure should be allowed to render the proceedings abortive.

F From this brief recital of the facts it is clear that it was the duty of WELLS, J., to determine the issue before him by reference to the familiar principles which are applicable in regard to the custody of infants and in Ontario are embodied in the Infants Act, R.S.O., 1937, c. 215. It was not, and could not be, argued before their Lordships' Board that the courts of Ontario had not jurisdiction to decide this issue. The infant was resident, if not domiciled, in the province. He was within the King's allegiance and entitled to the protection of his courts. G He was an infant, and, therefore, entitled to the special protection owed by the King as *parens patriae* to infants. Further, it was not, and could not be, disputed that the question of custody of an infant is a matter which peculiarly lies within the discretion of the learned judge who hears the case and has the opportunity generally denied to an appellate tribunal of seeing the parties and investigating the infant's circumstances, and that his decision should not be H disturbed unless he has clearly acted on some wrong principle or disregarded material evidence. It is important then to see what course was taken by WELLS, J., in a case which, undoubtedly, presented some features of difficulty. The trial before the learned judge occupied eleven days. In the course of it the father and mother were examined and cross-examined at some length. No circumstance which could be regarded as in any way relevant to the welfare of the infant was ignored. The learned judge, accompanied by counsel, went to the farm where the infant was living and saw for himself what were the

conditions of the infant's life. Having done so, he delivered a considered judgment of which their Lordships would say with respect that, in its lucid exposition of the facts and relevant law and in its careful appraisal of the factors which in such a case must be considered, it is open to no criticism. Some of his conclusions may be quoted. Of the father the learned judge said:

"There were even suggestions of private immorality, but in no case was anything established, nor was any evidence adduced which I believed which might lead one to believe that Mr. McKee's conduct had been anything but that of an honest and upright man. Mr. McKee in his testimony also indicated that his business affairs were closely integrated into the life of his own children and that of his brothers and sisters. If Terry is handed over to the custody of his mother, there will be a breach of that association which in later years may redound very markedly in his favour in a financial way and in the way of the opening of proper business opportunities to him when he is through his education."

Of the mother the learned judge said:

"In my view the evidence did not establish immorality on Mrs. McKee's part, but a looseness of public conduct and a lack of personal integrity and dignity, which I think might provide a very unhappy background to the proper upbringing of the child."

Of the infant's education he said:

"I also had the advantage of having the child's school teacher in the box and his evidence indicated that the boy is a bright and intelligent child who is equipped to take full advantage of a full education. I was very impressed with the school teacher's attitude towards the child and I think he is presently in safe hands in so far as his schooling is concerned at the present time. He is attending a small country school about two miles from his home at Linwood outside of Kitchener."

Finally, after referring to his visit to the child the learned judge said:

"While the equipment of the farm-house is simple to the point of austerity, it is entirely adequate, and I am not able to see that the boy is suffering at the present time either in lack of domestic care or in lack of educational facilities which he may require. I think he is well served in both. Looking at the whole matter his welfare seems inextricably bound up with the care, advice and education which his father can now give him and I think his interests will best be served by leaving him where he is in the custody of Mark T. McKee."

In this judgment the majority of the Court of Appeal for Ontario concurred, nor, although ROBERTSON, C.J.O., in that court and CARTWRIGHT, J., in the Supreme Court of Canada made some criticisms on this aspect of the judgment, does it appear that they would have thought fit to reverse the order of the trial judge but for two considerations to which reference must now be made. The first consideration, which has already been mentioned, is that the father's action in taking the infant out of the United States was a breach of the agreement of Sept. 4, 1941. Counsel for the father sought to justify the act by saying that the agreement had become no longer operative in this respect. Whether or not this argument could be sustained, there appears to be no doubt that the father did not so regard it. The fact that the father had broken an agreement solemnly entered into was, therefore, a circumstance which the learned judge had to take into account and weigh in determining what was for the welfare of the child. This he expressly did, and their Lordships see no ground for saying that he gave too little weight to what was only one of many elements in the case. The second and more serious consideration turns on the effect of the order of the Californian court of Aug. 1, 1945, which became effective on

Jan. 13, 1947. The validity of this order has been challenged on the ground that the Californian court had no jurisdiction to make it. Their Lordships will, however, assume, as it has throughout been assumed, that the order was validly made. They will further assume that it was for no other reason than to remove the infant from any jurisdiction in the United States that the father took him to Ontario on Dec. 24, 1946. It may well be that it had long been his intention one day to make his home in Ontario, but it is not open to doubt what was the immediate purpose of his action. These, then, are the facts to be considered—an order of a competent court giving custody to the mother and the deliberate evasion of that order by the father in removing the child to another jurisdiction. The matter is somewhat complicated by the fact that the father might as well in the State of Michigan, where the child was before his removal, as in Ontario, to which he was removed, have challenged the validity and effect of the order of the Californian court. This, however, may be disregarded by a court in Ontario which has only to consider how it should regard the order made by a competent foreign court on a question of custody. On this question, WELLS, J., after a survey of the relevant authorities, finally expressed himself thus:

“As I apprehend the law in Ontario, even granting the validity of the Californian judgment of 1945, it is only one of the factors which I must consider and the overriding factor which must guide me in my final decision is my view on the evidence of the welfare of the infant.”

He had already carefully considered that judgment and in his own words “given the greatest weight” to it. This view, which was affirmed by the Court of Appeal by a majority, then fell to be considered by the Supreme Court of Canada and their Lordships observe that CARTWRIGHT, J., does not appear to dissent from the general proposition stated by WELLS, J. Thus, he says that the authorities make it clear that the Californian judgment is not binding on the courts of Ontario in the sense that a judgment for payment of a sum certain in money pronounced by a foreign court will be enforced in an action brought on such judgment in the courts of Ontario. In his view it had been rightly held that the judgment of a foreign court as to the custody of an infant need not, as a matter of binding obligation, be followed in the courts of Ontario although great weight must be given to it. Such a judgment, he says, “would not be conclusive in our courts, but only of great persuasive effect.”

So far, then, there seems to be no difference of judicial opinion. It is at this point that CARTWRIGHT, J., appears to their Lordships to adopt a line of reasoning which cannot be supported. For, after re-affirming “the well established general rule that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant,” he observed that no case had been referred to which established the proposition that, where the facts were such as he found them to exist in the case, the salient features of which have been stated, a parent, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the court, whose jurisdiction he himself invoked, became “entitled as of right to have the whole question re-tried in our courts and to have them reach a new and independent judgment as to what is best for the infant.” It is, in effect, because he held that the father had no such right that the learned judge allowed the appeal of the mother, and that the Supreme Court made the order already referred to. With great respect to the learned judge, this was not the question which had to be determined. It is possible that a case might arise in which it appeared to a court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further inquiry. It is, however, the negation of the proposition, from which every

judgment in the present case has proceeded, *viz.*, that the infant's welfare is the paramount consideration, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated, but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, although in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case could be justified. If that is so, it would be not because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant. It cannot be ignored that such consequences might follow as are suggested by CARTWRIGHT, J. The disappointed parent might meet stratagem by stratagem, and, taking the child into the province of Manitoba, invoke the protection of its courts, whose duty it would then be to determine the question of custody. That is a consideration which with others must be weighed by the trial judge. It is not, perhaps, a consideration which in the present case should have weighed heavily.

It has been said that the weight or persuasive effect of a foreign judgment must depend on the circumstances of each case. In the present case there was ample reason for the trial judge, in the first place, forming the opinion that he should not take the drastic course of following it without independent inquiry, and, in the second place, coming to a different conclusion as to what was for the infant's benefit. For not only was the child two years older at an age when two years make a material difference, but the facts which, as appeared on the face of the Californian order, had influenced that court had substantially changed. No longer was the choice between California and "a place not accessible, snowbound in winter," and no longer was the child under the care and supervision for most of the time of aged employees hired by the father, nor was he many miles from adequate transportation and adequate school facilities. This conspicuous change of circumstances demanded an independent inquiry, and their Lordships see no reason for thinking that the learned judge, whose full and exhaustive inquiry they have already recognised, came to a wrong conclusion.

In the course of the proceedings a large number of authorities have been discussed. It is necessary only to refer to them shortly, for their Lordships concur in the review of them which is to be found in the judgment of KELLOCK, J., in the Supreme Court of Canada. It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody: see *Re Laurin* (1), following *Ward v. Laverty* (2). So, also, it is the law of Scotland: see *M'Lean v. Leflley* (or *M'Lean*) (3), and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield. The order of a foreign court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment. Comity demands, not its enforcement, but its grave consideration. This distinction, which has long been recognised in the courts of England and Scotland: see *Johnstone v. Beattie* (4) and *Stuart v. Bute* (*Marquis*), *Stuart v. Moore* (5); and in the courts of Ontario: see, *e.g.*, *Re Davis (an Infant)* (6), *Re Gay* (7); rests on the peculiar character of the jurisdiction and on the fact that an order providing for the custody of an infant cannot in its nature be final. Counsel relied (as had the Supreme Court of Canada) on the observations of SIR WILLIAM PAGE WOOD, V.-C., in *Nugent v. Vetsera*

(8) and of SIR WILLIAM JAMES, V.-C., in *Di Savini v. Lousada* (9). It is true that in both these cases particular emphasis was laid on the respect to be paid by an English court to a foreign judgment relating to custody. In the former case, however, SIR WILLIAM PAGE WOOD was careful to observe that he guarded himself against anything like an abdication of the jurisdiction of his court to appoint guardians. This can only mean that, if he thought that the welfare of the infant required the appointment of guardians by an English court, he would appoint them notwithstanding the foreign order. There is, in fact, no *via media* between the abdication of jurisdiction, which he rejected, and the consideration of the case on its merits, in which the respect payable to a foreign order must always be in the foreground. In the latter case SIR WILLIAM JAMES, V.-C., used language which appears to amount to blind surrender to a foreign order. He said (18 W.R. 426):

- B "I think that I am bound without exercising any judgment of my own to recognise their authority."
- "Their " authority appears to mean the authority of the Italian guardians who had been appointed by an Italian court, though this is not quite clear. If the learned Vice-Chancellor intended by this observation to apply a general proposition, their Lordships cannot accept it as an accurate statement of the law. It is, however, probable that he, no more than SIR WILLIAM PAGE WOOD, intended an abdication of jurisdiction. In their Lordships' opinion, the nature and limits of the jurisdiction of a court alike in England and Ontario in relation to the custody of an infant are correctly stated by MORTON, J., in *Re B.'s Settlement* (10). They would add, however, that too much stress should not be laid on the provisions of the Guardianship of Infants Act, 1925. Section 1 of that Act introduced no new principle of law, but merely enacted the rule which had long been acted on in the Chancery Division of the High Court of Justice: see *Re Thain* (11). It is true, as pointed out in the judgment of CARTWRIGHT, J., that the judgment in *Re B.'s Settlement*, *B. v. B.* (10) has been criticised by some writers whose opinions are entitled to consideration*, but it has not, so far as their Lordships are aware, been the subject of adverse judicial comment. In their opinion, it is not only consistent with authority but, as they have already observed, proceeds inevitably from the nature of the jurisdiction and of the subject-matter in regard to which it is exercised. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal for Ontario dismissing an appeal from an order of WELLS, J., of Oct. 18, 1947, should be restored. The orders as to costs made by the Court of Appeal for Ontario and WELLS, J., will stand and the order as to costs made by the Supreme Court of Canada will be varied by providing that each party will bear his or her own costs. There will be no costs of the appeal to His Majesty in Council.

Appeal allowed.

Solicitors: *Charles Russell & Co.* (for the husband); *Hancock & Scott* (for the wife).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

* See JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW, vol. 22, 3rd series, p. 234; 21ST BRITISH YEAR BOOK OF INTERNATIONAL LAW, pp. 204, 205; 4 MODERN LAW REVIEW, p. 64; CHESHIRE, PRIVATE INTERNATIONAL LAW, 3rd ed., pp. 537, 538; SCHMITTHOFF ON ENGLISH CONFLICT OF LAWS, 1945, p. 285.

- H In *Re B.'s Settlement* (10) it was held by MORTON, J., that whatever may have been the position before the Guardianship of Infants Act, 1925, the court is always bound to exercise a judgment of its own when dealing with the custody of a ward. Under s. 1 of the Act of 1925 the court is bound to consider first the welfare of the infant and to treat it as the paramount consideration. In so doing the court ought to give due weight to any views formed by the courts of the country of which the infant is a national, but the court is bound in every case to treat the welfare of its ward as being the first and paramount consideration, whatever orders may have been made by the courts of any other country. Any observations in *Nugent v. Vetzera* (8), or *Di Savini v. Lousada* (9), stating or implying a contrary view, ought not to be followed at the present day.

Re 139 HIGH STREET, DEPTFORD.

[CHANCERY DIVISION (Wynn-Parry, J.), April 10, 11, 1951.]

Registration of Land—Rectification of register—Land erroneously included in registered title of adjoining land—Contribution to mistake by registered proprietor—“Void” disposition—Land Registration Act, 1925 (c. 21), s. 82 (3) (a), (b).

The applicants had a paper title (extending back, through their predecessors in title, to 1834) to a small piece of land with a building thereon adjoining another property in Deptford High Street which was in different ownership. The piece of land to which the applicants were entitled had never been the subject of an application for registration under the Land Registration Act, 1925, or any preceding Act, as there had been no transaction in regard thereto which required such an application. Until the outbreak of the war in 1939, both the applicants' land and the adjoining property were leased to a company which, for the purpose of its business, made a hole in the party wall between the two buildings. In 1939 the company surrendered the leases of the two properties which then remained vacant and became derelict. In 1948 the respondent purported to buy the property in Deptford High Street and also the adjoining property, believing, as did the vendors, that the High Street property included the adjoining property, the only access to which was through the High Street property. Neither the contract of sale nor the conveyance to the respondent contained any plan, the land being conveyed by description as “all that shop and dwelling-house situate at and known as No. 139 High Street, Deptford”. The respondent applied to the Land Registry for registration of the property conveyed to him, describing it as “139 Deptford High Street,” and enclosing with the application the conveyance to him, but no plan. He was registered with an absolute title, the land belonging to the applicants being included in the plan annexed to the land certificate. The applicants applied for rectification of the property register, under the Land Registration Act, 1925, s. 82 (1) (g) and (h), basing their claim on each of the paragraphs in s. 82 (3).

HELD: as the disputed land would have appeared, to anyone looking at the properties, to form part of 139 Deptford High Street, the respondent had contributed to the mistake, within the meaning of s. 82 (3) (a) of the Act of 1925, by describing as “139 Deptford High Street” the property which he sought to have registered, and by enclosing with his application for registration the conveyance to him which described the property conveyed as “139 High Street, Deptford,” and, therefore, the property register should be rectified by excluding the land belonging to the applicants from the registered title relating to 139 Deptford High Street.

Chowood, Ltd. v. Lyall (2) ([1930] 2 Ch. 156), applied.

Per curiam: (i) section 82 (3) (b) of the Act of 1925 was designed to deal with cases where the deed in question was a void instrument, and, therefore, as there was a valid conveyance to the respondent, the applicants were not entitled to rectification under s. 82 (3) (b).

(ii) as the disputed land had remained derelict until the respondent purchased it and the applicants had not shown that it was required by them for the purposes of their undertaking, while the respondent, on the other hand, had shown that it was of importance to him and that he had expended money on it, the respondents would not have been entitled to rectification under s. 82 (3) (c), had their claim under s. 82 (3) (a) failed, but would have been properly protected by their right to an indemnity under s. 83 (6) (a).

FOR THE LAND REGISTRATION ACT, 1925, s. 82, see HALSBURY'S STATUTES, Second Edn., Vol. 20, p. 1013.

Case referred to:

- (1) *Chowood, Ltd. v. Lyall* (2), [1930] 2 Ch. 156; 99 L.J.Ch. 405; 143 L.T. 546; *affg.*, [1930] 1 Ch. 426; 142 L.T. 37; Digest Supp.

A SUMMONS by the British Transport Commission asking for an order that the property register be rectified by excluding from the registered title relating to land described as 139 Deptford High Street, London, a piece of adjoining land which was erroneously included in the plan annexed to the land certificate relating to the registered land.

B The respondent, who was registered as the proprietor of 139 Deptford High Street, was now in possession of the disputed land, but the applicants had a paper title to that land dating back, through their predecessors in title, to 1834. The applicants contended that the court had jurisdiction to order the rectification under the Land Registration Act, 1925, s. 82 (1) (g) and (h), and they relied on each of the paragraphs ((a), (b) and (c)) of s. 82 (3). The facts appear in the judgment.

Plowman for the applicants.

C *E. I. Goulding* for the respondent.

WYNN-PARRY, J.: This is a summons taken out by the applicants, British Transport Commission, by which they ask for an order that the property register of the registered title relating to an area of land in Deptford High Street should be rectified by excluding from that register a small piece of land.

D The applicants, through their predecessors in title, can trace a paper title to the land in dispute extending back to 1834. The land in dispute adjoins premises immediately to the north, and prior to 1939 both the disputed land and the adjoining property immediately to the north, which was in different ownership, were leased to a company called Munro & Co. (Deptford), Ltd. For the purpose of their business, that company made a hole in the party wall between the buildings on the two properties, but the evidence does not establish whether the consent of either lessor was obtained. At the outbreak of war in 1939, the company surrendered the leases of the disputed land and the adjoining property to the north, and the two properties remained vacant and became derelict. In 1948 the respondent was minded to buy property in Deptford High Street, including the land in dispute and the property immediately adjoining it to the north. The evidence establishes that, at the time when he bought, the only access to the disputed land was through the property immediately adjoining it to the north, which was known as 139 Deptford High Street. The vendors to the respondent, and the respondent, proceeded on the mistaken belief, *bona fide* held, that the description "139 High Street, Deptford," included not only the premises to the north of the disputed land, but the disputed land itself. F Both in the contract and in the conveyance, the land was conveyed by description and without the aid of any plan. The matter was completed by a conveyance, G dated Aug. 4, 1948, in which the property the subject-matter of the conveyance is described as:

"all that shop and dwelling-house situate at and known as No. 139 High Street, Deptford, in the county of London."

H Following on the conveyance, the respondent, by his solicitors, applied, as was his duty, to the Land Registry for registration of the property conveyed. Although the applicants, through their predecessors, can trace a paper title back to 1834, the land in dispute was never the subject of an application for registration under the Land Registration Act, 1925, or any preceding Act, because no transaction was ever involved which required any such application. The application form was not accompanied by any plan, and the only description of the property was "139 Deptford High Street." I have no direct evidence

of the steps which were taken at the Land Registry, but I assume that such steps as were thought necessary and proper were taken before registration was effected, particularly as, in the result, the respondent was registered with an absolute title. The plan annexed to the land certificate makes it clear that the disputed land was part of the area in respect of which registration was granted. Subsequently, the applicants discovered what had occurred, and raised objections, and the matter was referred to this court, under the Land Registration Rules, 1925 (S.R. & O., 1925, No. 1093), r. 298 (2). The question which I have to decide is the short question whether or not the property register should be rectified by excluding therefrom the disputed land.

The jurisdiction to rectify the register is contained in the Land Registration Act, 1925, s. 82, and the applicants rest their case on para. (g) and para. (h) of sub-s. (1) which provide for rectification:

“(g) Where a legal estate has been registered in the name of a person who if the land had not been registered would not have been the estate owner; and (h) In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.”

It is clear that, having regard to the facts of this case, and to the language of s. 82 (2), I should have jurisdiction to effect the rectification which the applicants seek, but for the provisions of s. 82 (3), which narrows the jurisdiction of the court to effect rectification. Section 82 (3) provides:

“The register shall not be rectified, except for the purpose of giving effect to an overriding interest, so as to affect the title of the proprietor who is in possession—(a) unless such proprietor is a party or privy or has caused or substantially contributed, by his act, neglect or default, to the fraud, mistake or omission in consequence of which such rectification is sought; or (b) unless the immediate disposition to him was void, or the disposition to any person through whom he claims otherwise than for valuable consideration was void; or (c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.”

By s. 82 (2) of the Act of 1925 power is given to rectify the register

“... notwithstanding that the rectification may affect any estates, rights, charges, or interests acquired or protected by registration, or by any entry on the register, or otherwise.”

Counsel for the respondent submitted that, although the Act of 1925, unlike the earlier Acts dealing with land registration, contains this power, it was, nevertheless, designed to preserve the scheme which underlay the earlier Acts, viz., to give a State guarantee of title. I think that there is force in that submission, because, although the guarantee is to be regarded only as a qualified guarantee in view of the provisions of s. 82 (2) of the Act of 1925, the opening words of s. 82 (3) make it clear that it is not in every case that the court has jurisdiction or a discretion to rectify the register. Indeed, as will be seen from the structure of s. 82 (3), in a case where the proprietor is in possession (as he is in the present case) the jurisdiction to rectify is strictly limited. On the other hand, it appears to me that, if any one of the conditions contained in s. 82 (3) (a), (b) and (c), respectively, is fulfilled, then the court ought to exercise the jurisdiction to rectify. Counsel for the applicants has submitted that he is entitled to rely on each of the three paragraphs ((a), (b) and (c)) of s. 82 (3). No element of fraud is present, and, so far as relevant, para. (a) in this case is concerned only with mistake. That a mistake has been made by the Land Registry in including the disputed land in the land certificate is clear. The question is whether or not the respondent can be said to have substantially contributed to that mistake.

The only case which bears in any way on that aspect of the matter is

Chowood, Ltd. v. Lyall (1), in which the purchasers of freehold land caused themselves to be registered as first proprietors with an absolute title under the Land Transfer Acts, 1875 and 1897, of the land purporting to be conveyed to them, which included certain strips of woodland to which the vendors had no title. The statement of the facts does not disclose expressly whether or not the conveyance by the vendors to the purchasers contained any plan, but from a passage in the judgment of LAWRENCE, L.J., in the Court of Appeal, and having regard to the fact that the land which was the subject-matter of the dispute comprised strips of woodland, I think it is reasonably certain that the conveyance must have contained a plan, and that the words of the conveyance must have referred to that plan. In the Chancery Division LUXMOORE, J., having referred to the language of s. 82 (3) of the Act of 1925, said ([1930] 1 Ch. 438):

“The register therefore is not to be rectified so as to affect the title conferred on the proprietor by registration, unless such proprietor has caused or substantially contributed by his act to the mistake in consequence of which rectification is sought. Now apply this to the present case. The plaintiff company has by its own act, that is, by the registration of a conveyance, which by itself is inoperative to pass the pieces of land in dispute, caused the mistake; that is, the inclusion of the pieces of land in dispute in the registered title, and it is in consequence of that mistake that the defendant, Mrs. Lyall, seeks rectification.”

In his judgment in the Court of Appeal, LAWRENCE, L.J., said ([1930] 2 Ch. 168):

“The other point was that the case has not been brought within s. 82, because the registration of the plaintiffs’ title was not a mistake within the meaning of sub-s. (1) (h) of that section. I disagree with that contention. I see no reason to limit the word ‘mistake’ in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified. Here I think there has been an obvious mistake by the erroneous inclusion in the plan filed in the register of this and of the two other strips of land which did not belong to their vendors. The evidence is clear that the predecessors in title of the plaintiffs had in fact no title and did not claim to have any title to the strip in question, and obviously therefore never intended to convey it to the plaintiffs. I have no reason to doubt that the plaintiffs thought that they were purchasing the land delineated on the plan, but in getting their title registered in the Land Registry they were acting on the mistakes which had been made in that plan, and the entry made in the registry in derogation of the right of the true owner who was in possession was an entry made by mistake within the meaning of the section.”

It appears to be reasonably clear from that passage that the Court of Appeal was dealing with a case where the conveyance to the purchasers who had effected registration was by reference to a plan. On that basis, the contribution which the purchasers made to the mistake was putting forward the conveyance with that plan, because it was that act which evidently induced the registration with an absolute title in respect of the strips of woodland in question.

The present case is somewhat different, because no plan was annexed to the conveyance, and the parcels were not described by reference to any plan. The respondent, by his solicitor, merely put forward an application in the usual form, describing the property as “139 Deptford High Street,” and accompanying the application with the conveyance containing the description to which I have already referred:

“all that shop and dwelling-house situate at and known as 139 High Street, Deptford, in the county of London.”

Counsel for the respondent, on the one hand, contends that, in doing that and nothing more, the respondent did something which cannot in any sense be said to have contributed to the mistake, the mistake being that of the Land Registry in including the disputed land in the registration. It is submitted by the applicants, on the other hand, that the respondent must be said to have contributed to the mistake. The question must be one of construction as to what is included in the language of the parcels. To resolve that, reference must be made to the surrounding circumstances so far as, in accordance with the well-established rules, they can be taken into consideration. When one looks at the surrounding circumstances, one finds that at the date of the contract and the conveyance the only access to the disputed land was through the immediately adjoining premises, which, quite clearly, were known as "139 High Street, Deptford," and that, therefore, as a matter of construction, this conveyance intended to include, and did include, the disputed land in the description "139 High Street, Deptford." On that view it is contended by counsel for the applicants that, by putting that description forward, the respondent contributed to the mistake, because the necessary consequence of putting forward the application must have been that the Land Registry officials would make the usual inquiries and, if necessary, a survey of the premises, and they would, therefore, be led to fall into the same mistake as had been made by the respondent and his vendors. It is not an easy point to resolve, but it appears to me that the determining factor is the circumstance that, so far as the physical aspect of the matter is concerned, the disputed land must have appeared to anyone looking at the properties in question to form part of 139 High Street, Deptford. It was, apparently, so obvious that the vendors to the respondent fell into the mistake, the respondent himself fell into the mistake, and the Land Registry fell into the mistake. On that view of the matter, it appears to me, notwithstanding the arguments both practical and theoretical of counsel for the respondent, to follow, necessarily, that the respondent must be held to have contributed to the mistake, within the meaning of s. 82 (3) (a) of the Act of 1925.

That would be sufficient to dispose of the matter, but, in case it should be taken to a higher court, I wish to say shortly, for the information of that court, that, as regards s. 82 (3) (b), I accept the submission of counsel for the respondent. In my view, "disposition," in para. (b), refers to the deed in question. There was a perfectly valid conveyance, and, therefore, there is no room for saying that the disposition to the respondent was void. I think that s. 82 (3) (b) is designed to deal with cases where the whole deed in question is a void instrument, either because it was a forgery, or for any other suitable reason. Had I not felt constrained to hold that there has been a mistake contributed to by the respondent within s. 82 (3) (a), I should not have been prepared to rectify the register under s. 82 (3) (c). The applicants have put forward no evidence to show that the property which is in dispute is required by them for the purposes of their undertaking. It remained derelict until the respondent purchased it, and he has since expended money on it. Weighing all the relevant circumstances, if I had had to decide the case under s. 82 (3) (c), I should have taken the view that the applicants would have been properly protected by their right to claim an indemnity under s. 83 (6) (a). It is with reluctance that I have felt constrained to come to the conclusion which I have stated, because, as the respondent makes clear in his evidence, the land in dispute, although very small in area, is of importance to him and he has expended money on it. Taking, however, the view which I do of the facts, I feel driven to hold against him under s. 82 (3) (a). In the result, I shall order that the property register of the registered title in question be rectified by excluding therefrom the land in question.

Order accordingly.

Solicitors: *M. H. B. Gilmour* (for the applicants); *Saunders, Sobell, Greenbury & Leigh* (for the respondent).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

SIMPSON v. SIMPSON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., Karminski, J.), February 2, 21, 22, March 19, 1951.]

Divorce—Cruelty—Natural consequence of respondent's acts—Rebuttable presumption—No act of violence—Callous indifference—Reasonable apprehension of danger to health.

A *Practice—Appeal—Question of fact—Disagreement with tribunal which heard witnesses.*

The husband appealed from the finding of justices that he had been guilty of persistent cruelty to his wife in whose favour the justices made a maintenance order. The wife alleged that her husband kept her short of money, bought food for himself which he did not share with her, refused to take her for a holiday, stayed out of the house until late at night, was taciturn and unfriendly while at home, ignored her, showed her no affection, and on several occasions told her to leave the house. It was admitted that there had been no violence, but the wife contended that the husband's conduct had affected her health and amounted to persistent cruelty. On behalf of the husband it was contended that his conduct amounted to no more than "the development and manifestation of his own character" and that it was no more "aimed at" his wife than her corresponding attitude was "aimed at" him.

HELD: the maxim that a man must be taken to intend the natural consequences of his acts was applicable in determining charges of cruelty in matrimonial cases, but it must be remembered that it did not express an irrebuttable presumption of law and was only to be applied in connection with conduct which could fairly be described as ill-treatment; in the present case the justices had found that the husband's conduct was of sufficient gravity; and, even though it might be said on one aspect to be "a manifestation of his own character," it could be held that his conduct was wilful and was "aimed at" his wife and that he intended injury to her health.

Observations of DENNING, L.J., in *Hosegood v. Hosegood* (1950) (66 T.L.R. 738, 739, 740), criticised.

Boyd v. Boyd ([1938] 4 All E.R. 181), disapproved.

Edwards v. Edwards ([1948] 1 All E.R. 157), approved.

Buchler v. Buchler ([1947] 1 All E.R. 319), applied.

Per LORD MERRIMAN, P.: There is an essential distinction between an appellate court finding that the evidence ought not to have been accepted by the tribunal which saw and heard the witnesses, and an appellate court accepting the totality of the facts found by the trial court, but holding nevertheless that in law those facts do not suffice to constitute the offence charged. It makes the task of an appellate court very difficult if it is precluded from expressing an opinion about the conclusion, taking the evidence at its most favourable for the complainant.

Watt (or Thomas) v. Thomas ([1947] 1 All E.R. 582), applied.

AS TO CRUELTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 649-654; and FOR CASES, see DIGEST, Vol. 27, pp. 281-293, Nos. 2513-2694, and Digest Supps.

Cases referred to:

- H** (1) *Horton v. Horton*, [1940] 3 All E.R. 380; [1940] P. 187; 109 L.J.P. 108; 163 L.T. 314; 2nd Digest Supp.
 (2) *Westall v. Westall*, (1949), 65 T.L.R. 337; 2nd Digest Supp.
 (3) *Kaslefsky v. Kaslefsky*, [1950] 2 All E.R. 398; [1951] P. 38; 114 J.P. 404.
 (4) *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle*, [1927] A.C. 37; 95 L.J.P. 153; 136 L.T. 33; Digest, Practice, 770, 3353.

- (5) *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582; [1947] A.C. 484; [1947] L.J.R. 515; 176 L.T. 498; 2nd Digest Supp.
- (6) *Allen v. Allen*, Feb. 1, 1951 (unreported).
- (7) *Squire v. Squire*, [1948] 2 All E.R. 51; [1949] P. 51; [1948] L.J.R. 1345; 112 J.P. 319; 2nd Digest Supp.
- (8) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (9) *Lauder v. Lauder*, [1949] 1 All E.R. 76; [1949] P. 277; 2nd Digest Supp. A
- (10) *Kelly v. Kelly*, (1869), L.R. 2 P. & D. 31; *on appeal*, (1870), L.R. 2 P. & D. 59; 39 L.J.P. & M. 28; 22 L.T. 308; 27 Digest 284, 2555.
- (11) *Mytton v. Mytton*, (1886), 11 P.D. 141; 57 L.T. 92; 50 J.P. 488; 27 Digest 285, 2561.
- (12) *Bethune v. Bethune*, [1891] P. 205; 60 L.J.P. 18; 63 L.T. 259; 27 Digest 288, 2618. B
- (13) *Hosegood v. Hosegood*, (1950), 66 T.L.R. 735.
- (14) *Boyd v. Boyd*, [1938] 4 All E.R. 181; 108 L.J.P. 25; 159 L.T. 522; 102 J.P. 525; Digest Supp.
- (15) *Edwards v. Edwards*, [1948] 1 All E.R. 157; [1948] P. 268; [1948] L.J.R. 670; 112 J.P. 109; 2nd Digest Supp.
- (16) *Buchler v. Buchler*, [1947] 1 All E.R. 319; [1947] P. 25; [1947] L.J.R. 820; 176 L.T. 341; 111 J.P. 179; 2nd Digest Supp. C
- (17) *Everitt v. Everitt*, [1949] 1 All E.R. 908; [1949] P. 374; 113 J.P. 279; 2nd Digest Supp.
- (18) *Sickert v. Sickert*, [1899] P. 278; 68 L.J.P. 114; 81 L.T. 495; 27 Digest 315, 2930.
- (19) *Derry v. Peek*, (1889), 14 App. Cas. 337; 58 L.J.Ch. 864; 61 L.T. 265; 54 J.P. 148; 9 Digest 125, 642. D
- (20) *Jones v. Hulton (E.) & Co.*, [1909] 2 K.B. 444; 78 L.J.K.B. 937; 101 L.T. 330; 32 Digest 164, 1989.
- (21) *Thomas v. Thomas*, [1924] P. 194; 93 L.J.P. 61; 130 L.T. 716; 27 Digest 315, 2925.
- (22) *Thomas v. Thomas*, [1946] 1 All E.R. 170; 115 L.J.P. 75; 110 J.P. 203; Digest Supp. E
- (23) *Russell v. Russell*, [1897] A.C. 395; 66 L.J.P. 122; 77 L.T. 249; 61 J.P. 771; 27 Digest 291, 2661.
- (24) *Clark v. Clark*, [1950] W.N. 489.
- (25) *Pew v. Pew*, Jan. 30, 1951 (unreported).
- (26) *Angel v. Angel*, [1946] 2 All E.R. 635; 176 L.T. 90; 111 J.P. 14; 2nd Digest Supp. F
- (27) *Evans v. Evans*, (1790), 1 Hag. Con. 35; 161 E.R. 466; 27 Digest 281, 2522.
- (28) *Walmesley v. Walmesley*, (1893), 69 L.T. 152; 27 Digest 288, 2619.
- (29) *Usmar v. Usmar*, [1949] P. 1; [1948] L.J.R. 1418; 2nd Digest Supp.

APPEAL by the husband from an order for maintenance made by the Kingston-on-Thames justices in favour of the wife on the ground that her husband had been guilty of persistent cruelty. G

Ormrod for the husband.

C. G. A. Cowan for the wife.

Mar. 19. The following judgments were read. H

LORD MERRIMAN, P.: This is a husband's appeal from a decision of the Kingston-on-Thames justices who, on Dec. 18, 1950, found that he had been guilty of persistent cruelty to his wife. On that ground they made an order in her favour, about the amount of which there is no dispute. They did not make a separation order. The children of the marriage are all of age, so that no question of custody arose. The sole issue in this appeal, therefore,

Cur. adv. vult. H

is whether the finding of persistent cruelty was justified. The case has been fully and clearly argued on both sides, and our attention has been called to a considerable number of recent authorities on the subject. The case is one that has caused me some difficulty because it seems to be increasingly difficult to obtain consistent guidance from decisions of the Court of Appeal on two distinct matters each of which is of vital importance in the determination of this appeal. I say this with all deference and diffidence—with deference because this court desires, as always, to pay due respect to any decision of the Court of Appeal; with diffidence because, as will appear, I must admit that, sitting as I have sometimes done in the Court of Appeal, decisions to which I have been a party have, apparently, contributed to the confusion which exists.

The first of these matters, which directly concerns the merits of this case, involves the question how far in connection with cruelty and the kindred offence of desertion of what is commonly called the “constructive” kind, phrases used aptly enough, no doubt, in a particular context, such as that the conduct complained of must be “aimed at” the aggrieved spouse and not merely be “the development and manifestation of the” offending spouse’s “character acting so to speak in its own sphere” are to be regarded as expressing a doctrine of universal application: *Horton v. Horton* (1), *Westall v. Westall* (2), and *Kaslefsky v. Kaslefsky* (3); and in relation thereto the application of the maxim that a person is to be taken to intend the natural consequences of his own conduct. The second is the more general question as to the point at which, in relation to the well-known limits laid down by the House of Lords in *S.S. Hontestroom v. S.S. Sagaporack*, *S.S. Hontestroom v. S.S. Durham Castle* (4) and in *Watt (or Thomas) v. Thomas* (5) on the right of an appellate tribunal to differ from the trial court, the line is properly to be drawn between interference with findings of fact and holding that there has been a misdirection because those facts do not, in law, constitute the offence charged.

As to the first question, I am fortified in the opinion that some confusion is in danger of arising by a judgment of SIR RAYMOND EVERSHED, M.R., delivered in *Allen v. Allen* (6), with which JENKINS, L.J., and HODSON, L.J., concurred. The appeal was from the refusal of the special commissioner at Bristol to pronounce a decree on the petition of a wife based on alleged cruelty. At the beginning of the judgment SIR RAYMOND EVERSHED, M.R., said:

“The material language of the section has, I think, always in these matters to be borne in mind, for, if a court is prone too much to indulge in exposition and attempted definition, there is a risk that there will be substituted for the language chosen by Parliament some other form of words. In such a case as this the duty of the court to pronounce a decree of divorce is ‘if the court is satisfied on the evidence’ that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty. As I ventured to point out in *Squire v. Squire* (7) those are English words in ordinary usage, and it means that the alleged cruelty must be something which satisfies that language according to its ordinary acceptance.”

Conversely, I would add that there is also a danger of undue restriction. This is expressed in a passage in the speech of LORD ATKIN in *Donoghue v. Stevenson* (8) ([1932] A.C. 583):

“I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted.”

This seems to me peculiarly applicable to the matrimonial offences of cruelty

and desertion. Neither is defined by statute. The whole law relating to each is judge-made.

Returning to *Allen v. Allen* (6), later in his judgment SIR RAYMOND EVERSLED, M.R., added:

"I am bound to say that the impression I have formed, reading the evidence and without quarrelling in the least degree with anything that the learned judge has said, is that unhappily these two persons became temperamentally estranged and that the learned judge is, therefore, right when he says that what the wife suffered she suffered because she and her husband really proved to be incompatible, neither interested in the other, and each, therefore, presumably sat round in silence without conversation with the other, and that state of affairs unhappily played seriously upon the wife's mind. If that is right, it seems to me that that would be stretching cases of cruelty to lengths which they have never reached yet, and which it seems to me they should not reach now. Indeed, if they did, it seems to me that one would be substituting as a ground for divorce something quite different from that which is relied on here, namely, the allegation that the respondent has treated the petitioner with cruelty."

After expressing approval of the decision of the Court of Appeal in *Lauder v. Lauder* (9), calling attention to the marked difference between the facts in that case and the facts of the case then under consideration, and quoting with approval from the headnote in *Horton v. Horton* (1) a citation from the judgment of BUCKNILL, J., SIR RAYMOND EVERSLED, M.R., continued:

"It has so often been said that it is obvious—yet it is worth repeating—that all cases that come before this court must be determined on their own particular facts, and I should imagine that in no class of case is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. The fact is, I think, another reason for a sense of danger in trying to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or riders to the actual statutory language."

I have quoted those observations because in this case the argument on behalf of the husband can be, and, indeed, was, shortly summarised by the submission that the justices had made an unwarranted extension of the principles laid down in *Lauder v. Lauder* (9). In substance the passage which I have already quoted could be used almost literally to describe the submission on behalf of the husband in this case. With the general observations of SIR RAYMOND EVERSLED, M.R., I desire most respectfully to express my complete agreement. With those general observations I would also couple the passage at the end of the judgment of DENNING, L.J., in *Kaslefsky v. Kaslefsky* (3) where he said ([1950] 2 All E.R. 403):

"If the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled."

On behalf of the wife it is said that this is a case of a course of conduct calculated to break her spirit within the meaning of the line of cases beginning, to go back no farther, with *Kelly v. Kelly* (10), in which the well-known passage in LORD PENZANCE's judgment (L.R. 2 P. & D. at p. 32) was expressly approved by the full court (at p. 60), and continuing with *Mytton v. Mytton* (11), *Bethune v. Bethune* (12), and *Lauder v. Lauder* (9), thereby endangering her mental health, or, at least, causing reasonable apprehension of such danger. On behalf of the husband it is contended that this is really a case in which both spouses

have lost all affection for each other and have become completely indifferent, and that the husband's alleged misconduct amounts to no more than the "development and manifestation of his character acting so to speak in its own sphere," and that it is no more "aimed at" the wife than her corresponding attitude is "aimed at" him.

As to the wife's case, let me say first of all that, if she establishes misconduct
A on the part of the husband, no question arises about the element of persistence essential to a charge of cruelty in a court of summary jurisdiction. That is implied in the allegation that it is a course of misconduct. Likewise, it is admitted that there is sufficient evidence, provided the necessary misconduct is established, that there is at least apprehended injury to the wife's health. Indeed, the allegation that the husband was callously indifferent to the signs
B of injury to his wife's mental health was one of the factors put forward as constituting misconduct. For the rest, the wife's case may be summarised briefly as follows. The husband had kept her short of money in spite of a solicitor's letter and until the local probation officer had intervened; he had closed the account at the stores at which she was accustomed to deal without informing the wife that he had done so, and in such a way as to humiliate
C her; that he had "made her life a hell," in support of which she said that he had compelled her to keep an account of her household expenses; that he used to keep food which he had bought for himself locked up in the garage, and had on more than one occasion brought food and asked her to cook it for him—"an egg, but he did not get one for me"; that he had refused to take her for a holiday or to take her out in his new car; that he had put the
D purchase of the car, partly used for his municipal duties, before the provision of new curtains or furniture for the home; and that, generally speaking, he neglected her by staying out of the house, except at week-ends, from the time he left in the morning until 11 o'clock at night, and was taciturn and unfriendly and took no notice of her; that there was no affection or love, and that, as his own evidence showed, he had not realised that their unhappy relationship
E was telling on her health; and that he had told her to go on several occasions, one of which was quite recent. She added that when she had been in bed for three days during the war the husband had never gone near her. On the other hand, it was admitted that there had been no violence of any kind. In conclusion the wife said that she was very unhappy and the only thing she could do was to go away. Accordingly, she proposed to leave him in order to go
F and live with the youngest son, an architect, who was about to acquire a flat. No question of constructive desertion arose because at the time of hearing the parties were still living together. On the other hand, she said more than once that the whole trouble was over money, though she had £3 a week for the last two years for housekeeping money in addition to £1 a week from the son for his keep, the husband paying rent, rates, taxes, electricity and gas. She
G also admitted that sexual intercourse had ceased three years ago when she withdrew into a separate bedroom after an attack of influenza. In other words, generally speaking, her complaint was of stinginess, lack of affection and attention, callous indifference, taciturnity and selfishness. The architect son, who lived in the matrimonial home, was called to corroborate her evidence. He said that the condition of the furniture was such that he refused to bring his
H friends home. He corroborated the allegations that the husband had no conversation either with him or the wife, that he did not remember the husband ever taking the wife out, that he had seen him producing food for himself without offering any to the wife or to him, and that there was no affection or love between him and his father or between his father and his mother; that he had no wish for his friends to meet his father; and that the whole of his affection was for his mother and the rest of the family. Seeing that the justices accepted the wife's story I refrain from putting the husband's version of the

facts, which, in a nutshell, was that he treated his wife as he himself was treated by her.

The justices stated the reasons for their decision as follows: (i) The court believes the wife and accepts her evidence of her husband's conduct and the state of affairs in the home. The corroboration offered by the son is also accepted by the court. (ii) The court is satisfied that the husband's conduct was wilful. The various acts of the husband over a long period were intentional¹, and he should have been able to foresee that the result would be misery and pain to the wife. (iii) The court is satisfied, after considering the authorities, that the acts of the husband as outlined by the wife constitute cruelty. (iv) The court is satisfied that the wife's health has suffered as a result of the husband's conduct, and a continuance of the present circumstances causes a reasonable apprehension of danger to her mental and bodily health. I have already dealt with reason No. (iv), and have summarised the evidence in support of reasons Nos. (i) and (ii). Reason No. (iii) is in effect a direction to themselves by the justices in point of law, but the note does not show, nor were counsel able to inform us, what were the authorities by which the justices guided their decision.

Before us the judgment of DENNING, L.J., in *Hosegood v. Hosegood* (13) was relied on. The case itself appears to have been a simple one. The other two members of the court appear to have disposed of the appeal on the facts, but these are not set out in the report. DENNING, L.J., however, in his judgment went much wider, and, as this judgment is constantly being cited as if it were the judgment of the court, I feel compelled to point out that in some respects it conflicts with authority by which I think DENNING, L.J., was bound. I say nothing about the conclusion expressed (66 T.L.R. 740) that two spouses in respect of the same parting may each be guilty of desertion at the same time. It may possibly be thought that a judgment which leads to this conclusion is not the most authoritative exposition of this branch of the law. I know of no other authority for this proposition, but it is one which must be dealt with when it is directly in issue in a concrete case. For the moment I am concerned with the development (*ibid.*, 738, 739) of the theory that there are two rival schools of thought about constructive desertion. This is based on the supposed misunderstanding of the time-honoured maxim, used in many contexts other than the law relating to cruelty and desertion, that a man must be taken to intend the natural consequences of his own conduct. The leading expositions of these two "schools of thought" are said to be found in *Boyd v. Boyd* (14), a decision of BUCKNILL, J., and *Edwards v. Edwards* (15), a decision of this court in which the judgment in *Boyd v. Boyd* (14) was expressly disapproved. Before going further I would point out that *Boyd v. Boyd* (14) has had a somewhat chequered career. It was a case in which the learned judge declined to find constructive desertion against a husband who had been guilty of an indecent assault on a girl under thirteen years of age, although his wife had previously forgiven him after he had served a sentence for incestuous adultery. The ground for the decision was that there was no evidence of an intention on the part of the husband to bring the cohabitation to an end. At the same time the learned judge indicated that the husband might have been guilty of cruelty, and, therefore, did not dismiss the petition, but allowed it to be amended to include a charge of cruelty. As a matter of history, as appears from a footnote to *Edwards v. Edwards* (15), he himself pronounced a decree of divorce on the ground of cruelty on the same facts.

As I have ventured to say on more than one occasion, the principles governing constructive desertion are, in my opinion, nowhere more accurately or more succinctly stated than in a passage at the beginning of the judgment of ASQUITH, L.J., in *Buchler v. Buchler* (16), when he says ([1947] 1 All E.R. 326):

"In the first place, it is common ground and a commonplace that the spouse who leaves the matrimonial roof is not necessarily the deserter.

Constructively the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But, thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better for worse.' The ordinary wear and tear of conjugal life does not in itself suffice."

In other words, as between cruelty and constructive desertion, the latter may in certain circumstances be the lesser offence of the two, but both involve conjugal ill-treatment of a serious kind. The point of the judgment of this court in *Edwards v. Edwards* (15) was that we were unable to accept the proposition that conduct which might be held to be cruelty, and, indeed, was subsequently so held, would not satisfy the test necessary to constitute constructive desertion because the husband was said in his own mind not to wish to break up the marriage. In passing, I may say that, in deciding *Edwards v. Edwards* (15), both members of this court were well aware of the reference to *Boyd v. Boyd* (14) in the judgment of LORD GREENE, M.R., in *Buchler v. Buchler* (16), where he adopted the phrase from the judgment of BUCKNILL, J., that the spouse charged with desertion must be shown to have been guilty of conduct equivalent to "driving the other spouse away." This, however, does not necessarily imply approval of the actual decision on the facts. In *Hosegood v. Hosegood* (13) DENNING, L.J., expressed the opinion that the reasoning in *Boyd v. Boyd* (14) was unanswerable and that *Edwards v. Edwards* (15) was wrong. I am still D unrepentantly of the opinion that *Boyd v. Boyd* (14) was wrongly decided on the facts, and that *Edwards v. Edwards* (15) was right in so holding. It would, no doubt, be an impertinence for me to say so if there were not authority of the Court of Appeal for that proposition. *Edwards v. Edwards* (15) was expressly approved in *Squire v. Squire* (7), and also in *Everitt v. Everitt* (17), a Court of Appeal, consisting of BUCKNILL and COHEN, L.JJ., and myself, expressly approved the E decision. This fact was ignored by DENNING, L.J., in *Hosegood v. Hosegood* (13), but in this court, at any rate, I consider myself bound by these decisions, and not the less so because in *Everitt v. Everitt* (17) the learned judge who decided *Boyd v. Boyd* (14) as a judge of first instance was party to our judgment as a member of the Court of Appeal.

I take leave to doubt, however, whether there really are two schools of F thought about the application of the doctrine that a man must be taken to intend the natural consequences of his own conduct. I prefer to think that in referring, as he did in the passage in his judgment in *Buchler v. Buchler* (16) to which DENNING, L.J., alluded, both to *Boyd v. Boyd* (14) and *Sickert v. Sickert* (18) LORD GREENE, M.R., was not really vacillating between two rival schools of thought, but that he said what he did because he did not think that G any such rivalry existed. After all, the conception embodied in the maxim has been applied, as I have already said, to a variety of subjects, and I doubt whether any court has regarded it as an irrebuttable presumption of law. For example, *Derry v. Peek* (19) settled the law that to establish deceit it is not sufficient to prove that there is no reasonable ground for a belief, in fact held, in the truth of the representation complained of, but that it must be proved H that the defendant made the representation knowing it to be false, or not believing it to be true, or (as a branch of the latter) recklessly, not caring whether it was true or false. And although the fact that no reasonable person could hold such a belief affords evidence of fraudulent intent, nevertheless, if it appears that the belief is truly held, the defendant is not guilty of deceit. In other words, although the natural consequences of making the representation may be to lead to the presumption that it was fraudulent, the presumption is not irrebuttable even if the belief is as absurd, to take an extreme example,

as that of the genuine "Geoplanarians" in Kipling's story. Likewise in what FARWELL, L.J., in *Jones v. Hulton (E.) & Co.* (20) regarded as the kindred case of defamation, the defendant is taken to have "intended the natural meaning of his own words" ([1909] 2 K.B. 480-483). If it is a natural consequence of the words used that the reader thinks that a particular A. B. was intended—whether that word is used in the literal sense of "pointed at" or the modern sense of "meant"—the writer's assertion that he had never heard of A. B. is irrelevant, but it may be otherwise if he proves that he wrote the words of and concerning another actual A. B. A

Without going through the careful examination of the doctrine in *Squire v. Squire* (7) with which I respectfully agree, I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim, provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment. That, I think, is what LORD GREENE, M.R., meant by saying in the passage in *Buchler v. Buchler* (16) ([1947] 1 All E.R. 325) that, if the facts relied on are not B

"... such as to justify her in treating them as a dismissal from the *consortium* ... she could not concert them into such a justification by announcing her intention of leaving her husband if he did not change his conduct." C

Again, in the same paragraph, he says (*ibid.*):

"This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts, for, if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home, no inference can be drawn from those acts of an intention to expel her." D

The fundamental objection to the decision in *Boyd v. Boyd* (14) seems to me to be that the inevitable conclusion from the finding that there was no constructive desertion because the husband wished to continue the marriage is that, in refusing to live with a husband who had been guilty for the second time of a sexual offence directly relevant to his conjugal obligations, the wife herself would be guilty of desertion if he offers to resume cohabitation. I use the words "directly relevant to his conjugal obligations" in order to guard against being supposed to suggest that the mere fact that a husband has been convicted of some crime unconnected with his obligations as a husband, injurious as that might be to the wife, would support a charge of cruelty or of constructive desertion. As LORD GREENE's reference to *Boyd v. Boyd* (14) in *Buchler v. Buchler* (16) ([1947] 1 All E.R. 320) has been cited in support of the proposition that the husband's conduct must be "aimed at" the wife, I point out that both LORD GREENE, M.R. (*ibid.*, 324) and ASQUITH, L.J. (*ibid.*, 327), made it clear that, if it had been shown that there was anything of a homosexual nature in the relations between the husband and the man in question, the appeal would have been otherwise decided. That suggestion had been expressly disclaimed. I would observe, however, that had the case been decided otherwise for that reason, such conduct would be neither more nor less "aimed at" the wife than was the conduct of the husband in *Boyd v. Boyd* (14) and would be neither more nor less a manifestation of his own character. That in such a case a wife who refused to resume cohabitation would be liable to be held to be the deserter is the inevitable result of the judgment of WARRINGTON, L.J., in *Thomas v. Thomas* (21). *Thomas v. Thomas* (22) was also referred to with approval in the judgment in *Everitt v. Everitt* (17) in a passage immediately preceding the approval of *Edwards v. Edwards* (15). I understand, also, that the reasoning in this later case of *Thomas v. Thomas* (22) was approved by the Court of Appeal in a case of which I have not been able to find a report. E
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In *Thomas v. Thomas* (21) WARRINGTON, L.J., was laying down the principle, founded on *Russell v. Russell* (23) and consistently followed in numberless cases, that the mere fact that an ill-treated wife refuses the husband's overtures for a resumption of cohabitation does not necessarily end a state of desertion if her refusal is reasonable in the circumstances, for if it did so the very fact of her refusal to resume cohabitation would change her from the deserted to the deserting spouse, which, as WARRINGTON, L.J., said, would be absurd. In such a case it is the husband's misconduct, not his avowed intention, which is the determining factor: see *Buchler v. Buchler* (16). Likewise, with regard to *Boyd v. Boyd* (14), to hold that the wife is entitled to divorce on the ground of cruelty while on the same facts she would be liable to be held guilty of desertion seems to me to be equally absurd. However that may be, the decision in *Boyd v. Boyd* (14) seems to afford a very insecure foundation for the line of thought of which it is said to be the best illustration. If the husband's conduct in the present case is held to be of sufficient gravity, I feel no doubt that, although it may be said that it was a manifestation of his own character or temperament, it should be held to be "aimed at" the wife, and that he should be taken to have intended the apprehended danger to her mental health.

That brings me to the second matter. In the course of the argument our attention was called to two decisions in the Court of Appeal, *Clark v. Clark* (24) and *Pew v. Pew* (25). In both these cases this court had overruled a decision of justices in favour of a wife on the ground of constructive desertion. In both cases the Court of Appeal reversed the decision of this court on the ground that the decision infringed the principle laid down in *Watt (or Thomas) v. Thomas* (5), about the limitation of the right of an appellate court to overrule the findings of the court which had the advantage of seeing and hearing the witnesses. As I was not concerned in the decision of *Clark v. Clark* (24), I know nothing beyond what appears in the short report in the WEEKLY NOTES. I was, however, party to the decision of this court in *Pew v. Pew* (25), and, as that case seems to me to have a direct bearing on the decision of the present case, I must refer to it. Let me say at once that I do not question the correctness of the decision of the Court of Appeal. It was a borderline case. This court took the view that it was on the wrong side of the line, but we gave leave to appeal after the Court of Appeal itself had referred back to us the question whether leave to appeal should be granted, because we thought that the Court of Appeal might very well take the view that from the wife's point of view it was on the right side of the line.

What I confess that I do not understand in relation to that case is how *Watt (or Thomas) v. Thomas* (5) bore on the decision one way or another. SOMERVELL, L.J., was correct in saying, as he did, that the principles laid down in that case were perfectly familiar to this court. Perhaps I may be allowed to mention one circumstance in support of this. Only a few months earlier an attempt had been made in Parliament to insert into the Married Women (Maintenance) Bill a clause transferring to quarter sessions the appellate jurisdiction of this court in relation to the Summary Jurisdiction (Married Women) code, for the express reason that this court habitually acted, as it is obliged to do, on the principles laid down in *Watt (or Thomas) v. Thomas* (5), but the statement of the principle in that case expressly excludes a case in which the trial court has misdirected itself. In such cases the principles laid down by the House of Lords have no bearing, otherwise the appellate court would always be bound by the conclusion, however clear it might be that in law, the evidence, taken at its highest, did not warrant it. Wrongly, as I recognise unreservedly, that was the conclusion to which this court came in *Pew v. Pew* (25). I have refreshed my memory from my own notes and the transcript of my judgment. We asked counsel for the wife, who was not the counsel who appeared for her in the Court of Appeal, to tell us in detail the very highest at which he put the evidence on which he

relied. I made a note of that analysis, and for the purposes of my judgment I stated expressly that without going through the evidence in detail I took the very fair summary of it which was made for us from the wife's point of view by her counsel. I can only speak for myself, but I can say definitely that my intention was to accept loyally every finding which the justices had made in her favour, but, giving full effect to that evidence, I came to the conclusion, as a matter of law, that the case was on the wrong side of any line which could properly be drawn. In so doing I attempted to guide my judgment by the decision in *Buchler v. Buchler* (16), not because I thought that one could derive much assistance from comparing the facts of one case with the facts of another, but because that case, like the one we were considering, was a borderline case, and was so considered by LORD GREENE, M.R., and because it was with reference to such a case that general observations of a very helpful character were made both by LORD GREENE, M.R., and by ASQUITH, L.J. A

In the Court of Appeal in *Pew v. Pew* (25), SOMERVELL, L.J., after referring to *Watt (or Thomas) v. Thomas* (5) and analysing the evidence in the case, said: B

"I am not sure that one can find any such evidence of misdirection having regard to the principles laid down in *Buchler v. Buchler* (16), to justify the court in interfering." C

And again, after quoting my own conclusion that "this case falls short of crossing the borderline which divides blameworthy conduct, causing unhappiness to the other spouse, from conduct equivalent to expulsion from the matrimonial home" the learned lord justice added: D

"This is no doubt a borderline case as to whether an appellate court should intervene."

In the last paragraph of his judgment, however, he states his own conclusion that there was evidence on which the justices could find that there was constructive desertion as laid down in *Buchler v. Buchler* (16). In spite of the doubts that SOMERVELL, L.J., had already expressed, this is in effect a definite decision that there had been no misdirection. DENNING, L.J., recognised that this court had accepted the findings of fact about the husband's conduct, but had held that this was not capable in law of being constructive desertion—that is to say, that we had held that the justices had misdirected themselves. He took the contrary view, even more definitely than SOMERVELL, L.J., had done. SINGLETON, L.J., emphasised the fact that the legislature had entrusted the justices with the jurisdiction to hear this type of case; that there was a long and careful hearing; that both sides were represented; and that this court had described the case as being a borderline case. So far, exactly the same was true of *Buchler v. Buchler* (16), yet the Court of Appeal held, reversing the trial judge, that the case was on the wrong side of the line. SINGLETON, L.J., continued: E

"If they come to a decision which is justified by the evidence no court ought to interfere, or at least no court ought to interfere unless it is shown that that decision is plainly wrong. I believe it to be of great importance in the administration of justice and particularly in this class of case, that the decision should be left to the magistrates to whom the statute has entrusted it, and that their decision should not be interfered with if they have directed themselves properly according to law and if their decision is based on the evidence before them." F G

With the greatest possible respect, it seems to me that this begs the question whether the magistrates had directed themselves properly and whether there was or was not evidence on which to base their decision, and ignores the essential distinction between an appellate court finding that the evidence ought not to have been accepted by the tribunal which saw and heard the witnesses, and an appellate court accepting the totality of the facts found by the trial court, H

but holding nevertheless that in law those facts do not suffice to constitute the offence charged. This distinction is plainly drawn in propositions I and III in LORD THANKERTON'S speech in *Watt (or Thomas) v. Thomas* (5) ([1947] 1 All E.R. 587).

The same question arose in the *Hontestroom* case (4). In his speech LORD SUMNER said ([1927] A.C. 42):

"I therefore think, for my own part, that the real issue in this case is, whether the Court of Appeal was justified in laying aside the learned President's view as to the relative credibility of the witnesses and the conclusions of fact which he rested thereon, and in reviewing afresh the whole of the evidence, so as to form their own opinion without regard to his appreciations."

It is this process, I venture to say, which is deprecated both in the *Hontestroom* case (4) and in *Watt (or Thomas) v. Thomas* (5), but it makes the task of an appellate court very difficult if it is precluded from expressing an opinion about the conclusion, taking the evidence at its most favourable for the complainant. However that may be, once the majority of the Court of Appeal in *Pew v. Pew* (25) had held that there was no misdirection, there was an end of the matter, and that, I suggest, was the true ground of the decision.

I have dealt with that case because it seems to me to have a direct bearing on our decision in this case. The two cases bear a strong resemblance to each other. I must say that, in so far as they are comparable, I think that the facts in this case, taken at their highest and bearing in mind that this is a charge of cruelty, are less favourable to the wife than the facts in *Pew v. Pew* (25). There is this distinction, that if this case had been one of constructive desertion the evidence that the husband had actually told the wife to go as lately as a few weeks before the hearing might have been decisive of that issue. Even on a charge of persistent cruelty it has an important bearing on the husband's intentions. For the rest it is clear, for the wife said so repeatedly, that one of the fundamental troubles was the husband's alleged meanness about money, but his salary was only £560 a year, out of which he paid all the household expenses and allowed the wife £3 a week. Out of this sum, since the son paid £1 for his board, the wife had only to provide food for herself and for such meals as the husband took in the home and did not buy for himself, which, in effect, seem to have been his daily breakfast and his other meals during the week-end. It is true that he had another house which brought in a small controlled rent out of which it was suggested there cannot have been much profit, if any, and the only other income that he had was the allowance given by the municipal authority for the use of his car in connection with his duty as health officer. No doubt, the housekeeping allowance was not lavish, but it is not without significance that it is the precise amount which the justices have awarded by their order, although they had jurisdiction to award £2 more.

I am bound to say that, if I felt it was open to do so, I should be inclined to hold that this case was covered by the principles laid down in *Buchler v. Buchler* (16), but I feel that if we were to do so we might be thought to be setting up the judgment of this court in *Pew v. Pew* (25) against that of the Court of Appeal. I feel bound by that decision to say that this appeal fails, but I think that there should be leave to appeal and I am impelled to say that I hope that some day, whether in this case or another, a full Court of Appeal will consider anew the whole question of cruelty and constructive desertion.

KARMINSKI, J.: I have had the advantage of reading the judgment of my Lord, and it is, therefore, unnecessary for me to recapitulate the evidence, since I agree with his summary of it. The justices made a finding of law which they stated in the following terms:

"The court is satisfied after considering the authorities that the acts of the husband as outlined by the wife constitute cruelty."

It is unfortunate that the justices did not set out what authorities they had consulted since there is the possibility that the justices may have considered irrelevant authorities, and in so doing may have misdirected themselves on the law: see *Angel v. Angel* (26). I am, therefore, left to infer what authorities they did, in fact, consider. It is of some assistance to note that in the second of their reasons they refer to the husband's conduct as being wilful and his acts as being intentional. These epithets indicate to my mind that the justices directed their minds to some, at any rate, of the more recent decisions on the subject of cruelty.

It was argued by counsel for the husband that, even accepting all the facts as found by the justices, such conduct could not amount in law to cruelty. He argued that to make a finding of cruelty on the facts before the justices would be to go further than any case hitherto reported had done, and that the finding of cruelty was wrong in law in the light of existing authority. It has for very long been settled law that married persons shall not be legally separated on the mere disinclination of one or both to cohabit together, nor do the courts pretend to furnish cures for all the miseries of human life: see *Evans v. Evans* (27); and also the judgment of SIR RAYMOND EVERSHED, M.R., in *Allen v. Allen* (6). In *Evans v. Evans* (27) SIR WILLIAM SCOTT, said (1 Hag. Con. 38):

"What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced."

These words have formed the basis of cruelty in law in many subsequent reported cases. That cruelty can exist in the absence of acts of physical violence has long since been established: see *Kelly v. Kelly* (10), and *Walmesley v. Walmesley* (28); provided that either injury to health or a reasonable apprehension thereof can be proved. A moody husband who sends his wife to Coventry, as in *Lauder v. Lauder* (9) or a wife who persists over a long period in nagging her husband, as in *Usmar v. Usmar* (29), can be guilty of cruelty, but conduct which causes injury to health is not by itself enough. The test was stated by BUCKNILL, J., in *Horton v. Horton* (1) ([1940] 3 All E.R. 384), in the following terms:

"A man takes the woman for his wife for better or for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think that he establishes cruelty merely because he finds that life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing injury to his health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting, so to speak, in its own sphere. It was injured by her wilful and unjustifiable conduct to him, which was an intrusion upon, and did violence to, his own mode of living. It was this course of conduct which injured his health, and which, in my view, amounted to legal cruelty."

By s. 1 of the Matrimonial Causes Act, 1950, a petition for divorce may be presented to the court on the ground that the respondent "has since the celebration of the marriage treated the petitioner with cruelty." In *Kaslefsky v. Kaslefsky* (3), it was pointed out by BUCKNILL, L.J. ([1950] 2 All E.R. 402) that the use of the word "treated" indicates conduct aimed at the offended spouse, and he agreed with the judgment of DENNING, L.J., in *Westall v. Westall* (2), where DENNING, L.J., said (65 T.L.R. 337) that

"Although malignity is not an essential element of cruelty . . . nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other."

In his own judgment in *Kaslefsky v. Kaslefsky* (3) DENNING, L.J., explained ([1950] 2 All E.R. 402) the meaning of the words "aimed at." He pointed out that the conduct of one party can properly be said to be aimed at the other when it consists of actions or words actually or physically directed at him, and that it might be cruelty even though there was no desire to injure or to inflict misery on the other spouse. It is important in considering the judgment of the Court of Appeal in *Kaslefsky v. Kaslefsky* (3) to examine the nature of the complaints there made against the respondent wife. These complaints alleged cruelty based on conduct which was almost wholly negative and which alleged that the wife was a lazy and sluttish woman who neglected her duties both as a wife and as a mother. It was held by the commissioner who tried the case, and his finding was upheld by the Court of Appeal, that such acts were not intentional acts or aimed specifically at the husband, and could not, therefore, amount in law to cruelty. I am content to follow the words of the statute, namely, "has treated the petitioner with cruelty," as being the true test when examined and applied in the light of the guidance afforded by the decisions of the Court of Appeal referred to above.

In cruelty cases in particular, once the guiding principle is established, its application depends on a careful examination of the facts of each particular case. Once the facts are established the question is whether this particular class of conduct by this man to this woman in all the circumstances of their married life is cruelty: see the judgment of PEARCE, J., in *Lauder v. Lauder* (9). Accepting the facts as found by the justices, in my view, the conduct of the husband here was wilful, intentional and aimed at his wife. Although I think that this is a borderline case, I am not prepared to differ from the conclusion that he entered into a course of conduct which was calculated to break the wife's spirit and, if possible, to induce her to leave the matrimonial home. In so acting, the husband's conduct caused injury to the wife's health, coupled with the threat of graver injury if she remained living with him. I cannot, therefore, regard the husband's conduct in this case as being part of the ordinary wear and tear of married life. After full consideration I do not think that the husband's conduct can be limited, as was suggested in argument, to what SIR WILLIAM SCOTT called in *Evans v. Evans* (27) "a want of civil attention and accommodation." For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rising & Ravenscroft*, agents for *Sherwood Cobbing & Williams*, Kingston-on-Thames (for the husband); *C. A. Maddin & Co.* (for the wife).

[Reported by R. HENDRY WHITE, Esq., Barrister-at-Law.]

MACLEAN v. MACLEAN.

[COURT OF APPEAL (Asquith and Birkett, L.JJ., and Harman, J.), April 3, 1951.]

Divorce—Security for wife's costs—Matters to be taken into consideration—Means of husband and wife—Reversionary interest of wife realisable for money—Conduct of parties in relation to the litigation—Undue prolongation of proceedings—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940/L.27), r. 65 (3).

In 1945 the wife filed a petition for divorce on the ground of cruelty. More than five years later she amended the petition to include charges of adultery. The petition was prosecuted in a dilatory manner, and for more than five years the husband paid alimony *pendente lite* amounting to £20 a month under a consent order. On an application by the wife

under r. 65 of the Matrimonial Causes Rules, 1950, for an order for security for her costs of the petition, her affidavits of means disclosed that she was possessed of a reversionary interest in a sum of capital expectant on the death or bankruptcy of her niece.

HELD: (i) any realisable asset was "means" within r. 65 (3) of the Matrimonial Causes Rules, 1950, and, therefore, the value of the wife's reversionary interest fell to be taken into account.

(ii) the conduct of the parties in relation to the litigation was a relevant circumstance to be taken into account in dealing with the application.

AS TO SECURITY FOR WIFE'S COSTS, see HALSBURY, Hailsham Edn., Vol. 10, pp. 724, 725, paras. 1107-1111; and FOR CASES, see DIGEST, Vol. 27, pp. 421-424, Nos. 4277-4307, and Digest Supps.

APPEAL by the husband from an order of KARMINSKI, J., made on Feb. 27, 1951, affirming the order of Mr. Registrar KINSLEY for security for the wife's costs of the petition in the sum of £1,500.

F. H. Lawton for the husband.

Crispin for the wife.

ASQUITH, L.J.: This is a husband's appeal from an order of KARMINSKI, J., affirming an order of the registrar, whereby the husband was ordered to give security for the costs of the wife's petition in the sum of £1,500. The petition of the wife for divorce was filed as long ago as July, 1945. The ground was originally cruelty, and then, more than five years later, the petition was amended by adding a charge of adultery with two named interveners. It was over three years before particulars of the original petition were delivered. An answer was then filed, denying the allegations and cross-claiming on the grounds of desertion and cruelty. In connection with the charge of cruelty, undoubtedly very squalid conduct was imputed to the wife, but I doubt if that has any particular relevance to the points this court has to decide.

Rule 65 of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940/L.27), provides:

"(1) After the registrar's certificate under r. 30 has been granted, or, with leave, at an earlier stage of the cause, a wife who is a petitioner or who has filed an answer may apply for security for her costs of the cause up to the hearing, and of and incidental to the hearing. (3) Where an application for security has been made under this rule, a registrar shall ascertain what is a sufficient sum of money to cover the costs of the wife, and if, after taking all the circumstances into account, including the means of the husband and the wife, he considers that the husband should provide security for all or some of the wife's costs, he may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as he may fix . . ."

Under para. (3) it appears that the relevant considerations, in considering an application of this kind, are three: (i) the probable cost of the proceedings; (ii) the means of the husband and the wife; and (iii) any other relevant circumstance, in which I have no doubt that certain aspects of the parties' conduct could properly be included. As regards the probable cost of the proceedings, counsel agree that some ten days is an estimate of the probable length of these proceedings, and that the cost would amount to something in the neighbourhood of £1,500 if leading counsel were employed.

As to the means of the parties, a string of affidavits, flatly contradicting each other, were read to us on the one side and on the other, none of the deponents having been cross-examined, and that always leaves the real position a matter to some extent of guess-work. The wife originally alleged that shortly before she lodged the petition the husband had a capital of at least £100,000,

that at about the same time he carried on an establishment which cost him £15,000 a year, and that he spent £20,000 or more. The husband, on the other hand, says in effect that at all material times his income has seldom exceeded £1,000 a year and is today more like half that amount. He says he has been living on capital, and in an affidavit of Jan. 15, 1946, he assesses his capital at that time at about £50,000 in cash, a house and certain valuable chattels, plus certain stocks and shares on which he does not set a valuation in that affidavit. In a later affidavit of Nov. 26, 1949, he gives his resources as consisting at that time (when, if he is telling the truth, he has been living on capital for several years) of New Pin Farm, valued at cost, £2,350, cash at the bank £5,000, stocks and shares £7,000, and jewellery and furniture £10,000. That adds up to about £25,000 capital, and he said that his income did not exceed £500 or £600 at that time. He alleges that the wife has a valuable interest in a reversion of about £75,000. There has, I think, been a certain confusion in this matter. The facts would appear to be that the wife has two reversionary interests, one of trifling value, the other of a value which is debatable, but, possibly, considerable. She has a life interest, expectant on the death of her sister, who is the present life tenant, in some £85,000, but that is only an interest in the nature of income and she does not come into it till her sister (both ladies being in the middle sixties) dies. The other reversionary interest is much more important for the present purpose. It consists of a reversion of £85,000 capital, once her niece, Mrs. Hobbs, who is the present life incumbent, dies or becomes bankrupt. In this connection it is to be remembered that Mrs. Hobbs has gone bankrupt before. I should have thought that this last reversionary interest must be saleable today, because there is a regular market in sales of reversions, and it should fetch something pretty substantial. KARMINSKI, J., according to one construction of his judgment, at any rate, took the view that reversionary interests of this kind could not be treated as "means," within the meaning which that word bears in r. 65 (3). If that was the view he took, I must respectfully record my dissent from it. Any asset, I should have thought, which is realisable today for money would be "means" within that provision, unless there was something in the context to repel that meaning and I can see nothing to do so. I think the wife had "means" which ought to have been taken into account by the registrar and the judge.

The disparity between the husband's resources as assessed by the wife and as estimated by the husband himself is gross and glaring, and there has been no cross-examination to help us to a conclusion as to which is nearer the mark. On the evidence I incline to the view that, although there must necessarily be some uncertainty about it (a) the wife had a substantial realisable asset and (b) the husband had an income much more of the modest dimensions which he alleges than of the inflated character which his wife attributes to it. In addition to the cost of the proceedings and the respective means of the parties, the registrar was bound to take into account all other relevant circumstances.

I have indicated that, in my view, the conduct of the parties in relation to this litigation is a relevant circumstance. Beyond question, this is a very stale petition. It was instituted at the end of July, 1945. It has been prosecuted without any semblance of dispatch by the wife. She sometimes had to be jogged into action by applications to dismiss the proceedings for want of prosecution. She waits five years before she makes an allegation of adultery and amends her petition for that purpose. She is guilty of disingenuous concealment, as it seems to me, of the re-settlement in November, 1945, of a sum in connection with her reversionary interest, an arrangement which ROMER, J., held to be void as against her trustee in bankruptcy and in fraud of her creditors. She has gone on receiving £20 a month alimony *pendente lite*—paid, it is true, under a consent order—for something like five years, when, at the time the husband consented, I do not suppose he thought that anything

like that five years would occur between the filing of the petition and the hearing of the suit. If the conduct of the parties is put in the scales as a factor, it depresses, it seems to me, the wife's scale very considerably. I am aware that we are not to substitute an exercise of our discretion for the registrar's exercise of his discretion. All we are entitled to do is to ask ourselves whether, in awarding the figure for security which he did, he was making any mistake of law—for instance, taking into account some factor that ought to be excluded or excluding from his purview some factor which was relevant, or whether, short of that, without having gone wrong in law, he reached a result which is plainly unjust. I think he has done both here. Speaking with great respect, I think the figure is wholly out of reason, and ought to be reduced to £500, the appeal being allowed to that extent.

BIRKETT, L.J.: I agree. The affidavits disclose the greatest possible controversy on the essential question of means. It is plain from them that what was being sought to say was that this was the right order for security because the wife was without means of her own. Indeed, those are the very words that are employed by her in one affidavit after another. I am quite satisfied that the wife in this case did possess means within para. (3) of r. 65. **ASQUITH, L.J.,** has dealt with the technical aspect of this reversionary interest, and it is impossible to ignore it. The circumstance that the wife was possessed of substantial means has not been taken properly into account by the registrar or by **KARMINSKI, J.** I am satisfied that this order of £1,500 ought not to stand. In my view, the figure which has been stated by my Lord of £500 is more nearly the figure which does justice between these parties.

The means of the parties was the essential matter in issue, but I agree that in order to arrive at a fair decision all the circumstances of this rather lamentable case throughout the tortuous length of its six years' history must be examined. I will say no more about the dilatory nature of the proceedings which gave rise to the husband's complaint, stated in one affidavit after another, that the whole purpose of these proceedings was not to pursue the remedy under the petition, but rather to postpone it and to make the important matter the amount of money which might possibly be obtained. That kind of factor must be considered. Secondly, although I cannot speak with any certainty about it, it is manifest that the wife has been spending very large sums of money. In one affidavit the husband speaks of her journey to America and in a previous affidavit he had spoken about her staying in the south of France and elsewhere. In the former affidavit he said that he had received a request from a lady in Memphis, Tennessee, for the repayment of £1,000 to cover debts and credits incurred by his wife and another woman. There has been no cross-examination on those affidavits, and it is necessary to speak with caution, but the fact that these affidavits do record a considerable expenditure of money from some source is a matter to which I cannot feel I ought to be blind. For these reasons, and the reasons expressed by my Lord, I agree that this sum of £1,500 should be reduced to £500.

HARMAN, J.: I agree, and would only add that the word "means" in the modern rule replaces the words "separate estate" in r. 74 (4) of the Matrimonial Causes Rules, 1944. I cannot think that, by this substitution, it was meant to narrow the meaning of that which the registrar had to consider. If "separate estate" meant, as I have no doubt it did mean, the entirety of the wife's property, whether in possession, reversion, or remainder, "means," I think, must have no less wide a connotation.

Appeal allowed; order varied.

Solicitors: *Petch & Co., agents for Sprott & Sons, Mayfield, Sussex (for the husband); Philip Conway, Thomas & Co. (for the wife).*

[*Reported by C. N. BEATTIE, Esq., Barrister-at-Law.*]

Re SANDBACH (deceased).

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.J.J.),
March 7, 8, April 13, 1951.]

Settled Land—Improvement rentcharge—"Redemption"—Tithe annuity—"Discharge"—Payment by tenant for life of periodical instalments under rentcharge, representing capital and interest, and of annuities—Right to recoupment, in respect of such part of payments as represented capital, out of capital moneys subject to settlement—*Settled Land Act, 1925* (c. 18), s. 73 (1) (xiii), (xvi).

Loans made by the Lands Improvement Co. in respect of an estate settled by the will of the testator were charged on the settled property by orders of the Board or Minister of Agriculture and Fisheries, and the instalments in respect thereof, consisting of capital and interest, were paid by the tenant for life, whose life estate commenced on June 25, 1928. Of the instalments so paid, the sum of £1,742 2s. 6d. represented capital. Tithe annuities charged on the estate in consideration of the redemption of tithe rentcharges under orders made under the Tithe Act, 1918, s. 4 (2), were also paid by the tenant for life, and of the sums so paid £824 18s. was attributable to capital. The tenant for life claimed that she was entitled to be repaid these sums of £1,742 2s. 6d. and £824 18s. out of capital moneys subject to the settlement as, under the *Settled Land Act, 1925*, s. 73 (1) (xiii), and s. 73 (1) (xvi), respectively, they were payable out of capital.

HELD: (i) the term "redemption" in s. 73 (1) (xiii) of the Act of 1925 in relation to a land improvement rentcharge connoted the compounding of future payments as distinct from the mere payment of the periodical sums as they became due, and it was in any case impossible to construe the term as including payment of the capital portion only of the instalments as they fell due; and, therefore, the tenant for life was not entitled to be recouped out of capital moneys in respect of so much of the land improvement rentcharge paid by her as represented capital.

Dicta of COTTON and FRY, L.J.J., in *Re Knatchbull's Settled Estate* (1885) (29 Ch.D. 592, 595) and of LORD ESHER, M.R., and LINDLEY, L.J., in *Re Egmont's (Lord) Settled Estates* (1890) (45 Ch.D. 399, 400), applied.

Re Sudeley's (Lord) Settled Estates (1887) (37 Ch.D. 123), explained.

Decision of VAISEY, J., ([1950] 2 All E.R. 1195), affirmed.

(ii) the payment of the capital portion of the instalments of the tithe redemption annuity could fairly be described as the "discharge" within s. 73 (1) (xvi) of such part of the annuity as represented capital, and, there being nothing in the Act of 1925 to prohibit recoupment of the tenant for life, she ought to have recouped to her the amount which she could have required the trustees to pay direct out of capital.

Decision of VAISEY, J. ([1950] 2 All E.R. 1195), reversed.

FOR THE SETTLED LAND ACT, 1925, s. 73 (1), see HALSBURY'S STATUTES, Second Edn., Vol. 23, p. 161.

Cases referred to:

- (1) *Re Knatchbull's Settled Estate*, (1885), 29 Ch.D. 588; 54 L.J.Ch. 1168; 53 L.T. 284; 30 Digest 281, 65.
- (2) *Re Sudeley's (Lord) Settled Estates*, (1887), 37 Ch.D. 123; 57 L.J.Ch. 182; 58 L.T. 7; 30 Digest 293, 199.
- (3) *Re Egmont's (Lord) Settled Estates*, (1890), 45 Ch.D. 395; 59 L.J.Ch. 768; 63 L.T. 608; 30 Digest 294, 205.
- (4) *Re Howard's Settled Estates*, [1892] 2 Ch. 233; 61 L.J.Ch. 311; 67 L.T. 156; 30 Digest 281, 66.
- (5) *Re Verney's Settled Estates*, [1898] 1 Ch. 508; 67 L.J.Ch. 243; 78 L.T. 191; 30 Digest 284, 90.

- (6) *Re Hotchkin's Settled Estates*, (1887), 35 Ch.D. 41; 56 L.J.Ch. 445; 56 L.T. 244; 30 Digest 294, 208.
- (7) *Re Sherborne's (Lord) Settled Estate*, [1929] 1 Ch. 345; 98 L.J.Ch. 273; 141 L.T. 87; Digest Supp.
- (8) *Re Borough Court Estate*, [1932] 2 Ch. 39; 101 L.J.Ch. 316; 147 L.T. 476; Digest Supp.
- (9) *Re Dalison's Settled Estate*, [1892] 3 Ch. 522; 61 L.J.Ch. 712; 30 Digest 293, 198.

APPEAL by the tenant for life of an estate settled by the will of Colonel Samuel Sandbach from an order of VAISEY, J., dated Nov. 23, 1950, reported [1950] 2 All E.R. 1195.

The life tenant applied by originating summons for an order that there ought to be recouped to her out of the capital moneys subject to the settlement (a) so much of the instalments paid by her in respect of improvement rentcharges as represented capital, and (b) so much of the sums paid by her in respect of tithe annuities as was attributable to capital. The application to the court was made under the Settled Land Act, 1925, s. 93 and s. 113, and it was contended by the tenant for life that, under s. 73 (1) (xiii) and s. 73 (1) (xvi) of that Act, respectively, the sums were payable out of the capital moneys subject to the settlement, and, therefore, she having paid them, she was entitled to be recouped out of capital. VAISEY, J., rejected this argument. The facts appear in the judgment of the court.

Jopling for the tenant for life.

F. B. Marsh for the tenant in tail male.

V. M. C. Pennington for the trustees.

Cur. adv. vult.

Apr. 13. JENKINS, L.J., read the judgment of the court. The appellant, Mrs. Mackeson-Sandbach, is and has since June 25, 1928, been tenant for life in possession under a settlement of land created by the will of her late uncle, Samuel Sandbach. The next interest under the settlement is that of her infant son, the respondent, Ian Lawrie Mackeson-Sandbach, who is tenant in tail male in remainder expectant on her death.

The land has from time to time been subjected to a number of land improvement rentcharges in the usual statutory form, providing for the repayment with interest of loans made by the Lands Improvement Co. to the appellant's uncle or to herself by half-yearly instalments of combined principal and interest spread over periods of in one case twenty and in others twenty-five and forty years. The charging order made by the Ministry of Agriculture and Fisheries in each case shows in an annexed table the proportions of each instalment attributable to principle and interest respectively, the former, of course, increasing and the latter diminishing as repayment of the loan progresses. These loans were all made to defray the expenses of improvements of kinds authorised by the Settled Land Act, 1925, sched. III, Part I. The land was also subjected in 1922 and 1923 to a number of tithe rentcharge redemption annuities charged thereon by orders of the Ministry of Agriculture and Fisheries under the provisions of the Tithe Act, 1918, s. 4, and payable by half-yearly instalments of principal and interest combined spread over a specified period of years, calculated so as to provide for the discharge with interest of the capital sum representing the compensation payable for the redemption of the tithe rentcharge by the end of the specified period. The method of computation differs from that used in the case of a land improvement rentcharge, but the proportions attributable to principal and interest of each instalment are, as in that case, definitely ascertained. Since the date on which Mrs. Mackeson-Sandbach (then an infant) became entitled to the land as tenant for life in possession the whole of the half-yearly instalments from time to time payable in respect of the land improvement rentcharges and tithe rentcharge redemption annuities for the time being

outstanding have been paid by her or on her behalf out of income arising under the settlement. The total amounts attributable to capital of the instalments so paid down to the date of the commencement of the proceedings to which this appeal relates are stated to be £1,742 2s. 6d. in respect of land improvement rentcharges and £824 18s. in respect of tithe rentcharge redemption annuities.

A In these circumstances the tenant for life applied to the court by an originating summons, to which the infant tenant in tail and the trustees of the settlement were respondents, claiming (in effect) declarations that under the provisions of the Settled Land Act, 1925, s. 73, each of the two sums of £1,742 2s. 6d. and £824 18s. above mentioned (the latter figure being erroneously stated in the summons as £819 17s. 10d.) ought to be repaid to her out of capital moneys subject to the settlement. The Settled Land Act, 1925, s. 73, so far as relevant, B provides:

“(1) Capital money arising under this Act, subject to payment of claims properly payable thereout and to the application thereof for any special authorised object for which the capital money was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one C and partly in another or others, of the following modes (namely): . . . (xiii) In redemption of an improvement rentcharge, that is to say, a rentcharge (temporary or permanent) created whether before or after the commencement of this Act, in pursuance of any Act of Parliament, with the object of paying off any money advanced for defraying the expenses of an improvement of any kind authorised by Part I of sched. III to this D Act; . . . (xvi) In the purchase of an annuity charged under s. 4 of the Tithe Act, 1918, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent interest.”

The matter came before VAISEY, J., who, by an order dated Nov. 23, 1950, dismissed the summons, holding that the payment of the periodical sums payable in respect of the land improvement rentcharges (as distinct from paying a lump sum in discharge of all instalments due and to become due) was not E “redemption” within the meaning of s. 73 (1) (xiii), and similarly that the payment of a tithe rentcharge redemption annuity as it fell due (as distinct from commuting it for a lump sum) was not “the discharge” of such annuity within the meaning of s. 73 (1) (xvi). From that order the tenant for life now appeals to this court.

F To appreciate the reasoning on which the judgment of VAISEY, J., proceeded so far as the land improvement rentcharges are concerned it is necessary to go back to the law on this subject as it stood when *Re Knatchbull's Settled Estate* (1) was decided. At the date of that decision the only statutory provision dealing with the application of capital moneys arising under a settlement in the redemption of incumbrances affecting the settled land was the general provision contained in the Settled Land Act, 1882, s. 21 (ii), which enabled capital money G to be applied:

“In discharge, purchase, or redemption of incumbrances affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land-tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land.”

H The application was by a tenant for life to have certain land improvement rentcharges on the settled land discharged and paid off out of capital money arising under the settlement. The Court of Appeal (affirming PEARSON, J.), held that the Settled Land Act, 1882, s. 21 (ii), could not be taken as authorising this transaction, having regard to the provisions of the Improvement of Land Act, 1864, and, in particular, s. 66 of that Act which provides that:

“Every landowner on whose land a charge shall have been made under this Act, and every succeeding tenant for life, tenant in tail, and other

person having a limited interest in the land so charged, shall, as between himself and the persons in remainder or reversion, be bound to pay the yearly or other periodical payments of such charge which shall become payable during the continuance of his interest . . .”

In the view of the court, the Settled Land Act, 1882, s. 21 (ii), was not to be construed as displacing the liability as between tenant for life and remainderman expressly provided for by the Act of 1864, and the application was accordingly refused. The following passages from the judgments of COTTON and FRY, L.JJ., may be quoted as indicative of their views as to the meaning of the term “redemption.” COTTON, L.J., said (29 Ch.D. 592):

“In my opinion what is asked is not in accordance with this section, and though these are incumbrances affecting the inheritance, they are not incumbrances which in their nature are capable of being discharged or being redeemed, having regard to this fact, that the Act under which they were created expressly requires that they shall be paid off by instalments, including interest and capital during a term of years, and expressly provides that a person having a limited interest, shall pay not only the interest on the capital but also his proportion of the capital remaining unpaid.”

FRY, L.J., said (*ibid.*, 595):

“The incumbrance does not provide for any other method of discharge than by the annual payments. Therefore there is no method of discharging it by the payment of a capital sum. There is no power of redeeming it by the payment of a capital sum.”

Presumably to meet the difficulty raised by *Re Knatchbull's Settled Estate* (1), the Settled Land Acts (Amendment) Act, 1887, was passed some two years later, receiving the Royal Assent on Aug. 23, 1887. The two operative sections of that Act are in these terms:

“1. Where any improvement of a kind authorised by the Act of 1882 has been or may be made either before or after the passing of this Act, and a rentcharge, whether temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rentcharge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorised by the Act of 1882. 2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of s. 28 of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.”

The next case to which reference must be made is *Re Sudeley's (Lord) Settled Estates* (2), which was decided on Dec. 6, 1887. In that case a life tenant, in reliance on the Act of 1887, applied for a declaration to the effect that capital money arising under the settlement might properly be from time to time applied in the payment of the portions attributable to capital of the instalments payable in respect of certain land improvement rentcharges. At the hearing it was asked that the declaration sought by the summons might be extended to cover the whole of the instalments, interest as well as capital. In opening the summons, counsel for the applicant said:

“It is not proposed to redeem the rentcharge, but only to pay the instalments representing capital, and this is ‘otherwise providing for the payment’ of the rentcharge within s. 1 of the Act of 1887.”

KAY, J., granted the application as regards such portions of the instalments remaining to be paid as from time to time represented capital, but thought it would not be right for capital money to be applied in payment of such portions of the instalments as represented interest, as he did not think the Act of 1887 was intended, nor that it would be just, to relieve the tenant for life from his liability in that respect.

A It will thus be seen that the Act of 1887, as construed in *Re Sudeley's (Lord)*
B *Settled Estates* (2), produced the result for which counsel for the tenant for life contends in the present case. But the matter did not rest there, for in 1890 the decision in *Re Sudeley's (Lord) Settled Estates* (2), in so far as it excluded interest, was disapproved by the Court of Appeal in *Re Egmont's (Lord) Settled Estates* (3). In that case a tenant for life applied for a declaration that capital money might be applied under the Act of 1887 in the redemption of certain land improvement rentcharges on terms which involved the payment of sums comprising, in addition to the outstanding balances of capital, sums by way of bonus to compensate the lender for the loss of the interest which would have been payable but for the redemption. The Court of Appeal, reversing NORTH, J., made the declaration sought. LORD ESHER, M.R., said (45 Ch.D. 399):

C "What then is the meaning of s. 1 of the Act of 1887? It says that 'any capital money expended in redeeming such rentcharge . . . shall be deemed to be applied in payment for an improvement authorised by the Act of 1882.' Taking the words in their ordinary sense, they must mean the money which would have to be paid for redeeming the rentcharge—that is, the sum which the owner of the rentcharge would accept for the redemption. D It seems to me that the proposed payment comes absolutely within the words of the section. Was then NORTH, J., precluded by the decision of KAY, J., in *Re Sudeley's (Lord) Settled Estates* (2) from sanctioning the proposed payment? That case was not one of the redemption of a rentcharge. It was asked that the trustees might pay out of capital moneys the instalments of the rentcharge as they should become due, including, that is, interest as well as principal. KAY, J., was of opinion that the interest was a debt due from the tenant for life, and that he could not authorise the trustees to pay it out of 'capital moneys.' Even if he was right in that view, it does not, I think, affect the present case. But I will venture to say that I think he took too strict a view of the Act of 1887. It is quite E true that what he was asked to do did not come within the words 'redeeming such rentcharge,' but I think it did come exactly within the words 'or otherwise providing for the payment thereof.' I could not, therefore, agree with the decision in *Re Sudeley's (Lord) Settled Estates* (2), even if it governed the present case. But I think it does not, for this is a case of redemption pure and simple."

F G LINDLEY, L.J., said (*ibid.*, 400):

H "The words of s. 1 are very wide. It is to be observed that no distinction is drawn between rentcharges which are by the contract creating them redeemable and those which are not; it applies to all rentcharges equally. In the present case we are asked to apply the Act to a rentcharge which is not redeemable by contract, so that the owner of the rentcharge cannot be compelled to accept payment of the loan in any other mode than that which is provided by the agreement with him, that is, by a series of instalments extending over a number of years. In order, therefore, to redeem the rentcharge you must come to terms with the owner. He says, 'I am willing to be redeemed; but you must pay me, in addition to the balance of principal remaining unpaid, something which will compensate me for the loss of interest which I may sustain.' If he is asking for an extortionate sum the trustees, of course, will not listen to his proposal. If they are in

doubt whether the sum demanded is a proper one, they can ask for the opinion of the court. If only a reasonable sum is asked by way of bonus, the money must be paid, or the rentcharge must remain unredeemed."

With reference to the decision of KAY, J., in *Re Sudeley's (Lord) Settled Estates* (2), LINDLEY, L.J., said (*ibid.*, 401):

"I think he took too narrow a view of the section, which speaks of 'redeeming the rentcharge,' and does not limit the redemption to that part of the rentcharge which represents capital."

We think it is reasonably plain that LORD ESHER, M.R., and LINDLEY, L.J., in that case regarded "redemption" in relation to a rentcharge as a transaction involving the payment of a lump sum in discharge of all instalments due and to become due in respect of the rentcharge as distinct from the mere payment of the instalments as and when they became due. We think the observation of LINDLEY, L.J. (*ibid.*, 401), at first sight inconsistent with that view, really means no more than that the "redemption" of an interest-bearing debt, including a rentcharge comprising interest on the loan as well as instalments of the capital of the loan, necessarily involves payment of interest as well as principal, so that the distinction drawn by KAY, J., between principal and interest for this purpose was ill founded. It follows, if we are right in our reading of the judgments in *Re Egmont's (Lord) Settled Estates* (3), that in their Lordships' view the process KAY, J., was asked to authorise in *Re Sudeley's (Lord) Settled Estates* (2) was not "redemption" of the rentcharges in question, but was "otherwise providing for the payment thereof" within the meaning of the Act of 1887, and, *per* LINDLEY, L.J., as we understand the observation quoted above (*ibid.*, 401) that inasmuch as "redemption" was a process necessarily involving the discharge of interest as well as principal, there could be no ground for restricting the process of "otherwise providing for the payment of" a rentcharge to the portions of the instalments representing capital.

From the date of the decision in *Re Egmont's (Lord) Settled Estates* (3) down to the commencement of the Settled Land Act, 1925, the position, as we understand it, was that, on the strength of this decision, the Act of 1887 was regarded as authorising the application of capital money in the payment of the entire instalments, as and when they became due, payable in respect of land improvement rentcharges, principal as well as interest. But, as we have said, we think this process was permissible, not as "redemption" of such rentcharges, but as "otherwise providing for the payment thereof" within the meaning of the Act of 1887, as construed in *Re Egmont's (Lord) Settled Estates* (3). This seems to have been the view on which STIRLING, J., proceeded in *Re Howard's Settled Estates* (4), as regards the instalments of the rentcharge authorised by him to be paid out of capital in that case: see also *Re Verney's Settled Estates* (5), where KEKEWICH, J., said ([1898] 1 Ch. 512) of a sum paid by the tenant for life in order to secure a reduction in the rate of interest charged by certain land improvement rentcharges, and of which he sought recoupment out of capital money:

"Money expended in repaying the [sum in question] will certainly not be expended in 'redeeming' the rentcharges. Redemption implies the payment of principal, interest, and costs to the mortgagees . . ."

As appears from a comparison of the sections as set out above, the Settled Land Act, 1925, s. 73 (1) (xiii), which superseded the Act of 1887, is expressed in terms materially different from those of the earlier enactment, and, in particular, the words "or otherwise providing for the payment thereof" as an alternative to "redemption" are omitted from the new provision. Counsel for the tenant for life invites us to hold that this change in the language has produced no change in the law save to the extent of restricting payment out

of capital money of the instalments of land improvement rentcharges as they fall due to such part of the instalments as represent capital. In other words, he says the effect of the change is simply to place the matter in the position in which it was held to be by KAY, J., in *Re Sudeley's (Lord) Settled Estates* (2). He argues with force that the Settled Land Act, 1925, was a consolidating enactment, and that, if it had been intended to alter the law to the extent of abolishing altogether the application of capital money in paying these instalments, reference would have been made to this change in the Law of Property Act, 1922, s. 64, which on the contrary merely states various additional modes in which capital money may be applied. He also argues that a rentcharge of this character may as a matter of language accurately be described as "redeemed" when it has been paid off by the stipulated instalments over the prescribed period, and that, accordingly, the process of paying such instalments falls fairly within the term "redemption." Perhaps the most forcible way of putting this argument is to compare a rentcharge of this character to a mortgage for a lump sum redeemable by stipulated instalments of principal and interest combined, where the payment of each instalment as it falls due is a step in the process of redemption culminating in the right to call for a reconveyance under the proviso for redemption when the final instalment is paid. Counsel has also on his side the undeniable fact that the net result as between tenant for life and remainderman is substantially the same whether capital moneys are applied in redeeming the rentcharge out and out by payment of a lump sum or in payment of the capital portion of each instalment as it falls due, the interest portion being paid by the tenant for life. It is, therefore, difficult to discern any good reason for restricting the application of capital money to redemption out and out. Nevertheless, we find it impossible to differ from the conclusion reached by VAISEY, J., on this part of the case. Even though the Settled Land Act, 1925, was a consolidating Act, some effect must be given to the omission of the words "or otherwise providing for the payment thereof." The inclusion of those words in the Act of 1887 made it clear that "redemption" was not regarded as covering all modes of payment, and their omission from the Act of 1925 can hardly be regarded as enlarging the meaning of that term. We are, on the whole, in agreement with VAISEY, J., as to the natural meaning of "redemption" in relation to an obligation such as a land improvement rentcharge—that is to say, that it connotes a compounding of future payments as distinct from the mere payment of the periodical sums as they become due. As appears above, we think, as did VAISEY, J., that this conclusion is reinforced by the history of the legislation, and it certainly accords with the view which appears to have been taken in the cases under the Act of 1887 to which we have referred above. We think the reference to "temporary" as well as "permanent" rentcharges in s. 73 (1) (xiii) of the Act of 1925 points in the same direction. Obviously there could be no question of redeeming a permanent rentcharge otherwise than by payment of a lump sum. We should add that we think it must, in any case, be impossible to construe "redemption" as including payment of the capital portion only of the instalments as they fall due. As pointed out in *Re Egmont's (Lord) Settled Estates* (3), "redemption" involves payment of interest as well as capital. Accordingly, the real choice seems to us to lie between construing "redemption" in s. 73 (1) (xiii) of the Act of 1925 either as including what was formerly held covered by the Act of 1887, that is to say, payment as and when due of the entire instalments, principal as well as interest, or as confined to the discharge of all instalments due and to become due (principal as well as interest) by payment of a lump sum. For the reasons we have endeavoured to state, we are unable to accept the former alternative.

We now turn to the matter of the tithe rentcharge redemption annuities. The relevant provision as regards these (s. 73 (1) (xvi) of the Act of 1925, set

out above) is new, and the language is materially different from that of sub-s. (1) (xiii). The words relied on here are

“or in the discharge of such part of any such annuity as does not represent interest,”

which appear as an alternative to “the purchase” of any such annuity. The learned judge dealt very shortly with this question, which, indeed, seems incapable of any great elaboration. He said ([1950] 2 All E.R. 1197):

“The question is whether an annuity is discharged, within the meaning of that word, by being paid as it falls due or only by being commuted for a lump sum, as is suggested in *WOLSTENHOLME AND CHERRY'S CONVEYANCING STATUTES*, 12th ed., p. 1103, in the note to s. 73 (1) (xvi). I think, on the whole, that the latter is the correct view, and that this application also fails as regards the £824 18s.”

For our part, we see no sufficient reason for limiting the relevant words of para. (xvi) in this way. We think the payment of the capital portion of the instalments of such an annuity as they fall due can fairly be described as “discharging” such part of the annuity as represents capital. “Discharge” in the context of s. 73 (1) (xvi) cannot mean full discharge in relation to the annuity, confined as it is to the part thereof not representing interest. The conception of “discharge” as connoting a transaction which results in a complete quittance at one stroke with respect to a given liability thus seems hardly applicable here. Moreover, it is difficult to suppose that s. 73 (1) (xvi) contemplates exclusively the somewhat peculiar transaction of “discharging” by one payment the whole of the capital while leaving the interest element outstanding. Accordingly, we are of opinion that para. (xvi) should be construed in the sense contended for by the tenant for life.

It remains to consider the question of recoupment, which is confined by the conclusions we have so far reached to the payments not representing interest made by the tenant for life in respect of the tithe rentcharge redemption annuities. This question has commonly arisen with respect to the recoupment to a tenant for life out of capital moneys of sums expended by him in effecting improvements. Under the Settled Land Act, 1882, as originally enacted, there was an obstacle to such recoupment in the shape of the requirement in s. 26 to the effect that a tenant for life desiring capital money to be applied in payment for an improvement must submit for approval to the trustees a scheme for the execution of the improvement showing the proposed expenditure thereon; and it was held in *Re Hotchkin's Settled Estates* (6) that, in view of this requirement, a tenant for life who had himself paid for improvements without first submitting such a scheme was not entitled to be recouped out of capital money. The law was altered in this respect by the Settled Land Act, 1890, s. 15 (since replaced by the Settled Land Act, 1925, s. 87), which empowered the court in proper cases to direct or authorise capital money to be applied in payment for any improvement notwithstanding that a scheme was not submitted for approval before its execution, and it is well settled that since this change in the law recoupment to a tenant for life of his expenditure on improvements can be authorised by the court, and can moreover be so authorised although the land to which the improvements relate has been sold: see *Re Sherborne's (Lord) Settled Estate* (7); *Re Borough Court Estate* (8). It is true that the provisions of s. 15 of the Act of 1890 (now s. 87 of the Act of 1925) apply only to improvements and cannot, therefore, be relied on in the present case, but we think it is reasonably plain that the court in *Re Hotchkin's Settled Estates* (6) would have found no difficulty in ordering recoupment out of capital money to the tenant for life of the payments made by him for the improvements, as in substance equivalent to a direct payment out of capital moneys for the improvements themselves, had it not been for the obstacle presented by s. 26, which was

likewise confined in its application to expenditure on improvements. *Prima facie*, therefore, it appears to us that if recoupment to a tenant for life of his expenditure on improvements can be authorised as equivalent to payment for such improvements, recoupment to a tenant for life of any payment properly chargeable to capital under the Act, such as the proportion attributable to capital of an instalment of a tithe rentcharge redemption annuity, properly so chargeable under s. 73 (1) (xvi) as construed above, should by parity of reasoning be capable of like authorisation. This view is borne out as regards the particular matter here in question by para. 10 (2) of sched. IV to the Act of 1925, which makes (*inter alia*) s. 73 (1) of that Act retrospective in its effect. To our minds this affords some support for the view that recoupment is permissible, as otherwise the retrospective operation contemplated by the paragraph to which we have referred could only be given a restricted effect.

There are certain authorities with respect to land improvement rentcharges under the Act of 1887 in which the right to recoupment was negatived: see *Re Howard's Settled Estates* (4); *Re Dalison's Settled Estate* (9), and *Re Verney's Settled Estates* (5). But *Re Howard's Settled Estates* (4) (where the main question, decided in the negative, was whether the provisions of the Act of 1887 were retrospective) and *Re Dalison's Settled Estate* (9) both seem to us to have turned on the particular language used in the Act of 1887, and, although in *Re Verney's Settled Estates* (5) KEKEWICH, J., ([1898] 1 Ch. 513) expressed the view that, according to what seemed to him to be the natural construction of the words, "the enactment" did not "extend to recouping the tenant for life in respect of payments already made", the words to which he was addressing himself were again those of the Act of 1887 which are entirely different from the language of s. 73 (1) (xiii) and (xvi) of the Act of 1925. We have already expressed the conclusion that there has here been no "redemption" of the land improvement rentcharges within the meaning of s. 73 (1) (xiii), so that the question of recoupment does not arise in regard to them. But suppose the tenant for life had in fact redeemed them by lump sum payments out of her own pocket, we think it would be a strong thing to hold that she could not have claimed recoupment of the cost of such redemption out of capital money, for such recoupment should, so far as we can see, rank as an application of capital money in redemption of the charge just as much as recoupment to a tenant for life of the cost of improvements in fact already paid for by him or her, even in land sold in the interval, undoubtedly ranks as an application of capital money in payment for such improvements under s. 73 (1) (iii) and s. 87 of the Act of 1925. Similarly, under s. 73 (1) (xvi) we see no reason why an application of capital money in recouping to the tenant for life money applied by her in the discharge of the capital portion of a tithe rentcharge redemption annuity should not rank as an application of capital money in the discharge of that portion of the annuity. There may, of course, be cases in which the proper inference from the facts must be that the tenant for life intended in making the payments in question to benefit capital at the expense of income and to waive any question of recoupment. Again, there may be cases in which delay in claiming recoupment has in the particular circumstances produced a state of affairs in which recoupment could not equitably be allowed, but no such considerations enter into the present case. It is true that the period over which recoupment is sought is a long one—in fact upwards of twenty years—but nothing has happened in the interval to make recoupment inequitable. Nor can it fairly be said that the tenant for life has by her conduct waived her right to recoupment. The evidence indicates that the practice of paying the whole of the tithe rentcharge redemption annuities out of income, begun when she succeeded to the estate as an infant, has been automatically continued by her agents without any consideration of her rights in the matter. There is, we understand, ample capital money in hand for the purpose. Accordingly, finding nothing in the Act to prohibit recoupment, we think this is a case in

which equity demands that the accounts as between capital and income should be adjusted by recouping to the tenant for life such of the payments referred to in the summons as she could have required the trustees to pay direct out of capital money, that is to say, the sum of £824 18s., being the aggregate of the sums paid by her "in the discharge" (according to the construction placed on that expression above) of the parts not representing interest of the tithe rentcharge redemption annuities.

In our judgment, therefore, the appeal should be allowed to the extent of substituting for the dismissal of the summons a declaration to the effect that the trustees ought to recoup to the tenant for life out of capital money subject to the settlement the above-mentioned sum of £824 18s.

Appeal allowed in part.

Solicitors: *Gregory, Rowcliffe & Co.* (for all parties).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Overruled. JOHNSON v. JOHNSON.
[1952] 1 All E.R. 250.

AMBLER v. AMBLER.

[LEEDS WINTER ASSIZES (Wallington, J.), March 14, 1951.]

Divorce—Petition—Petition within three years of marriage—Leave to present—Jurisdiction of commissioner to grant—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 70 (5)—Matrimonial Causes Act, 1937 (c. 57), s. 1 (1).

A special divorce commissioner has no jurisdiction to make an order under the Matrimonial Causes Act, 1937, s. 1 (1), giving leave to present a petition for divorce before the expiration of three years from the date of the marriage, since at the time when the application for the order is made no matrimonial cause is in existence, and, consequently, the application cannot be a matter "arising out of or connected with" any such cause within s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925.

FOR THE SUPREME COURT OF JUDICATURE (CONSOLIDATION) ACT, 1925, s. 70 (5), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 363.

DEFENDED PETITION for divorce by the husband.

The parties were married on Jan. 24, 1948. On Nov. 3, 1950, His Honour JUDGE ESSENHIGH, sitting as a special commissioner, made an order granting the husband leave to present a petition for the dissolution of the marriage within three years from the date of the marriage. On Nov. 17, 1950, the petition was presented.

Beaton for the husband.

Cumming-Bruce for the wife.

WALLINGTON, J.: In the absence of an effective order giving leave for this petition to be presented, it could not be presented on Nov. 17, 1950, because that would be less than three years from the date of the marriage of the parties on Jan. 24, 1948. My jurisdiction depends on whether an order giving leave was made, and if it was valid when made. The order purporting to give leave was made on Nov. 3, 1950, by His Honour JUDGE ESSENHIGH sitting as a special commissioner and is in these terms:

"On the evidence given and on the reading of the affidavits it is ordered that the applicant be given leave to present a petition for the dissolution of marriage within three years from the date of marriage."

The petition was filed on the basis that this order was valid, and the matter comes before me.

I have come to the conclusion that the learned special commissioner was not clothed with jurisdiction to make the order. The question of jurisdiction seems to me to depend on the effect of s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 225 of which statute gives the definition of "matrimonial cause" and "matter." Article 1 (1) of the Matrimonial Causes (Special Commission) (No. 2) Order, 1946 (S.R. & O., 1946, No. 2112/L.28) provides:

"All classes of matrimonial causes may, subject to rules of court, be tried and determined by a special commissioner, acting under a special commission."

His Honour JUDGE ESSENHIGH was, no doubt, a special commissioner purporting to act under the terms and authority of a special commission. "Judge" is defined in r. 1 (3) of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940/L.27), thus:

"'Judge' means the President, any judge of the Probate, Divorce and Admiralty Division, any judge of the High Court for the time being exercising jurisdiction in matrimonial causes and matters, or any commissioner for the time being exercising jurisdiction in such causes and matters under or by virtue of s. 70 (5) of the Supreme Court of Judicature (Consolidation) Act, 1925 and any order made thereunder."

For the purpose of the present case I am satisfied that the Matrimonial Causes (Special Commission) (No. 2) Order, 1946, is made under the authority or by virtue of s. 70 (5) of the Act of 1925, and the words of the definition in the Matrimonial Causes Rules, 1950, r. 1 (3), which are of particular importance here are:

"... any commissioner for the time being exercising jurisdiction in such causes and matters under or by virtue of s. 70 (5) . . ."

It is argued that the order giving leave was properly made under s. 70 (5) of the Act of 1925, which provides:

"A commissioner acting under a commission of assize or any other commission issued under this section, shall, subject to rules of court, have power to try and determine matrimonial causes of any prescribed class and any matters arising out of or connected with any such causes, and shall for that purpose have all such powers and duties as are vested in the Probate Division under the enactments (including this Act) relating to matrimonial causes and matters."

It is plain that this matter does not "arise out" of a matrimonial cause, because there was no such cause in existence when the order was made. Furthermore, it seems to me that the words "connected with any such causes" in s. 70 (5) are inserted to indicate that once there is a matrimonial cause in the hands of a special commissioner he has authority to determine any matter arising out of it or connected with it. I do not understand how anything can arise out of or be connected with a non-existent thing.

The Matrimonial Causes Rules, 1950, contain these provisions as to originating summonses. By r. 2 (1):

"An application for leave to present a petition for divorce before three years have passed since the date of the marriage shall be made by originating summonses in accordance with Form 1."

Form 1 is headed:

"In the Matter of a Proposed Petition by A.B. for the dissolution of his (or her) marriage with C.D. Let of in the County of attend the judge in chambers at the Royal Courts of Justice, Strand, London, W.C.2 [or elsewhere as the case may be] . . ."

The last words apply if the judge to whom application is to be made is not sitting at the Royal Courts of Justice, London, but is on an assize.

In my opinion, in these circumstances it is impossible for me to proceed with the hearing of the present petition because when the order giving leave for its presentation was made the learned commissioner had no jurisdiction to make it, and, therefore, there is in existence no petition which this court can properly try and determine. This matrimonial dispute, therefore, is left in the air. The three years required under the Matrimonial Causes Act, 1937, s. 1 (1), expired on Jan. 24, 1951, and it is now open to the petitioner to present the same petition. I am not pretending to give any advice to the parties, but it seems to me there are two courses, one of which they could adopt. The first is, they could appeal against my conclusion that I have no jurisdiction to try the present petition, and, if the Court of Appeal then held that I had jurisdiction, the case could be set down and tried at the next assizes. The other course is for the parties through their advisers to agree that the petition should be re-presented now that the three years have expired.

Solicitors: *George Bairstow & Rhodes*, Halifax (for the husband); *C. M. Thain*, Halifax (for the wife).

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

Applied. TRAVIS v. MIN. OF LOCAL
GOVERNMENT AND PLANNING. [1951]
2 All E.R. 673.

Affirmed. H.L. [1952] 1 All E.R. 509.

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. v. MINISTER OF TOWN AND COUNTRY PLANNING AND ANOTHER.

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), March 19, 20, April 13, 1951.]

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—Planning permission granted by local authority to prospective lessee—Owner unwilling to sell at existing use value—Town and Country Planning Act, 1947 (c. 51), s. 43 (1) (2).

The owners of a plot of land offered to grant to R., who wished to build a house on it, a three hundred years' lease thereof at an annual rent which exceeded the existing use value of the plot and to assign to him the benefit of the owners' claim for compensation for loss of development rights under the Town and Country Planning Act, 1947, R. to pay the development charge under the Act. Permission to build the house was granted to R. by the local authority. On a request by R. that a compulsory purchase order should be made for his benefit because the owners did not propose to lease the land at the existing use value, the Central Land Board wrote to the owners asking them whether they would be prepared to adopt one of three methods of disposing of the land. The methods, which the board considered fair to buyers who wanted a house immediately, were set out in a document entitled "House 1," and were: (i) to sell the land at existing use value, the buyer paying development charge; (ii) the seller to pay the development charge, and then to sell the land at a fair price, including the development charge; or (iii) the seller to pay the development charge, erect the house, and then sell the house and land at a fair price, including the development charge. The owners refused to adopt any of these methods, and the board then tried to negotiate with them a purchase by agreement. The existing use value

of the land was £35, but the owners would only agree to sell it at £462 (its probable value if it were developed). As they were unable to acquire the land by agreement on what they considered to be reasonable terms, the board resolved to acquire it compulsorily, and on June 22, 1949, an order to that effect was made under s. 43 (2) of the Act of 1947, and was confirmed by the Minister of Town and Country Planning on Dec. 3, 1949. On an application to the court by the owners for an order that the compulsory purchase order and the Minister's confirmation order be quashed, the owners contended (*inter alia*) that the board's main purpose in making the order was to punish them for refusing to follow the policy of the board, set out in "House 1," in regard to the sale of land, and, therefore, the order was invalid as it was made for a purpose not authorised by s. 43 (1).

HELD: (i) on the true construction of s. 43 (1) of the Act of 1947, the second limb of the sub-section, introduced by the words "in particular," did not confer on the board a power wholly independent of the first part of the sub-section, but was introduced to make it clear that the power of the board to acquire land "for the purpose of disposing of it for development for which permission has been granted . . . on terms inclusive of . . . development charge . . ." was "a purpose connected with the performance of [the board's] functions" under the Act, within the opening words of the sub-section.

(ii) (DENNING, L.J., *dissentiente*) under s. 69 (1) of the Act it was the duty of the board to determine and collect development charges; that task would be impeded by sales of land above existing use value; and, therefore, the order made by the board under s. 43 (2) to acquire the land for a purpose authorised by the second limb of s. 43 (1) was made for a purpose connected with the performance of the functions of the board under the Act within the first limb of s. 43 (1), and was valid.

Decision of BIRKETT, J. ([1950] 2 All E.R. 765), affirmed.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, see HALSBURY'S STATUTES, Vol. 40, p. 727.

Cases referred to:

- (1) *Sydney Municipal Council v. Campbell*, [1925] A.C. 338; 133 L.T. 63; *sub nom. Sydney Municipal Council v. Hughes Motor Service, Ltd.*, 94 L.J.P.C. 65; Digest Supp.
- (2) *Clanricarde (Marquess) v. Congested Districts Board for Ireland*, (1914), 79 J.P. 481; 11 Digest 118, 116.
- (3) *Point of Ayr Collieries, Ltd. v. Lloyd-George*, [1943] 2 All E.R. 546; 2nd Digest Supp.
- (4) *Green & Sons v. Minister of Health* (No. 2), [1947] 2 All E.R. 469; [1948] 1 K.B. 34; [1948] L.J.R. 1; 111 J.P. 530; 2nd Digest Supp.
- (5) *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] 1 All E.R. 142; [1942] A.C. 435; 111 L.J.P.C. 17; 166 L.T. 172; 2nd Digest Supp.
- (6) *Carltona, Ltd. v. Works Comrs.*, [1943] 2 All E.R. 560; 2nd Digest Supp.
- (7) *Proclamations' Case*, (1611), 12 Co. Rep. 74; 77 E.R. 1352; 11 Digest 503, 55.
- (8) *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bell London & Provincial Properties, Ltd.*, [1949] 1 All E.R. 720; [1949] 1 K.B. 666; 113 J.P. 209; 2nd Digest Supp.

APPEAL by the applicants from an order of BIRKETT, J., made on July 31, 1950, and reported [1950] 2 All E.R. 765, whereby he refused to make an order quashing a compulsory purchase order, made by the Central Land Board on June 22, 1949, and a confirmation order, made by the Minister of Town and Country Planning on Dec. 3, 1949.

The applicants were the owners of large estates in Sheffield which they had

been developing for some years by leasing plots of land on building leases for a term of three hundred years. In August, 1948, they informed the prospective lessee of one of the plots of the terms on which they would grant a lease to him. The prospective lessee, who had obtained permission from the local authority to build a house on the land, wrote to the Central Land Board complaining that the applicants did not propose to lease the land at present use value, and asking if the board would make a compulsory purchase order for his benefit. The board drew the applicants' attention to three methods of disposing of land which they considered fair to buyers and asked the applicants if they were prepared to accept one of these methods. The applicants replied that they were not, and on June 22, 1949, the board made a compulsory purchase order in respect of the land. On Dec. 3, 1949, the order was confirmed by the Minister of Town and Country Planning. The applicants contended that the order was not within the powers conferred on the board by the Town and Country Planning Act, 1947, s. 43 (1) and s. 43 (2), because its object was to make the applicants conform to the board's policy that land should not be sold at a price greater than its existing use value and it was made as a reprisal for the applicants' refusal to conform to the methods of sale suggested to them. They also contended that the power conferred by the second part of s. 43 (1), *viz.*, the power to acquire land for the purpose of disposing of it for development for which permission had been granted under the Act, was limited by the power conferred by the first part of the sub-section, and, therefore, it was a power exercisable only in connection with the performance by the board of their functions under the Act (*viz.*, the ascertainment of development values and the determination of development charges), and was not a separate and independent power. The respondents, the Minister of Town and Country Planning and the board, contended that the powers of the board had been properly exercised, that the power under the second part of s. 43 (1) was a separate and independent power enabling the board to do what they had done, and that, both respondents having acted in good faith, their decisions could not be impugned or inquired into. The respondents further contended that in the circumstances of the case the board were entitled to exercise their power of compulsory purchase, even if one of the considerations in their mind was to enforce their view as to the sale of the land at existing use value, and that, if the power in the second part of s. 43 (1) was not a separate and independent power, the order was not outside the functions of the board, one of which might reasonably be to see that land was not sold at a price greater than its existing use value in the circumstances of the case.

BIRKETT, J., held (i) that, if the board had exercised their compulsory powers under s. 43 (1) and s. 43 (2) of the Act with the sole purpose of enforcing their policy that land should not be sold save at existing use prices, the compulsory purchase order would not have been valid, as that was not a purpose authorised by the Act, but, on the facts, the enforcement of their policy was not their sole purpose in making the order, and (ii) that the power given to the board by the second part of s. 43 (1) was not limited by the earlier words of the sub-section, but was wide enough to allow the board to make the compulsory purchase order in the circumstances of the case, and, therefore, the order was valid. The facts appear in the judgment of SOMERVELL, L.J.

Sir David Maxwell Fyfe, K.C., and R. G. C. Davison for the applicants.

The Attorney-General (Sir Hartley Shawcross, K.C.) and J. P. Ashworth for the respondents.

Cur. adv. vult.

Apr. 13. The following judgments were read.

SOMERVELL, L.J.: In this case the applicants moved to quash a compulsory purchase order, made by the Central Land Board, and a confirmation of that order, made by the Minister of Town and Country Planning, under s. 43

of the Town and Country Planning Act, 1947 (hereinafter called the Act), on the ground, in substance, that it was *ultra vires*. The learned judge dismissed the application and the applicants appeal.

The compulsory purchase order was in respect of a small plot of land, 1,960 square yards in Whirlow Lane in Sheffield, the property of the applicants. To make the issue intelligible it is necessary to outline the broad effect and scheme of the Act. I will deal first with its effect on land which had potential development value on the appointed day, July 1, 1948. Section 80 contains special provisions with regard to land which was ripe for development on that day, with which we are not concerned. I will consider a plot of land which, on the appointed day, was being used for some agricultural purpose. If restricted to its existing user, it was worth £250, but it had a potential value over and above this as a future site for a house or houses. Assuming that the right of development could be exercised, subject only to such restrictions as existed prior to the passing of the Act, its value would be £750. By s. 12 (1) of the Act permission is required for any development of land which is carried out after the appointed day, "development," as defined by s. 12 (2), including the building of a house. By s. 69 a development charge has also to be paid before a house can be built. By s. 2 a body called the Central Land Board (hereinafter called the board) was set up, and by s. 3 (3) the functions of the board are exercised on behalf of the Crown. The board are not concerned with the granting of permission to develop, but, by s. 70, they are concerned *inter alia* with the assessment of the development charge which is to be paid to them under s. 69. By s. 70 (2) the board, in determining the amount of the development charge, are to have regard to the difference between the value of the plot with permission to build a house and the value of the plot with no such permission, *i.e.*, restricted to existing user. If one assumes that agricultural values have remained unchanged, the latter figure in my example would be £250. As the land was, *ex hypothesi*, not ripe for development on the appointed day, but has become so at the time being considered, the value of the plot with permission to build might be £900. Section 70 (3) provides for the making of regulations as to the general principles to be followed by the board in determining the amount of the development charge, and the Town and Country Planning (Development Charge) Regulations, 1948 (S.I., 1948, No. 1189), made under s. 70 (3) and s. 111, provide that in ordinary cases the development charge shall be the full amount of the difference, as above stated, to which the board are to have regard. On the figures given in my example, this would be £650. The broad effect of this is that the State, through the Central Land Board, collects "development values," as and when development takes place. These development values may (and, at present, normally will—as in the example which I have given) have existed in part on the appointed day as the property of the then owners. As years go on, land may be developed which had no development value on the appointed day, and its development will be subject to the same conditions.

The broad effect of this, in the example which I have given, is that the owner, assuming that he remains the owner, has lost what he had on the appointed day, *viz.*, the development value, worth £500, and its subsequent increment. The Act does not purport to provide for compensation on the basis of the market value to be ascertained of all development values as on the appointed day. Section 58 (1) and (2) provide that payments may be made under a scheme in respect of interests in land which are depreciated in value by the provisions of the Act, the aggregate amount of the payments for England, Scotland and Wales to be £300,000,000. Claims are to be made to and dealt with by the board under the scheme. There was no evidence before us as to what proportion of his £500 depreciation the notional owner would be likely to receive. By s. 64 (2) the right to receive a payment under the scheme is transmissible by assignment or by operation of law as personal property. There is nothing in the Act which precludes a notional owner from refusing to sell to a private

purchaser who wants the land for development. Nor is there anything in the Act to preclude him, in the example which I have given, from selling it at a price in excess of £250 if he can find anyone willing to pay that price. Nor can I find anything in the Act which precludes him from saying that anyone who wants the land must also buy his claim on the fund, at whatever price he can find a willing purchaser.

There were, before the Act, very considerable powers of compulsory acquisition of land—in particular, powers in local authorities to acquire land for housing. Powers of compulsory acquisition by Ministers, local authorities and statutory undertakers are dealt with in s. 37 and s. 38 of the Act. The details do not, I think, matter, but those sections give new and increased powers for compulsory acquisition. This appeal is concerned with s. 43, which confers powers of compulsory acquisition on the board. Section 43 (1) and (2) provide:

“(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section.”

The broad submission of counsel for the applicants was that, on the facts, the board exercised or purported to exercise the power conferred by s. 43 for a purpose not authorised by the section. The principle of law on which he relied is stated in *Sydney Municipal Council v. Campbell* (1). DUFF, J., delivering the opinion of the Judicial Committee, said ([1925] A.C. 343):

“The legal principles governing the execution of such powers as that conferred by s. 16, in so far as presently relevant, are not at all in controversy. A body such as the Municipal Council of Sydney, authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the courts will interfere. As LORD LOREBURN said, in *Marquess of Clanricarde v. Congested Districts Board for Ireland* (2) (79 J.P. 481): ‘Whether it does so or not is a question of fact.’ Where the proceedings of the council are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object.”

The facts in the case before us are briefly as follows. In August, 1948, a Mr. Rodgers approached the applicants’ surveyors for a long lease of a plot of land on which to build a house. He was told that he could have such a lease at a rent of £20 10s. a year, inclusive of the applicants’ claim against the fund, Mr. Rodgers bearing the development charge. It was not disputed by the applicants that the figure of £20 10s. was greatly in excess of the existing use value, and was a figure which might well represent the full development value of the plot. In his affidavit Sir William Fraser, the deputy chairman of the board, stated that this was the opinion of the district valuer, and it appears to have been agreed at the public inquiry hereinafter referred to. The existing use value was put by the district valuer at £35. Mr. Rodgers did not accept the applicants’ offer. On Aug. 16, 1948, he obtained permission, under Part III of the Act, to build a house on the plot of land, and, on Oct. 7, 1948, through

an architect, Mr. Lusby, he applied to the board to make a compulsory purchase order for his benefit. This was obviously on the basis that the board had power, under s. 43, to acquire the plot of land "on reasonable terms," presumably at existing use value, and then to dispose of it to Mr. Rodgers at a figure which would cover that value plus the development charge. The board wrote to the applicants' surveyors on Nov. 1, 1948:

- A "The Central Land Board understand that you are acting for a client who wishes to dispose of land at Whirlow Lane, Sheffield. The board have been informed that the price which your client is asking for the land is £20 10s. per annum ground rent (inclusive of the assignment of the right to claim a payment in respect of the development value of the land out of the £300 million set aside under the provisions of the Act). This price
- B appears to approximate to the level of prices obtained for similar land in the neighbourhood before the Act came into operation. I inclose a document which sets out three methods which, in the view of the board, should be adopted by landowners. The board will be glad to know as soon as possible whether your client is prepared to adopt one of these alternatives, and if so, which."
- C The document referred to is headed House 1 and contains "Advice on buying and selling a site for building a house." "Advice to Sellers" is:
- "Three courses, which will be fair to buyers who want a house immediately, are open to sellers of land: (a) To sell the land at existing use value leaving the buyer to pay the development charge (Method A). (b) The
- D seller to pay (or agree with the board to pay) the development charge; to disclose the amount of this charge to the buyer; and then to sell the land at a fair price, including the development charge, direct to the person who wishes to erect the house. This method, after discussion and agreement with the board, can be used either for a sale to a named buyer, or by public or other advertisement, or by auction (Method B). (c) The seller to pay the development charge; erect the house himself; and then sell the house
- E and land at a fair price, including the development charge (Method C). Owners of land with building value on July 1, 1948, have been given a right by the Act to make a claim before Mar. 31, 1949*, upon the fund of £300,000,000 set aside to meet varying cases of hardship. No promise has been given that everyone will be paid the whole of the market value of his loss of building rights. Indeed, clear statements have been made to the
- F contrary, and that some will receive the whole loss and that some will not. The decision will not be made (except in the case of certain 'near-ripe' land) until 1952 or 1953 and then by a scheme which will require affirmative approval by Parliament. Payments will be made in 1953. A sale of land, therefore, at a price which includes building value is unfair
- G to buyers for two reasons: (i) It passes on the claim to the purchaser at a definite amount, whereas the claim is as yet unestablished and the amount is unknown. (ii) It forces the purchaser to pay for building value twice over in two immediate payments (the purchase price and the development charge). This places an intolerable burden on persons who have been carefully selected for a building licence on their urgent need for a house.
- H In normal cases, therefore, where an owner is not prepared to sell at a price related to Method A, B, or C, the Central Land Board will have to consider the various compulsory purchase powers in the Act. If sellers will sell, and purchasers will only buy, as advised in this pamphlet, land can be sold at a price which will not hinder or prevent houses being built."

* Extended to June 30, 1949, by Claims for Depreciation of Land Values (Period for Making Claims) Regulations, 1948 (S.I., 1948, No. 2822).

On Nov. 5, 1948, the applicants' surveyors replied to the Central Land Board:

"In reply to your letter of Nov. 1, we wish to correct you in para. one [of the 'Advice to Buyers,' in House 1, which stated that building value now belonged to the State, and not to the seller]. It is presumed that your informant wishes to acquire the land of our client. In regard to your final paragraph, we are instructed that our client is not disposed to adopt any of the alternatives set out in the document referred to."

On Dec. 23, 1948, the board replied:

"With reference to your letters of Nov. 5 and 30, 1948, the board note that your clients are not prepared to adopt any of the approved methods described in the pamphlet 'House 1.' As far as the board are aware, the land is not the subject of a certificate under s. 80 of the Town and Country Planning Act, 1947. The board have notice that planning permission for the erection of houses on the above sites has been granted and that licences will be granted to the would-be purchasers. It appears, therefore, that the approved development may be hindered, if not prevented, unless the land is made available. The board have therefore requested the district valuer, as a matter of urgency, to negotiate with you for the immediate purchase of the land on the basis provided in s. 51 of the Town and Country Planning Act, 1947. This basis the board considers to be the reasonable terms mentioned in s. 43 (2) of the Act."

The board then proceeded to negotiate with the surveyors as to purchase by agreement. The surveyors asked £462 which was unacceptable to the board. On June 22, 1949, the board made a compulsory purchase order. Section 43 (3) of the Act introduces the familiar procedure, by which objection can be made to an order requiring confirmation by a Minister and a public inquiry can be held. The applicants objected and a public inquiry was held. The main point taken for the applicants was that the board were using their powers to enforce the policy set forth in "House 1" and as a sanction against the applicants for refusing to follow it. On this view it was submitted that the order was invalid as it was not made for a purpose authorised by the section. On Dec. 3, 1949, the Minister confirmed the order. There is an affidavit by the Minister which follows the wording of the Act. There is also the affidavit from Sir William Fraser, the deputy chairman of the board. There is no challenge to the good faith of the board or the Minister. The suggestion is that they misconstrued their powers. On the correspondence and Sir William Fraser's affidavit it seems to me clear that the board exercised their powers because the applicants were asking a price which was greatly in excess of existing use value. At one time it seemed as if the main point was the condition that the purchaser should take over the claim against the fund. This, I think, is subsidiary. As it seems to me on the documents, the board might well have thought proper to seek to exercise their powers if a sum greatly in excess of existing use value was being asked although the claim on the fund was retained, though, no doubt, this would make it more difficult to obtain a sum so much in excess.

I do not find the case an easy one. It is plain that s. 43 contemplates that the board may want to acquire land in connection with their functions. Under s. 43 (4) the board may manage land until it is disposed of, but they are prohibited from carrying out any development. Counsel for the applicants contended that the only purpose connected with the functions of the board for which the board would want to acquire land would be to test the market for the purpose of fixing development charges. He submitted that, as the purchase price on a sale of land would in the future be restricted to its existing use value, the board may well require evidence of what purchasers would give for land with permission to develop. The Attorney-General agreed that this would be a useful purpose. There is, no doubt, force in this contention. In

the future, there will be sales of plots of land on the basis of payment of a development charge if a house is built, and there will also be sales of houses which are already built, but there will be no sales of plots on the basis that the purchase price covers the right to develop. The Attorney-General submitted that this "purpose" (*viz.*, to test the market) is fully covered by the opening words, the first limb as it was called, of s. 4g (1). What content is then left for the words following "in particular." I agree with the argument of counsel for the applicants that the words following "in particular" must be related to a function of the board, and I do not agree with the Attorney-General that it is a function of the board generally to encourage development or to see that owners do not impede development by refusing to sell or by asking excessive prices. That is the function, in the main, of local authorities. The board have, however, the function of assessing and collecting the development charges. The Town and Country Planning (Development Charge) Regulations, 1948, para. 2, which is contained in Part II of the regulations, headed "General," reads:

"Subject to the provisions of the Act and of any regulations made thereunder and for the time being in force, the general principles set out in the schedule to these regulations shall be followed by the board in determining under Part VII of the Act whether any, and if so what, development charge is to be paid thereunder in respect of any operations or use of land."

The schedule reads:

"1. Development charge shall be determined so as to secure, so far as is practicable, that land can be freely and readily bought and sold or otherwise disposed of in the open market at a price neither greater nor less than its value for its existing use. This object is the governing principle by which the board are to be guided in determining development charge. 2. Development charge shall not be more than the amount which, to the satisfaction of the board, represents the additional value, measured by normal processes of valuation, of the land due to planning permission for a particular development. 3. Development charge shall not be less than the amount referred to in para. 2 of this schedule, unless in the opinion of the board the charge ought properly to be less in order to comply with the governing principle."

The regulations of 1948 cannot, of course, enlarge the powers conferred by the Act. It is, however, not disputed that they are *intra vires* in laying down that, *prima facie*, the development charge shall be the full amount of the difference referred to. The provisions of s. 51 of the Act support the argument that the principle embodied in the regulations of 1948 is in accordance with the general intention of the Act. That section deals with the compensation to be paid in respect of compulsory acquisition by a government department or a local or public authority. Read with sched. III to the Act, the effect is that such compensation is to be based on existing use value only. The owner would, of course, retain his claim, if any, against the fund.

As it seems to me, the task of the board in working the development charge scheme is, undoubtedly, impeded by sales above existing use value. Until the fund of £300,000,000 is distributed, the problem is complicated by the inclusion in the sale of the speculative claim against the fund. An applicant who comes to have his development charge fixed would, naturally, put forward what he has had to pay for the land as the *datum* figure. If this were taken, the intention of the Act and of the regulations of 1948 is defeated if the price was substantially above existing use value, subject, until the fund is distributed, to the uncertain value of the claim on the fund, if that is included. If it is not so taken, the development charge scheme becomes a kind of taxation operating on losses.

The plot in question, *ex hypothesi*, will be one which none of the various public authorities want to acquire compulsorily. I would expect to find in the Act some power to deal with this problem and I would have expected that power to be in the board rather than in local authorities. It was suggested by counsel for the applicants that it would have been easy to make it an offence to sell land at a price greater than its existing use value. If the whole point in the case was the inclusion of the claim against the fund, I would agree that it could have been made an offence to make its inclusion a condition of a sale. Its inclusion can, no doubt, be used, as it were, as a justification for demanding a higher sum, but the real "evil" is the demanding of a sum in excess of existing use value. It would, I think, have been difficult to make this an offence. In the first place, it is, within limits, a matter of opinion as to what the existing use value may be in any particular case. It would be unfortunate to make it an offence to accept from someone willing to pay it a figure higher than that which some tribunal might say the property was worth. The power which the board are claiming is to operate s. 43 in what they consider plain cases of excess and so to have a certain control to prevent the impediments to which I have referred. No doubt, if they can operate it in plain cases, they can operate it in others, but, if the owner is asking little, if any, more than the existing use value, there would be little, if any, point in the board using their powers and the owner would be little, if at all, damaged if they did.

To return to s. 43 (1), there was argument as to the effect of the words "in particular," which introduce the second limb of the sub-section. I do not accept the Attorney-General's submission that one should construe the second limb as a wholly independent power. I think that the words should be construed as making it clear that a certain power, as to which there might have been doubt, is to be regarded as one in connection with the functions of the board. That the compulsory purchase order, which was made and approved in this case, is within the letter of the sub-section is not disputed. There is, I think, force in the Attorney-General's argument that the testing of the market is a purpose fully covered by the first limb. For the reasons which I have given, I think that its exercise, on the facts as found, was in connection with the functions of the board as the authority operating the development charge scheme, and is, therefore, covered. On this view, the point taken by the Attorney-General that the matter was, on any view, concluded by the satisfaction of the Minister under s. 43 (2) does not arise. He relied on the *Point of Ayr Collieries, Ltd. v. Lloyd-George* (3). I myself am inclined to think that, if the order was outside the powers of the board under s. 43 (1), the applicant was entitled to have it set aside as not being "within the four corners" of the Act to borrow a phrase from the judgment of LORD GREENE, M.R. ([1943] 2 All E.R. 547), in the *Point of Ayr* case (3). I have arrived at the same conclusion as BIRKETT, J., but by a somewhat different route. The learned judge said ([1950] 2 All E.R. 777) that, if it were shown that the board had exercised their powers under s. 43 with the sole purpose of enforcing the policy of ensuring that land should not be sold save at existing use prices, he would have been of opinion that their power of compulsory purchase could not be used for that purpose. If one considers that policy as a policy unrelated to the functions of the board in relation to development charges, I would have agreed. The learned judge based his judgment on the fact, as I understand it, that the board had done precisely what they were expressly authorised to do under the second limb of s. 43 (1), and that the applicants did not on the evidence satisfy him that they had exceeded their powers. There is, if I may say so, great force in this approach to the problem. As I have indicated, it was, in my view, necessary to show that the purpose of operating s. 43 in circumstances such as those of the present case, would be related, as I hold it was, to the functions of the board in relation to development charges. For these reasons I would dismiss the appeal.

SINGLETON, L.J.: In my view, the second part of s. 43 (1) of the Town and Country Planning Act, 1947, is governed by the first part. In other words, the effect of the sub-section is that the board may acquire land

" . . . for any purpose connected with the performance of their functions under the following provisions of this Act . . ."

but in such event they may acquire land

" . . . for the purpose of disposing of it for development . . . on terms inclusive of any development charge . . ."

The sub-section deals with the acquisition of land by agreement, and the approval of the Minister is necessary. Section 43 (2) provides that, if the board are unable to acquire the land by agreement on reasonable terms, the Minister may authorise the board to acquire the land compulsorily

" if the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as afore-said . . ."

There is thus the safeguard of the Minister's approval in cases falling within sub-s. (1), and the necessity of the Minister's certificate that he is satisfied that it is expedient in the public interest to acquire the land in cases falling under sub-s. (2).

The functions of the Central Land Board include the fixing and collecting of development charges. If all owners of land insist on a much higher price for their land than the existing use value and if the would-be developer has to pay development charge as well, it is obvious that development will not be as easy or as speedy as it would be if the land was sold at existing use value, leaving the developer to pay development charge and leaving the landowner the right to share in the £300,000,000 fund set up by s. 58 of the Act. The board are not directly concerned with development, but they are indirectly concerned, for, unless development goes along normally, they will not be able to collect development charges to the same extent as they otherwise would be. Under s. 43 (1) the board may acquire land for a " purpose connected with the performance of their functions under the following provisions " of the Act—one of which is the collection of development charges. The words " connected with " are wide. It seems to me that they are wide enough to cover a case in which the board think it right to acquire land to enable them to collect the development charge. They can only do this if the Minister approves. Section 43 (4) provides what shall be done with the land they acquire, and under s. 43 (2) the Minister may authorise the board to resort to compulsory acquisition if he is satisfied that it is expedient in the public interest. I cannot accept the argument that the sole purpose of s. 43 (1) and s. 43 (2) was to enable the board to test the market, or to find out by dealing in land themselves what the value of developed land was. I cannot think that the power given to the board was for any such limited purpose. There is nothing in the section itself or in any other part of the Act to lead to such a construction.

It was submitted by the applicants that the real reason for the making of the order in this case was to compel the owners of the land to fall in with the board's advice as to the methods which should be adopted by landowners, as shown in the letter of Nov. 1, 1948, and in the scheme set out in " House 1," and that, as Parliament had not said that an owner must sell his land at existing use price, the board could not put themselves in the position of the legislature and compel an owner to sell on such terms. It was further contended that the action of the board was in conflict with s. 64 (2) of the Act, which expressly provides that an owner of land can assign his share in the £300,000,000 fund. It may well be that the main purpose of the board was to induce landowners in general, and the applicants in this particular case, to adopt one of the methods favoured by the board. No doubt, they believed that this was the best way of

forwarding or carrying out the objects of the Act. Moreover, they considered, and rightly considered, that it was the best course to take to help them to collect development charges, and, in particular, the development charge arising out of the land in question. All these matters are in a sense allied, and I am unable to say that the board went further than they were entitled to go. The Minister directed that an inquiry be held and, after receiving the report, gave his certificate in accordance with the requirements of s. 43 (2). This is not a case in which it can be said that powers were exercised for a purpose differing from those specified in the statute, as was said in *Sydney Municipal Council v. Campbell* (1). The power was used to enable the board to carry out their function of collecting development charges—or, perhaps I should add, to enable the board to collect the charges more easily—and the fact that there were other reasons within the spirit of the Act, though outside the scope of the board, does not invalidate the procedure adopted. I agree that the appeal should be dismissed.

DENNING, L.J.: This case is brought by the applicants to test the validity of a compulsory purchase order. The applicants, Earl Fitzwilliam's Wentworth Estates Co., owned a plot of land, near Sheffield, of less than half an acre, which they desired to let on long lease for three hundred years at £20 10s. a year. The Central Land Board objected to their letting it on these terms, and, to stop them doing so, the board have made a compulsory purchase order under which they will acquire the land for £35. The validity of their action depends on the scope of their powers under the Town and Country Planning Act, 1947. The applicants put their case in this way. They say that this plot was suitable for building before the Act came into force and they are only asking the same price for it as they asked before the Act for similar plots. They recognise that the purchaser will now have to pay a development charge before he is permitted to build on it, but they are ready to assign to him the compensation which is payable by the State on that account. Therefore, they are not asking to be put in any better position than they were before the Act, but only that they should be no worse off. The board, on the other hand, say that they wish to protect the purchaser. They have laid it down as their policy that a landowner must sell his land at its existing use value only, and that they will, if necessary, exercise their compulsory powers of purchase to make him do so. In pursuance of this policy, the board propose to take this plot of land compulsorily from the applicants for £35, leaving them to receive whatever compensation is payable by the State, and then the board themselves will sell the land to the purchaser on terms inclusive of the development charge. The question is whether the board are entitled to use their compulsory powers for this purpose. The case was tried by BIRKETT, J., who held that, if the board had exercised their compulsory powers with the sole purpose of enforcing their policy of "sales at existing use value only," their action would be invalid, but he decided against the applicants, because he thought that, in this particular case, that was not the sole purpose of the board. In the course of the hearing before us, however, we all expressed the view that on the evidence the dominant purpose of the board, if not their sole purpose, was to enforce the policy of "sales at existing use value only," and the Attorney-General did not seriously contend the contrary. He said boldly that, accepting that to be the purpose of the board, there was nothing wrong about it. So the issue of principle was fairly joined.

Before I turn to discuss it, however, I must give some description of the Act of Parliament which established the Central Land Board and gives it compulsory powers. It is the Town and Country Planning Act, 1947, which is a revolution in itself. It takes away the freedom of each man to do as he likes with his own land. No one can now develop his land or make any material change in the use of it without the permission of the planning authority, and,

if he is given permission, he must pay for the privilege. He must pay a charge to the board which is calculated by reference to the increase in value of the land owing to his being allowed to develop it. For instance, if it is being used for agriculture—so that that is its existing use—and he desires to build on it, he must pay to the board its development value, *i.e.*, its value as building land less its value as agricultural land. Its building value may be much higher than its agricultural value because it is near to an expanding town or to a new road made by the community. This increase in value is, as a rule, due to no effort by the landowner, but to the efforts of the community, and Parliament has determined to recover it for the State by imposing a development charge. This charge is fair enough on landowners who acquired the land, before or after the Act, as agricultural land, but it is not fair on those who bought the land before the Act as building land and gave a building price for it. Nor, indeed, is it fair to any landowner whose land was already suitable for development and increased in value before the Act came into operation, unless these landowners are compensated for the loss which the imposition of the charge inflicts on them. Parliament has, accordingly, provided for this. It has provided that they shall be compensated out of a fund of £300,000,000 which has been set aside for the purpose. This fund, however, will probably not be sufficient to compensate all the landowners for all their loss, but only some of them for some of it. For instance, a man who bought a plot of land as building land before the Act for £500, whereas its agricultural value was only £100, will have to pay a development charge of £400 before he is allowed to build a house on it, but he will probably only get a fraction of that sum as his share of the £300,000,000. He will, therefore, not get full compensation for his loss. Hence the trouble in this case. The applicants wish to throw the deficiency on the purchaser, whereas the board say that the applicants should bear it themselves.

To administer this scheme, Parliament has established the Central Land Board which acts on behalf of the Crown. Its functions under the Act are of a fiscal nature. It has to assess and collect the development charge on new development, and to assess the compensation payable to individual landowners out of the £300,000,000 fund. It is not itself a planning authority. It does not itself give or refuse permission for development. That is left to the local authorities. Nevertheless, the board has been given by Parliament a power to acquire land compulsorily, and this court is today called on to determine the extent of that power. The purposes for which the board may acquire land compulsorily are defined by s. 43 of the Act. They fall into two. (i) By s. 43 (1) the board may:

“ . . . acquire land for any purpose connected with the performance of their functions under the following provisions of this Act . . . ”

Those provisions are all of a fiscal nature. They relate to payments out of the £300,000,000 fund (Part VI of the Act) and to the levy of development charge (Part VII). (ii) Section 43 (1) goes on to provide:

“ . . . and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development.”

It is important to notice that before this part of the section can be used by the board, the planning authority must already have granted permission to develop the land. That means that the owner of the land, or, at any rate, some one having a sufficient interest in the land, must have applied for permission to develop it and been granted it, or a general order must have been made by the Minister granting a general permission which covers the land in question.

Much discussion took place before us as to the relation of the two parts of s. 43 (1) to one another. In my opinion, the second part is, by statutory definition, a particular instance of what the legislature had in mind in the first half.

The reason for it is this. When Parliament gives to a public body a compulsory power to acquire land, it usually specifies the purpose for which the land is to be used by that body, such as for making a railway, or housing the working classes, or some other development which is to be carried out by the public body itself. It is rare to find Parliament giving a compulsory power of acquisition, not for the purpose of the public body using the land itself, but simply for the purpose of selling it or disposing of it to some one else. Therefore, Parliament, to make clear that that was the purpose in this case—and to avoid any argument on the matter—expressly gave a particular instance of what it had in mind. It made the matter even more clear by a later sub-section, s. 43 (4), which says that the board are not themselves to develop any of the land which they acquire but are to dispose of it in accordance with the Minister's directions. I do not think, therefore, that the second part of s. 43 (1) can be considered independently of the first part. The second part specifies only an immediate purpose which the board must have. It does not mention the ultimate purpose. It says that the board may acquire land for the purpose of re-sale, but it does not say what the object of the re-sale is to be. It is rather like giving a power to acquire land for the purpose of erecting a building without saying what the building is to be used for. The immediate purpose is to erect a building, but the ultimate purpose may be to house the working classes, to provide office accommodation for municipal staff, or to keep a public house. In such a case one has to look at other parts of the Act to see whether the ultimate purpose is one which is authorised by Parliament or not. So here the second part specifies the immediate purpose, but one has to look at the first part to find the ultimate purpose. The ultimate purpose of the board must be a purpose which is "connected with the performance of their functions" under the Act. It is impossible to suppose that Parliament gave the board power to acquire land compulsorily for a purpose which was not connected with their functions. In my opinion, therefore, the first and second parts of s. 43 (1) fit together harmoniously. The board have power to acquire land for the immediate purpose of disposing of it for development on inclusive terms, but their ultimate purpose in acquiring it must be connected with the performance of their functions in levying development charge, or in making payments out of the £300,000,000 fund.

This conclusion means that the board and the Minister have misunderstood the extent of the compulsory powers which Parliament conferred on them. Both the deputy chairman of the board and the Minister have made affidavits in which they affirmed that the purpose of the board was to acquire the land

"... for the purpose of disposing of it for development for which permission had been granted under Part III of the Act on terms inclusive of any development charge."

The affidavits show that the defendants thought that that was all that was necessary, whereas it was also necessary, in my opinion, that the ultimate purpose should be connected with the performance by the board of their functions under the Act. The question then is: What purposes are so connected? Several were discussed in the course of the argument.

(i) To "test the market." Both sides agreed that the power of compulsory purchase can be used so as to enable the board to "test the market." For instance, supposing that the board wished to assess the appropriate development charge in a particular neighbourhood under s. 70 of the Act, it would be helpful for the board to "test the market" by acquiring a typical piece of land compulsorily at its agricultural value and then re-selling it by auction on inclusive terms at its building value. The difference in figures would give the proper development charge for that piece of land, which would be a guide for others in the neighbourhood. It may not be necessary at the present time for the board to "test the market" in this way, because there is a good deal of evidence still

available of agricultural values and building values dating back from the time before the Act was passed, but it may become necessary to "test the market" later on when those values are out of date, because private owners will probably not be inclined to sell on inclusive terms, *i.e.*, on terms which bind the seller to pay an unknown development charge, and thus there will be nothing to guide the board in fixing the development charge, unless it tests the market itself by acquiring the land. The purpose is, therefore, connected with the functions of the board under the Act.

(ii) *To "promote development."* It was suggested by the Attorney-General, and denied by counsel for the applicants, that the power of compulsory purchase can be used so as to enable the board to "promote development." For instance, supposing that a landowner, who owned land suitable for development, refused to sell it for the purpose, or to allow it to be developed, his attitude would mean that the board was being deprived of the development charge on it, and in those circumstances, to overcome his obstinacy, the board, it was said, should be able to acquire the land at its agricultural value and sell it on inclusive terms. Counsel for the applicants denied that this was a legitimate object for the board to pursue and I agree with him. It is no part of the board's functions to promote the development of land. That is the function of the local authorities and it is carefully delimited in the various Acts dealing with the matter. The local authorities are entitled, not only compulsorily to purchase land in order to develop it themselves, but also to purchase land for re-sale to private individuals in the interests of housing or of the proper planning of the area: see the Housing Act, 1936, s. 73 (c) (which gives a very wide power: see *Green & Sons v. Minister of Health* (No. 2) (4); and has been extended by the Housing Act, 1949, s. 1 and s. 9) and the Town and Country Planning Act, 1947, s. 38 (2) and sched. XI, setting out, as amended thereby, s. 19 (2) (5) of the Town and Country Planning Act, 1944. There are, however, no similar provisions in favour of the board. The truth is that the local authorities have knowledge of local conditions and are fitted for the task of promoting development, whereas the Central Land Board are not. The function of the board is, not to promote development, but only to fix and collect the development charge on such development as does take place. It is obvious, of course, that the amount which they fix may have an important influence on development. It may be so high as to hinder development or so low as to encourage it, but it does so only as an incident of their function of fixing the charge. It does not confer on them the function of promoting development independently of fixing the charge.

BIRKETT, J., thought that the board could compulsorily acquire land to assist a private individual to erect a memorial hall or a library in a particular spot. I cannot agree with this. If it were correct, it would mean that the board could supplant the local authorities altogether, and could, by a side wind, overthrow all the limitations which Parliament has so carefully put on compulsory acquisition for development purposes. The correct view is that it is no part of the board's functions under the Act to promote development and they are, therefore, not entitled to acquire land for that purpose. In case I am wrong about this, however, I would pause to say that the present case is not one in which the board can say that they are concerned to "promote development." This is not a case of an owner who refuses to sell his land or to allow it to be developed. The applicants are willing to sell the land at a price which they consider reasonable and which, presumably, they think they can get, if they are at liberty to ask it. For aught we know, there are purchasers available who would pay the price asked and also the development charge. Therefore, development is not being held up.

(iii) *To "collect development charge."* This brings me to what is, I think, the real reason why Parliament gave to the board a power of compulsory purchase. It was to assist them in their function of collecting the development charge. Take a case where the land is not only suitable for development but

also—and this is the point—permission to develop it has actually been granted, and then the owner demands an extortionate price for it—a price which is so high that a purchaser cannot reasonably be expected to pay the development charge as well. In such a case, the price demanded by the owner will obviously hamper the board in collecting the development charge, because any purchaser who has paid an extortionate price to the landowner will view the board's claim with righteous indignation. To avoid this, the board would be quite justified in seeking to acquire the land on reasonable terms, by agreement, if possible, and, failing agreement, to use their compulsory powers to buy it, and then re-sell it to the purchaser on inclusive terms. That seems to me to be just the kind of case which is contemplated by Parliament in s. 43 (1) of the Act. It is a purpose which is connected with the performance of their functions under the Act, because it is done to facilitate the collection of the development charge. The question, therefore, is: Did the board exercise their powers in the present case to facilitate the collection of the development charge? Here, I think, is the crux of the case. It was certainly not the major purpose, but I think that it was *one* of the purposes of the board. Permission to develop this land had already been granted, and the price demanded by the landowners was so unreasonably high that it was likely to hamper the board in collecting the development charge from the purchaser. The board, however, certainly had another purpose in mind, too. They exercised their powers to enforce their policy of "sales at existing use value only." That, indeed, was their dominant purpose. They chose this case, not so much because it assisted them to collect development charge, but much more because it was an excellent case in which to enforce their policy. It was a case which was likely to win the support of the Minister and of the courts, and it has, in fact, done so. This, however, is the very point at which we must be on our guard lest a dangerous inroad is made unawares on some of our important principles. The validity of the board's action depends on the purpose with which it was done. There were two purposes here. One purpose was to collect development charge, the other purpose—and the dominant purpose—was to enforce a policy. What is the legal position when the board has more than one purpose in mind? In the ordinary way, the courts do not have regard to the "purpose," or "motive," or "reason," of an act but only to its intrinsic validity. For instance, an employer who dismisses a servant for a bad reason may justify it for a good one, so long as he finds it at any time before the trial. Sometimes, however, the validity of an act does depend on the purpose with which it is done—as in the case of a conspiracy—and in such a case, when there is more than one purpose, the law always has regard to the dominant purpose. If the dominant purpose of those concerned is unlawful, then the act done is invalid, and it is not to be cured by saying that they had some other purpose in mind which was lawful: see *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (5), per VISCOUNT SIMON, L.C. ([1942] 1 All E.R. 149), per VISCOUNT MAUGHAM (*ibid.*, 153), and per LORD WRIGHT (*ibid.*, 166). So, also, the validity of government action often depends on the purpose with which it is done. There, too, the same principle applies. If Parliament grants to a government department a power to be used for an authorised purpose, then the power is only validly exercised when it is used by the department genuinely for that purpose as its dominant purpose. If that purpose is not the main purpose, but is subordinated to some purpose which is not authorised by law, then the department exceeds its powers and the action is invalid. The department cannot escape from this result by saying that its motive is immaterial. Just as its real purpose is crucial, so also is its true motive, because they are one and the same thing: see the *Harris Tweed* case (5), per VISCOUNT MAUGHAM ([1942] 1 All E.R. 152) and per LORD WRIGHT (*ibid.*, 161).

(iv) To "enforce a policy." It is necessary, therefore, to consider the dominant purpose of the board in this case. It was to enforce their policy of "sales at

existing use value only." They have laid it down as their policy that a landowner must sell his land at its existing use value only, and that they will, if necessary, use their powers of compulsory purchase to make him do so. It was in pursuance of this policy that they used their powers in this case. The purchaser, Mr. Rodgers, entered into negotiations with the applicants to take the land at the price asked by them. A draft agreement was drawn up between them. The purchaser's architect wrote to the board saying:

"As the [landowner] does not propose to lease this land to my client at present use value, will you please make a compulsory purchase order or lease for the benefit of my client."

Thereupon the Central Land Board intervened. They sent to the applicants a copy of their pamphlet "House 1," which set out their policy and asked them if they would adopt one of the alternatives which it contained. It was framed in the form of "Advice to sellers," but the practical effect of it was to tell the applicants that, if they left the purchaser to pay the development charge, they were to sell only at existing use value, and that, if they refused, the board would consider exercising their powers of compulsory purchase. The applicants did refuse and the board exercised their powers. Hence this action.

It may surprise some people to know that landowners are able to find purchasers who are ready to pay the building value of the land and also to pay the development charge, for it means that the purchaser has to pay development value twice over, once in the price he pays to the landowner, and again in the charge he pays to the board, subject, however, to a deduction for the amount he receives from the £300,000,000 fund. In practice, however, landowners can often get building value for the land, because houses with vacant possession are scarce and expensive to buy. The annual report of the board to Parliament shows that it often happens that, if a person is fortunate enough to get a building licence, it may be cheaper for him to pay all the costs of building a house (including the payment of building value to the landowner, development charge to the board, and the cost of labour and materials to the builder) than it is for him to buy an existing house with vacant possession. Landowners are, therefore, able to obtain a price much in excess of existing use value. This, evidently, appeared to the board to be very undesirable, and, to prevent it, the board's policy, as stated by them in their annual report

"... has been to select a certain number of typical cases in which to consider using their compulsory powers, these selected purchases being designed to serve as a warning to owners of land in general."

The question is whether it is permissible for the board to use their powers to enforce this policy. There can, I think, be no doubt that Parliament expected that, after the Act was passed, land would, in the ordinary way, change hands at its existing use value only. That is what anyone would expect from the imposition of a development charge. If a purchaser has to pay the development value to the State, he will, presumably, only pay existing use value to the landowner. That is a perfectly sound economic theory, and the Minister, with the approval of Parliament, made regulations designed to give effect to it. He declared that the development charge should be fixed at a hundred per cent. of the development value, and he did this expressly so as to secure, so far as practicable, that the land should change hands at its existing use value only: see the Town and Country Planning (Development Charge) Regulations, 1948. While, however, it is one thing to rely on economic forces, it is quite another thing to impose a policy on the people by legal sanctions. Parliament did not attempt to do so. It did not itself enact any positive law that land was to change hands at its existing use value only, nor did it authorise anyone else to make such a law. There were good reasons why it should not do so, for it

might lead to grave injustices as well as to practical difficulties. Take the injustices first. Supposing that a man bought land in 1945, before the Act, at its building value of £500, whereas its agricultural value was only £100, why should he be compelled to sell it to a private person, after the Act, for £100? Why should he not be at liberty to sell it at the same price as he gave for it, £500, assigning to the purchaser his rights out of the £300,000,000 fund? By so doing he would not be making a penny profit, and he would be putting the purchaser in the same position as he was in himself. Parliament has, indeed, recognised the validity of such an assignment by s. 64 (2) of the Act. Supposing, now, that the seller had bought the same land in 1938 as building land for £250, but it had increased in value in 1945 to £500, why should he be compelled to sell it after the Act for £100 only? Why, indeed, should he not sell it for £250, or even more, if the purchaser were willing to pay it, assigning to the purchaser his rights out of the £300,000,000 fund? There is nothing in the Act to prevent it. Again, supposing that a landowner wanted to keep a field near his house, not built on, so as to preserve its amenities, would it not be legitimate for a purchaser to offer him a higher price so as to overcome his reluctance? There is nothing in the Act to prevent it. Apart from such injustices, there would be practical difficulties which the Expert Committee on Compensation and Betterment (the Uthwatt Committee) foresaw. They said (Cmd. 6386 of 1942, p. 46):

"We are prepared to face the possibility or the probability that in order to clear the ground the intending developer may see that in some form or other the landowner gets more than he would on a compulsory acquisition. That possibility or probability cannot we think be effectively provided against, and it is not worth while making the attempt. If the parties can come to an accommodation, we see no reason why they should not do so."

These considerations lead me to the conclusion that Parliament quite deliberately did not make any positive enactment that land was to change hands at its existing use value only. They preferred to rely on the economic theory that the development charge would, as a rule, leave the developer unable or unwilling to pay more than the existing use value for the land.

The expectations of Parliament, however, have not been fulfilled. The board state in their annual report that the economic theory "is not at present working out in practice." There is, they say, "a large number of transactions at prices much in excess of existing use value." In an attempt to stop them, the board have rushed in where Parliament—I will not say feared to tread—but, at any rate, did not tread. They have issued pamphlets in which they have proclaimed their policy of "sales at existing use value only" and sought to enforce it by the use of their powers of compulsory purchase. Is this lawful? The Attorney-General says that it is. The Central Land Board are entrusted by Parliament with a compulsory power to acquire land for the purpose of re-sale on inclusive terms. They can quite truthfully affirm that that is their purpose even though they may have at the same time an ulterior object in view, as, for example, in this case, where their ulterior object is to induce the landowners of the country to conform to the policy which the board lay down, or, as the board would no doubt prefer to put it, to persuade the landowners to follow the advice which the board gives them. The Attorney-General did not shrink from this conclusion. He said that the ulterior object of the board was immaterial so long as their immediate object was to re-sell, and that the safeguard for the people was that the board could not exercise the power unless the Minister was satisfied that it was expedient in the public interest. The Minister, he said, could consider the ulterior object of the board, but the courts could not do so, and, once the Minister declared himself satisfied that it was expedient in the public interest, that was the end of the matter. For authority on this point the

Attorney-General referred to *Point of Ayr Collieries, Ltd. v. Lloyd-George* (3), and *Carltona, Ltd. v. Works Comrs.* (6).

Let us pause for a moment to see what this means. It is, in its effect though not in its terms, a claim by a government department to legislate. The policy of "sales at existing use value only" may be an excellent policy, and a policy which it is very proper to encourage by economic means, but, once the board proclaim that they will use their compulsory powers to enforce it, then it ceases to be a policy and becomes a law, and, be it noted, a law laid down by a government department and not by Parliament. Though it is called advice, it is, nevertheless, a rule of conduct which all landowners are expected to obey, and, if they disobey, it is enforced by a powerful sanction, *viz.*, compulsory purchase. A general rule of conduct of that description, so enforced, is legislation and nothing else, and, as such, it is invalid unless it has been enacted by Parliament, or by some one to whom Parliament has delegated its legislative authority. The policy is, no doubt, well conceived for the purpose of protecting purchasers from extortionate demands by undeserving landlords, but, nevertheless, I cannot allow the goodness of it to cloud my judgment as to the validity of the board's action, for, by the same token, the board and the Minister might proclaim a thoroughly bad policy to which they expect all landowners to conform and then enforce it by means of the same compulsory powers. It is axiomatic in our constitution that no government department has any right to legislate except in so far as Parliament has said that it may, and the mere fact that Parliament has granted to a department executive powers does not carry with it any right to use those powers for legislative purposes. I do not agree with the contention that, once the Minister says that he is satisfied, these courts cannot look behind his confirmation order to see what he is doing. If a government department, however well intentioned, takes on itself the functions of Parliament and seeks to legislate without any authority in that behalf, then it is the duty of these courts to intervene in these days, as they did in days past when another executive power sought to legislate by means of proclamations without the authority of Parliament: see *Proclamations' Case* (7). A little reflection will be sufficient to show how undesirable it is that executive powers should be used for legislative purposes. However good may be the intentions of the framers of this policy, nevertheless it suffers from the great drawback that it is capricious in its operation, because the government department can enforce it, or dispense with it, in any particular case just as it pleases. Take this very case. The policy of the Central Land Board of "sales at existing use value only" is not enforced in every case, but only in those cases which the board select for its enforcement. Many landowners still sell with impunity at prices much in excess of existing use values. Only a few are picked on by the board for compulsory purchase, "those selected purchases," as the board say, "being designed to serve as a warning to owners of land in general." See, however, how much a matter of chance it is. If a purchaser chooses to pay more than existing use value, he is perfectly at liberty to do so, and no one can say him nay. If he prefers to report the matter to the Central Land Board, he can do so, but it is entirely for the board to decide whether it will take action or not, and that depends on whether it considers it expedient to do so or not. The annual report of the board to Parliament shows that there is a large number of transactions at prices much in excess of existing use value, and that it is only in very few cases that the board have considered it expedient to interfere. This means that the rights of the parties do not depend, as JOHN LOCKE said that they should, on "established standing laws, promulgated and known to the people": see LOCKE'S ESSAY ON CIVIL GOVERNMENT, para. 131. They depend on the views of expediency which a government department may entertain.

The serious thing about it is that the policy of the board goes much further than Parliament authorised them to go. Their pamphlets apply to *all sales*

and purchases of land, whereas the compulsory powers on which they rely are expressly confined to land for which development permission has already been given. They have no right whatever to interfere in sales of land where no development permission has been given—and these are, of course, the great majority of sales. Yet the pamphlets give the impression that they have the power to interfere. It is quite clear that, so long as no development permission has been given, the owner of a piece of land has a perfect right to sell it at a reasonable price, even though that price is in excess of the existing use value, especially when he is ready to assign to the purchaser his claim on the £300,000,000 fund. I have already given some illustrations of this. Nevertheless, many a landowner who reads the pamphlet would feel that, if he tried to do so, the board might use their compulsory powers against him. He would, in consequence, refrain from selling at any price higher than existing use value. That is, indeed, just the result which the board intended the pamphlets to produce. Thus, innocent people may be led to forego their rights when there is no law on the statute book compelling them to do so.

My conclusion is, therefore, that the ultimate object of the board and the Minister is one which is not lawful, because it is not their function to legislate. I would willingly support their action, if I could, because I see no reason why the applicants should make an undeserved profit out of the purchaser. There is, however, a principle at stake which is far more important than the stopping of one particular piece of profiteering. The principle is that the legislative power in this country resides in Parliament and not in the government departments. If once it appears that the ultimate object of the board is one which is not authorised by Parliament, then it is the duty of the courts to interfere, for it is a principle of our law that a public authority which is entrusted with executive powers must exercise those powers genuinely for the purposes for which they are conferred. They must not be used for an ulterior object which is not authorised by law, however desirable in the public interest that object may seem to the authority to be: see *Sydney Municipal Council v. Campbell* (1), per DUFF, J., delivering the judgment of the Judicial Committee ([1925] A.C. 343), and *R. v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bell London & Provincial Properties, Ltd.* (8), per LORD GODDARD, C.J. ([1949] 1 All E.R. 725, 726). I am greatly strengthened in this view by the judgment of BIRKETT, J., who said quite clearly ([1950] 2 All E.R. 777) that the powers of the board did not enable them to exercise and enforce a policy that land should not be sold at a price greater than its existing use value. He only decided in favour of the board because he thought (*ibid.*, 778) that the enforcement of their policy was not their sole purpose in making the compulsory purchase order. It was at that point, in my opinion, that he fell into error, for, even if it was not their sole purpose, nevertheless, if it was their predominant purpose, as it clearly was, that is sufficient to invalidate their action.

After all is said and done, it comes to this. The Central Land Board required the applicants to conform to the board's policy of "sales at existing use value only," and, because the applicants refused, the board took the land compulsorily at that value. I do not think that they had any right to do this. If it is to be the law of this country that landowners are to sell their land at existing use values only, that law should be enacted by Parliament. It is often said that Parliament can do anything, but I do not know that even Parliament can so divest itself of its functions as to leave the making of such an important enactment to a government department without any consideration of it by Parliament itself. I would, therefore, be in favour of allowing the appeal.

Appeal dismissed.

Solicitors: Warren, Murton & Co. (for the applicants); Treasury Solicitor.

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

PEARLBERG v. MAY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins and Hodson, L.JJ.), April 10, 11, 1951.]

Sale of Land—Interest on purchase price—Purchaser in possession before completion—Failure to complete—Payment of purchase money into court—Liability of purchaser to pay interest from date of lodgment until completion.

On Nov. 24, 1948, P. successfully bid at an auction for certain freehold property, and signed a memorandum of the purchase affixed to the auction particulars containing the special conditions of sale. The special conditions of sale provided that the property was sold subject to the National Conditions of Sale, 14th ed., so far as not inconsistent with the special conditions, and that completion should take place on Jan. 12, 1949, when the balance of the purchase money was to be paid. If the balance was not so paid, it was to carry interest at five per cent. until payment, or the vendor, at his option, was to take the rents and profits of the property down to the actual date of completion. Clause 5 (1) of the National Conditions provided that, on failure to complete on the day fixed, the balance of the purchase money was to bear interest at the rate provided by the special conditions. The purchaser was let into possession in January, 1949. Completion was postponed by agreement until May 10, 1949, at which date the purchaser had paid part only of the purchase money. The vendor gave notice of his intention to re-sell, and on May 16, 1949, the purchaser, although in default in payment of the purchase price, issued a writ claiming specific performance. On June 9, 1949, the vendor moved the court for an order that the purchaser pay into court the balance of the purchase money and interest or that the action be dismissed. On June 21, 1949, the purchaser was ordered to pay into court the unpaid balance with interest to the day of lodgment, and in default to deliver up possession of the property to the vendor on or before July 5, 1949. The purchaser remained in possession and paid the moneys into court as directed. The vendor now claimed that the purchaser was liable to pay interest at five per cent. per annum on the balance of the purchase money during the period for which the money was lodged in court.

HELD: the effect of the order of June 21, 1949, was merely to place the purchase price and interest into the keeping of the court to abide the result of the action so that both purchaser and vendor had equitable interests in the fund, and the vendor had no such paramount interest therein that the payment-in constituted a quittance of the purchaser so as to deprive the vendor of his right to interest.

Small v. Attwood (1838) (3 Y. & C. Ex. 105) and *Humphries v. Horne* (1844) (3 Hare 276), applied.

Gell v. Watson (1825) (2 Sim. & St. 402), distinguished.

Decision of HARMAN, J. ([1950] 2 All E.R. 1022) affirmed.

AS TO PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 29, pp. 348-350, paras. 466-469, and FOR CASES, see DIGEST, Vol. 40, pp. 197-203, Nos. 1641-1697.

H Cases referred to:

- (1) *Greenwood v. Turner*, [1891] 2 Ch. 144; 60 L.J.Ch. 351; 64 L.T. 261; 40 Digest 119, 945.
- (2) *Re Cassano & MacKay's Contract*, [1920] W.N. 7; 40 Digest 119, 946.
- (3) *Morgan v. Shaw*, (1817), 2 Mer. 138; 35 E.R. 892; 42 Digest 552, 1143.
- (4) *Bramley v. Teal*, (1818), 3 Madd. 219; 56 E.R. 490; 40 Digest 294, 2539.
- (5) *Pope v. Great Eastern Ry. Co.*, (1866), L.R. 3 Eq. 171; 36 L.J.Ch. 60; 15 L.T. 239; 40 Digest 188, 1573.

- (6) *Small v. Attwood*, (1838), 3 Y. & C. Ex. 105; 160 E.R. 633; 40 Digest 349, 2964.
- (7) *Humphries v. Horne*, (1844), 3 Hare 276; 67 E.R. 386; 40 Digest 197, 1646.
- (8) *Burroughs v. Oakley*, (1815), 1 Mer. 52; 35 E.R. 596; 42 Digest 560, 1253.
- (9) *Gell v. Watson*, (1825), 2 Sim. & St. 402; 3 L.J.O.S. Ch. 199; 57 E.R. 400; 40 Digest 213, 1799.
- (10) *Roberts v. Massey*, (1807), 13 Ves. 561; 33 E.R. 404; 40 Digest 200, 1669.

APPEAL by the purchaser from an order of HARMAN, J., dated Nov. 1, 1950, and reported [1950] 2 All E.R. 1022.

The purchaser of certain freehold property claimed specific performance of two contracts for sale appertaining thereto. After the delivery of the statement of claim the vendor applied by motion in the purchaser's action for an order that the purchaser should forthwith bring into court the balance of the purchase price then due, with interest at the contractual rate up to date, and that in default the action should be dismissed. Pursuant to the order on motion the purchaser paid the balance into court, and the question arose whether, having regard to the provisions of the contracts, the purchaser was bound to pay interest on the moneys paid into court from the date of lodgment until the date of completion. HARMAN, J., held that the lodgment in court did not deprive the vendor of his right to interest at the contractual rate.

Pennycuik, K.C., and *I. S. Warren* for the purchaser.

Cross, K.C., and *Collard* for the vendor.

SIR RAYMOND EVERSHED, M.R.: This is an appeal from a reserved judgment of HARMAN, J. As the learned judge pointed out ([1950] 2 All E.R. 1025) (and it is a curious fact, although none the less a fact), although there has been a great number of what are commonly known to practitioners in the Chancery Division as "Greenwood and Turner" orders, the particular question which the present case raises never appears to have been before the court since those orders became settled. The question is this. Where a purchaser of property is put on election either of giving up possession or of paying into court the amount of the purchase price then remaining due, does that order (if the second alternative be accepted) have the effect, if the sale goes through, of discharging, from the date of the payment into court, the purchaser from any contractual obligation there may be to pay interest until actual completion on the balance for the time being remaining unpaid of the purchase price? That is the question, and as counsel for the purchaser has, I think, rightly put it, it depends essentially on the further question: Is payment into court of the balance of the purchase price such a payment as to discharge the purchaser as though for this purpose he has paid it to the vendor or his agent? The learned judge came to the conclusion that such an order did not have the effect for which the purchaser here contends, and I will say at once that I think the learned judge rightly so held.

There were two contracts here, but counsel has told us it would sufficiently deal with the matter if we treat them as one. We are concerned, then, with a contract, dated Nov. 24, 1948, for the sale by the vendor, Mr. May, to the purchaser, Mrs. Pearlberg, of a property known as Cams Hall Estate, Fareham, Hampshire, at a sum of £33,925. The completion date stated in the contract was varied and may now be taken to have been May 10, 1949. There had been a sum paid by way of deposit, and the balance of the purchase price which was due for payment on the altered completion date was (a further figure having been paid on account) £20,532 10s. In January, 1949, the purchaser was let into possession. She did not complete on May 10, 1949, and I am satisfied that

we must proceed on the view that she was then in default. Although in default, in May, 1949, she issued a writ for specific performance, and it was that action which came before the learned judge when he gave the judgment appealed from, although, as things turned out, the only question which remained for determination was this one question of the vendor's right to interest at the contractual rate. On June 9, 1949, the vendor applied by motion in the purchaser's action for an order that she should forthwith bring into court the balance of the purchase price then due with interest at the contractual rate up to date, and that in default her action should be dismissed. The order made by ROXBURGH, J., was a "Greenwood and Turner" order in this form:

"This court doth order that [the purchaser] do on or before July 5, 1949, lodge in court as directed in the schedule hereto £20,832 7s. being the unpaid balance of the purchase money and interest to June 9, 1949 (together with interest on the principal sum of £20,532 10s. at five per cent. per annum from June 10, 1949, to the day of lodgment) for the freehold property known as Cams Hall Fareham in the county of Hants and land adjoining thereto in the said writ mentioned. And in default of the plaintiff so lodging the said sum within the time aforesaid it is ordered that the plaintiff do on or before July 5, 1949, deliver up to the defendant possession of the said property."

The amount of the interest from June 9, the date of the notice of motion, to the date of lodgment was calculated and that sum was added, the figure mentioned of £20,832 7s. being the unpaid purchase price of £20,532 10s. plus interest at the contract rate up to June 9.

That was the form of the order, and, as is clear, it makes no specific reference anywhere to the effect, if any, that it was supposed to have as to interest after payment in. It is, indeed, inherent in the argument of counsel for the purchaser that it should not do so, because (according to him) payment into court involves for this purpose a discharge of the purchaser. Furthermore, as counsel observed, there is no specific reference in the order to the payment being merely a security for the due performance thereafter of the contract for purchase. I think, therefore, it is clear that the problem is a question of law, to be determined on the language and having regard to the ancestry of the "Greenwood and Turner" order, as to what is its legal effect so far as this matter is concerned.

Before I refer to the ancestry of this order, I would like to complete my reference to the facts by referring specifically to the contract, so far as it relates to interest. The contract took the form of printed particulars of sale, including certain special conditions. The first of those special conditions was as follows:

"The property is sold subject to the National Conditions of Sale (14th ed.) so far as they are not varied by or inconsistent with these conditions."

Condition No. 3 (a) provided that the date fixed for completion was Jan. 12, 1949, but, as I have said, for present purposes we can treat that as having been altered to May 10, 1949. The condition goes on to say:

"The balance of the purchase money (credit being given for the deposit of ten per cent. payable on the sale) is to be paid on that day and if not so paid will carry interest at five per cent. until payment, or the vendor at his option shall take the rents and profits of the property down to the actual date of completion."

Condition 3 (b) provided that the deposit should be paid to the vendor's agent. There is no doubt, to my mind, what the effect of that provision is. The vendor did not adopt the option of taking the rents and profits, and it, therefore, followed that, if the matter rested on the special conditions alone, the purchaser was bound, if for any reason at all completion did not take effect on the date suggested, to pay, in addition to the balance of the purchase price (that is to

say the total sum less the deposit) interest at five per cent. per annum on the balance from the day fixed down to the actual completion. That was a legal obligation on the purchaser and a legal right on the vendor. It was, however, qualified in some measure by the National Conditions of Sale which were made part of the contract, and in particular by cl. 5 of those conditions, which reads:

"(1) If from any cause whatever (save as hereinafter provided) the purchase shall not be completed on the day fixed for completion the purchaser shall pay interest on the remainder of his purchase money at the rate provided by the special conditions . . . from that day until the purchase shall actually be completed."

Sub-clause (3) of the National Conditions of Sale adds a qualification in this form:

"And provided also that, if the delay arises from the state of the title or from any cause other than the neglect or default of the purchaser, and if the purchaser (not having been let into possession of the property) places the remainder of his purchase money (at his own risk) at interest on a deposit account with any bank within twenty miles of the office of the vendor's solicitor or on any security which the purchaser may select, and gives written notice thereof to the vendor or his solicitor, then in lieu of the interest or rents and profits payable to or receivable by the vendor as aforesaid, the vendor shall from the time of such notice be entitled to such interest only as shall be actually produced by such deposit or security."

That qualifies the wide term I read as to interest in the special conditions, but it is a somewhat limited qualification. It provides that in certain circumstances a purchaser may determine his or her obligation to pay interest at five per cent. by placing the money on deposit or by investment in a security, but he or she may only take advantage of that privilege, first, if the delay in completion is not attributable to any neglect or default on his or her part, and, secondly, if he or she is not in actual possession. It is plain in the present case that the necessary conditions which would enable the purchaser to take advantage of that qualification were both absent. In the first place, the delay was due to neglect or default of the purchaser, and, in the second place, she was in possession. Therefore, when, on June 9, the vendor's application was made, and when, on June 21, the order which I have read was made, the position was that the purchaser was under a legal obligation under the contract to pay interest at the rate of five per cent. on the unpaid balance of £20,532 10s. until completion, and she remained under that obligation until completion unless the vendor's right was somehow or other taken away. I have put the matter in that form deliberately, because I think that, if, as counsel for the purchaser suggests, the result of the order of June 21 is to take that right away from the vendor—and a vendor, be it observed, who was not in default, but who was applying in order to try to get for himself protection, or to compel the defaulting purchaser to perform her bargain—it would be wrong to conclude that the contractual right was taken away from the vendor unless that result plainly emerges from the order when properly construed in the light of authority. I confess, therefore, in approaching the matter, I regard it as the duty of the court not to say that the contractual right is taken away unless beyond reasonable doubt that result follows from the form the transaction took.

Before I deal with the main point I will say something on what I have called the ancestry of this form of order. *Greenwood v. Turner* (1) was decided in 1891. The headnote is as follows:

"Where a purchaser of real estate fails to complete his contract by payment of the balance of his purchase money by the stipulated day, but, being in possession on that day, retains possession thereafter without paying interest or rent, the court will not, on a motion by the vendor in an

action for specific performance, order him to pay the balance of purchase money into court without giving him the option either of retiring from possession on a certain day or of paying the balance into court on that day, with interest from the day fixed by the contract for completion, even though the purchaser is in possession under the contract and has made no objection to the vendor's title; but that option will not be given if the purchaser has done anything to prejudice the value of the property as a security for the balance."

In that case KEKEWICH, J., had his attention drawn to some of the older authorities from which this rule of practice of the court has emerged, and since 1891 there is no doubt whatever that in circumstances such as those we find in the present case where a vendor moves for an order against the purchaser that he should give up possession, or for an order that he should have the action dismissed unless the purchase money is paid, the court adopts this form of order, giving to the purchaser the option either of paying the purchase money into court, with interest to date, or of going out of possession. In the course of his judgment, HARMAN, J., referred to another characteristic which in some cases these orders have assumed, which is to the effect that, if the purchaser elects to go out of possession, still the purchaser must pay into court the interest on the unpaid balance up to the specified date. That characteristic was criticised by ASTBURY, J., in *Re Cassano & MacKay's Contract* (2) and is criticised by HARMAN, J. I can well appreciate the grounds of the criticism, but, since it does not arise in the present case, I think it would be better that I should say no more about it. It may be that the question will arise hereafter for determination. It is sufficient for me to say that in the present case ROXBURGH, J., did not add that rider to his order, and, so far as I know, there is no compelling reason for the court to do so. Whether in particular cases it is proper to do so is a matter with which in the present case we are not concerned.

Counsel for the purchaser has directed our attention to what I am ready to assume are all the cases which constitute what I have already referred to as the ancestry of this form of order, and it is, I think, clear that this ancestry can be traced to more than one type of case. There is first of all the case in which the purchaser has no contractual right to possession. Such instances, I think, constitute the bulk of the earlier cases particularly associated with LORD ELTON, L.C., who decided a great number of them. In those cases, if the purchaser, being in possession otherwise than under his contract, was unable or unwilling to complete, he was put on election either to pay the balance of the purchase money into court or to go out. To take one example, in *Morgan v. Shaw* (3) it was said it was against conscience that the purchaser should have both the property and the purchase money. That is the first class. The second is, perhaps, a refinement of the first. It is the type of case in which there was a right to possession by virtue of the contract. Still, the result may be the same if the purchaser's behaviour on the property, although there by right under the contract, is to deteriorate its value. On the other hand, if what the purchaser has done has been to ameliorate the property, then such an order will not or may not be made, because, as was said in *Bramley v. Teal* (4), the vendor's security is increased, but where the purchaser has let down the property it may even be that no option will be given. That was so in *Pope v. Great Eastern Ry. Co.* (5) where a railway company, being entitled to possession, so managed affairs that unauthorised persons came and started to remove the houses altogether, piece by piece. In those circumstances no option was given to the company. They were simply ordered to pay the balance of the purchase price into court. There is, I think, a third distinct class of case which has contributed to the form of the order now made, which arose from the conflict between the jurisdictions of the common law courts and the courts of equity,

cases in which a vendor sought to enforce his legal rights, but the purchaser obtained or sought an injunction from the court of equity to restrain the vendor from exercising them. In those cases, as a condition of obtaining an injunction, the purchaser was put on terms, e.g., he was put to the option (as illustrated in the present type of order) either of paying into court the purchase price, or whatever other sum of money the vendor was seeking to recover, or of going out of possession. That was the condition of his obtaining a stay of the vendor's legal action. That last class of case is important when one comes to examine some of the authorities, because it is illustrated by one case which caused me a little difficulty. That is *Small v. Attwood* (6) which was referred to by SIR JAMES WIGRAM, V.-C., in *Humphries v. Horne* (7). That latter case was much relied on, and I think rightly relied on, by HARMAN, J., and it will be necessary for me to make some reference to it, and also to *Small v. Attwood* (6).

From an examination of all these numerous authorities I think it plain that, with the one exception of *Humphries v. Horne* (7) to which I have already referred, this particular point never appears to have come for consideration before the courts. Language is used of a somewhat general character. I have already referred to the formula that "it is against conscience that he should have both the property and the purchase money." I will refer to one other, an observation of LORD ELDON, L.C., in *Burroughs v. Oakley* (8) where he speaks (1 Mer. 54) of the purchase money being taken into the court's keeping. Since the particular point with which we are concerned was not before the court, I should be most reluctant to say that those observations ought to be taken as concluding the matter. In the end it comes to this question: Is the effect of a payment into court to put an end to the contractual obligation to pay interest on the purchase money so paid because it operates as a discharge of the purchaser in respect of the purchase price? In other words, is the meaning of the order that the purchase money brought in is, subject to possible defeasance in certain events, in equity the vendor's money? Counsel for the purchaser has said boldly that no other possible meaning can be given to the order; that when a vendor contracts to sell land, then in equity, subject to defeasance, the property passes to the purchaser; and so when the purchase money is so segregated and appropriated to the contract, as it is when paid into court, the equitable interest in the money similarly passes to the vendor. I do not agree with that argument. I do not think that any of the general observations in the cases can fairly be said to constitute a pronouncement one way or the other on the point, although I think that the judges who made those orders, in ordering the payment into court, were concerned—and here I am consciously following the phrase of LORD ELDON, L.C., about taking the purchase money into the court's keeping—with providing a security for the vendor which they thought the vendor was entitled to have because he was not only in the circumstances out of his money, but was out of his property too. I think *Bramley v. Teal* (4) lends support to that view.

Small v. Attwood (6) deserves a little further consideration. It is a complicated case, but I think the facts may for this purpose sufficiently be stated thus. A purchaser had made a bargain to buy certain mines, and he had become liable to pay certain instalments of interest. Those instalments did not themselves carry interest, but that does not matter. He then sought to get out of his bargain, alleging that the vendor had defrauded him, and proceedings to that end were instituted. Meanwhile, the obligations as to those instalments of interest were accruing, and two orders were made. First, as a term of the vendor not suing at law each time, the purchaser was given liberty to pay the instalments into court. A certain number, I think about seven, were so paid in. Then, as the sums began to mount up and the time passed, a further order was made suspending any further payments of instalments, and fourteen of the instalments were so suspended. Then the purchaser's action came to hearing

and he was held entitled to succeed. In other words, the court found in his favour that he had been defrauded. The instalments which had been paid into court were paid out to him. Later still the House of Lords reversed the earlier finding and held that the vendor had not defrauded the purchaser who was not entitled to get out of the contract. That created a difficult situation, and the case came before LORD ABINGER, C.B., sitting in the Court of Exchequer

A to give effect to the directions of the House of Lords to do justice according to the decision of the House. The problem arose, who was entitled to receive the interest or dividends which the instalments which had been paid into court had earned while they were there? The argument for the purchaser was that all he was liable to do was to pay the actual amount of the instalments according to the contract, and it was pointed out that, if the sums paid into court had

B fallen in value, then the vendor would be entitled to say, "You must pay the full amount of the instalments." The court rejected that argument, however, and at first reading it seemed to me to lend some support to counsel for the purchaser here for the contrary opinion taken by the court seemed to have proceeded on the view that the payment into court of those instalments must be treated as payments to the vendor and beneficially his. On further examination, however, I think that the answer which counsel for the vendor put

C forward should be accepted.

I will cite a few passages from the judgment of LORD ABINGER, C.B. He said (3 Y. & C. Ex. 139):

"It appears to me, therefore, that the investment and the accumulations were clearly made in this case for the benefit of Mr. Attwood. If they had fallen short by a fall in the price of the funds, as Mr. Knight Bruce put it, of the aggregate amount of all the instalments due to him, he might have said that he was not sufficiently paid. I will not give a definite opinion upon that subject; but it is quite consistent with my opinion as to the reverse of the case, for the court to have said to Mr. Attwood that they could not deprive him of any remedy he had at law to recover the balance, and upon this plain principle—that the plaintiffs having, by their injunction, prevented Mr. Attwood recovering the money at law, and having brought the money into court, could not bind him to take less than the amount whenever they paid it, which, by being brought into court, they had admitted he was entitled to."

F I think that amounts to this, that the court thought that those payments into court must be treated as having been paid for the benefit of whichever litigant was ultimately the victor—for the benefit (as it turned out) of the vendor, because he was the winner in the event, but that conclusion had nothing to do with any contractual right which might exist in addition and belong to either party. As the learned judge pointed out, if insufficient had been paid into

G court, there would have been nothing inconsistent with the decision in saying that the vendor would have been entitled to recover what he was entitled to at law, and so, as counsel for the vendor in the present case pointed out, if there had been a legal right to interest at a specific rate and the dividends which the instalments had earned did not amount to that specific rate, there would have been nothing in the order made to prevent the vendor (Attwood)

H suing in addition for the unpaid amount of his contractual interest.

That that is the true view, I think, is borne out by the interpretation put on this case by SIR JAMES WIGRAM, V.-C., in *Humphries v. Horne* (7), which was relied on by HARMAN, J., as being an authority which strongly supported the view taken by counsel for the vendor. In that case a purchaser, complaining that his conveyance did not comprise the whole of the property which he had contracted for, filed his bill for a conveyance of the remainder and obtained an injunction restraining the vendor from suing him for the purchase money,

part of which was afterwards ordered to be paid into court to abide the event of the suit. The bill was dismissed, it being held that the vendor was entitled to the residue of the purchase money and the interest upon it to the time of payment, although the purchase money in court had not been laid out, and, therefore, no interest had accrued thereon. The case is shortly reported and the report is defective in that it does not appear in terms, although I think it must follow from what I have said, that under the contract there was a right to some specific interest on the balance of the purchase money. As appears from the report, a sum of £337 odd was paid into court, the purchaser wrongly contending that the conveyance which he had received did not comprise all the property. When the matter had been tried out and it was held that the purchaser was wrong, the question arose whether the vendor could claim the contractual interest on this sum which had been lying in court pending the decision. SIR JAMES WIGRAM, V.-C., said (3 Hare 279):

"In order to show that the original right of the vendor to interest upon his purchase money was altered the plaintiff has relied upon a supposed rule of practice that, where purchase money is paid into court in a suit for specific performance, it becomes, without more, a payment to the vendor. The case of *Gell v. Watson* (9) shows that, if the vendor had applied to have the money laid out, the rise or fall of the funds would have been at his risk—a risk which I think in such circumstances he was not obliged to incur: *Roberts v. Massey* (10). Then, is he to lose his interest? This is not the case of a deposit by a purchaser whilst the vendor is making out his title, but a retainer by the purchaser whilst he is wrongfully asserting a claim which ultimately fails. In such a case justice requires that I should consider the payment into court as the price of an injunction and made for security only; and that I should place the defendant in the same situation he would be in by proceeding upon the judgment. I must either do this, or order the money out to the plaintiff and dissolve the injunction."

The learned judge added that *Small v. Attwood* (6) supported that view. In the course of his judgment, HARMAN, J., laid considerable emphasis on the fact ([1950] 2 All E.R. 1026) that the purchaser in *Humphries v. Horne* (7) was in possession, so that it was a parallel case. I think myself the purchaser probably was in possession, because the report refers to the fact that a conveyance had been made out to him. I think, however, there is, perhaps, this criticism, which counsel for the purchaser made of the learned judge's judgment—that it does not seem to have been, and I do not think it was, an essential part of the judgment in *Humphries v. Horne* (7) that the purchaser was in possession. The decision was based on the type of case I have mentioned, where, on an application for an injunction against the exercise of a legal right, a purchaser is put on terms, and in that case the terms were payment into court. So that, although I think the learned judge may, perhaps, have over-emphasised or wrongly emphasised the point of the purchaser being in possession, that criticism does not affect the validity of the learned judge's adoption of *Humphries v. Horne* (7) as an authority in support of his conclusion. For the reasons I have tried to explain, I think that SIR JAMES WIGRAM, V.-C., in taking *Small v. Attwood* (6) as supporting his conclusion, must have interpreted the judgment of LORD ABINGER, C.B., in the way I have done. I think, therefore, that in that case, which was decided more than a hundred years ago and, so far as I know, has never been questioned, there is authority to which this court should pay respectful attention. Although it does not bind us, I think it is right in principle.

There is one other case which I should mention before I conclude what I have to say on the argument which counsel for the purchaser has put forward. That is *Gell v. Watson* (9), referred to by SIR JAMES WIGRAM, V.-C., in *Humphries*

v. *Horne* (7). In point of brevity, *Gell v. Watson* (9) is everything the harassed practitioner might desire. The report is (2 Sim. and St. 402):

"Vendor and purchaser. Purchase money paid into court is the property of the vendor. The Vice-Chancellor [SIR JOHN LEACH, V.-C.] ruled that where a purchaser pays into court a sum of money on account and in part of the purchase money, it is the money of the vendor who is to take the chance of the rise or fall of the stocks."

If that is to be taken at its full significance, it obviously lends strong support to the principle which counsel for the purchaser has made the foundation of his argument, but I observe that SIR JAMES WIGRAM, V.-C., said (3 Hare 279) that the report must be qualified to this extent, that—as appears in SUGDEN'S VENDORS AND PURCHASERS, 14th ed., p. 640—the investment in that case was made at the request of the vendor. In other words, he asked to have a particular investment made, and from that fact it seems not unnatural to infer that he was told, when the investment was made, that since it was made at his request he must take it for better or for worse. I, therefore, agree with SIR JAMES WIGRAM, V.-C., that it cannot be treated as authority for so broad a proposition as at first sight it seems to postulate.

Those are the authorities, and I have given my reasons for thinking that they do not constitute or contain a ruling of the courts, by which we must abide, that payment into court in such circumstances as is contemplated by the present order is equivalent to payment to the vendor so as to be a quitance of the purchaser. Counsel for the purchaser has argued that, apart from any authority, no other possible meaning can be put on the order than that what has to be paid into court is not a sum of money equivalent to the purchase price, but is the purchase price or that part of it which remains unpaid, and he says that, if the purchase price is paid into court, then, by application of the rule of equity, that must be treated as done which ought to be done, and in equity the money goes to the vendor and must, therefore, be a quitance of the purchaser. I cannot accept that view. When one looks at the order and when one refers to its ancestry, I do not think such a thing was in the contemplation of those who started this convenient practice. I think the court is doing no more than to take the money into its keeping to abide the result of the action. I think both the purchaser and the vendor may fairly say they have equitable interests in it. I certainly do not think it right to say that the vendor has such a paramount equitable interest in the fund as to make it equivalent to the type of equitable interest a purchaser has in the land the vendor has agreed to sell to him. JENKINS, L.J., at the end of the reply of counsel for the purchaser, asked what would happen if, for some reason, after payment in the contract went off altogether? Counsel for the purchaser was forced, I think, to say that, apart from some court rate of interest which the payer-in would get back, any interest on the sum invested would go to the vendor—in other words, it would be wrong to deprive him of the equitable interest which, on that view of it, he acquired by virtue of payment-in. I cannot think that is right. I am unable to accept, either as a matter of principle or as one of authority, that such a payment-in is, in truth, a quitance of the purchaser. It is conceded that payment into a deposit account could not be such a quitance unless it was paid as part of the purchase price and accepted as such, and I cannot think it would be right to draw such a conclusion from an order made at the suit of the vendor against a purchaser in default, where what the vendor is seeking to do is to protect himself from further risk and to put on the purchaser some kind of screw, if I may use that phrase, so that the purchaser is compelled either to proceed and get on with the contract or to give up the property and enable the vendor to regain possession. Therefore, after so long a journey through the authorities, I come back to the way in which HARMAN, J., put it, with which I entirely agree ([1950] 2 All E.R. 1025):

"The cases, as it seems to me, throw no direct light on the subject. It is true that the principle under which these orders are made is that it is unjust for the purchaser to have both the property and the purchase money, and it is argued from this that what is paid is, in fact, the unpaid balance of the purchase money, and that lodgment of this sum discharges the payer from all liability in that respect so that there is no balance of the purchase money on which interest is leviable. It is said that there is no hardship on the vendor who chose to take this course knowing that the money would only earn the court rate of interest henceforward. Further, that it would be an injustice if the purchaser, being out of her purchase money, must still pay interest on it. I find these arguments persuasive but not decisive. It seems to me that there is nothing in that which has happened to vary the contract which provides for interest at five per cent. on the purchase money until actual completion, an event which has not yet occurred. It is true that the money lodged in court was calculated by reference to, and is in the order described as, the balance of the purchase money, and it has been so described ever since these orders were made, but it appears to me that, in fact, the contractual amount of the purchase money and interest up to the date of lodgment is merely the measure by which the court judges the just obligation of a purchaser who wishes to retain possession pending settlement of his dispute."

For the reasons which I have indicated, I think that is a right conclusion, and I, therefore, think this appeal fails and ought to be dismissed.

JENKINS, L.J.: I agree, and I am content to adopt the reasons given by the learned judge and those of my Lord without adding any further grounds of my own, which, I think, would involve repeating what has already been said.

HODSON, L.J.: I agree, and I would like to put my assent in the same form as that adopted by **JENKINS, L.J.**

Appeal dismissed.

Solicitors: *Warren & Warren* (for the purchaser); *Curwen, Carter & Evans*, agents for *Biscoe-Smith & Blagg*, Portsmouth (for the vendor).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

THOMAS v. DANDO.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 20, 1951.]

Street Traffic—Motor vehicle—Lighting—"Road"—Forecourt of shop adjoining highway, but used only by customers—No wall between forecourt and highway—Road Transport Lighting Act, 1927 (c. 37), s. 1 (1), s. 15.

On the night of Aug. 23, 1950, the respondent caused his motor car to be left unlighted on an unpaved forecourt, which adjoined his garden and shop and was his private property. The forecourt was separated from the highway by a pavement, but, at the material time, no wall or fence separated the forecourt and the pavement. The respondent's customers were in the habit of crossing the forecourt to enter his shop, but the public did not habitually use it. The respondent was charged with an offence against the Road Transport Lighting Act, 1927, s. 1 (1), in that he had caused an unlighted motor vehicle to be on a road, within the meaning of the Act, during the hours of darkness.

HELD: the unpaved forecourt on which the car was standing at the material time was not a "road" within the definition in s. 15 of the Act of 1927, and, therefore, the respondent had not committed an offence against s. 1 (1) of the Act.

Bugge v. Taylor ([1941] 1 K.B. 198), distinguished.

FOR THE ROAD TRANSPORT LIGHTING ACT, 1927, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 562.

Cases referred to:

- (1) *Bugge v. Taylor*, [1941] 1 K.B. 198; 110 L.J.K.B. 710; 164 L.T. 312; 104 J.P. 467; 2nd Digest Supp.
- (2) *Harrison v. Hill*, 1932 S.C. (J.) 13; Digest Supp.

CASE STATED by the deputy stipendiary magistrate for the city of Cardiff.

The respondent was the owner of premises comprising a shop with forecourt and garden attached and an unpaved area in front of the garden at the side of the forecourt. Between the unpaved area and the highway were the pavement and kerbstone. A wall, which had previously surrounded the area, had fallen down and been removed, and, at the material time, there was no wall or fence separating the area from the pavement. Customers were in the habit of crossing the unpaved area and forecourt to enter the respondent's shop. On the night of Aug. 23, 1950, the respondent caused his motor car to be left, unlighted, on the unpaved area, and, on Oct. 27, 1950, on an information preferred by the appellant (the assistant chief constable of Cardiff), the respondent was charged with an offence against the Road Transport Lighting Act, 1927, s. 1 (1). The learned magistrate held that the land on which the car was left was not a "road" within the meaning of the Act of 1927, and dismissed the information.

The Road Transport Lighting Act, 1927, s. 1 (1), provides:

"Subject to the provisions of this Act and of any regulations made thereunder by the Minister of Transport . . . every vehicle on any road shall during the hours of darkness carry—(a) two lamps, each showing to the front a white light visible from a reasonable distance; (b) one lamp showing to the rear a red light visible from a reasonable distance; and every such lamp shall, while the vehicle is on any road during such hours as aforesaid, be kept properly trimmed, lighted, and in efficient condition . . . It shall be the duty of any person who causes or permits a vehicle to be on any road during the hours of darkness to provide the vehicle with lamps in accordance with the requirements of this Act and of any regulations made thereunder."

Rutter for the appellant.

Baerlein for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the learned deputy stipendiary magistrate for the city of Cardiff, before whom the respondent was charged with unlawfully causing

" . . . a certain motor vehicle, to wit, a motor car, to which the Road Transport Lighting Act, 1927, applied, to be on a certain road within the meaning of that Act, called Pantbach Road, during the hours of darkness, to wit, at 10.30 p.m., in contravention of a provision of that Act, that is to say, that such vehicle did not carry two lamps each showing to the front a white light visible from a reasonable distance and one lamp showing to the rear a red light visible from a reasonable distance, contrary to s. 1 of the said Road Transport Lighting Act, 1927."

By s. 15 of the Act a "road" is defined, for the purposes of the Act, as "any public highway and any other road to which the public has access."

At the material time the respondent's motor car was standing on some unpaved ground which was the private property of the respondent and adjoined the forecourt of his shop. There was no physical interruption between the surface of this unpaved area and that of the road, but the only people who used the unpaved area were those who wanted to go to the respondent's shop. The question for the learned magistrate was whether or not this area was a "road," within the meaning of s. 1 (1) of the Act of 1927, and he held that it was not. We are asked to reverse his decision because of the decision in *Bugge v. Taylor* (1), but, in my opinion, that was a wholly different case. In *Bugge v. Taylor* (1) a motor vehicle was left unlighted in the forecourt of a hotel. Although the forecourt was the property of the hotel, it was in no way separated from the road, and the public were in the habit, not only of walking over it, but also of driving over it. In fact, the people at the hotel allowed it to be used as though it were part of the road. In his judgment LORD CALDECOTE, C.J., cited ([1941] 1 K.B. 200) a passage from *Harrison v. Hill* (2), a decision of the Court of Session in Scotland, where the Lord Justice-General (LORD CLYDE), referring to the definition of "road" in the Road Traffic Act, 1930, s. 121, said (1932 S.C. (J.) 16):

"It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user."

After saying that that passage was applicable in the case before him, by reason of the definition of "road" in s. 15 of the Act of 1927, LORD CALDECOTE, C.J., went on to say ([1941] 1 K.B. 201) that there was evidence on which the justices could find that the forecourt in the case before him was a "road," within the meaning of s. 1 (1) of the Act of 1927. That was the only reason given by the court for their decision and it was not laid down that a court is bound to find that a place is a "road," for the purposes of the Act of 1927, merely because it is not separated by a wall or rail from the highway. In the case now before us it seems to me impossible to hold that this small forecourt, which was used only by the customers of the shop, is a "road," for the purposes of the Act of 1927. After hearing the evidence, the learned magistrate came to the conclusion that it was a piece of private property which the public did not habitually use, and, in my opinion, he was justified in finding that it was not a "road," within the meaning of s. 1 (1) of the Act of 1927.

OLIVER, J.: I agree.

CASSELS, J.: I also agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co.*, agents for *S. T. Jones*, town clerk, Cardiff (for the appellant); *Amery-Parkes & Co.* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

R. v. HERITAGE.

[COURT OF CRIMINAL APPEAL (Oliver, Cassels and Sellers, JJ.), April 10, 1951.]

Criminal Law—Sentence—Corrective training—Not to run concurrently with imprisonment—Criminal Justice Act, 1948 (c. 58), s. 21 (1).

A sentence of corrective training should not be ordered to run concurrently with a sentence of imprisonment.

FOR THE CRIMINAL JUSTICE ACT, 1948, s. 21 (1), see HALSBURY'S STATUTES, Second Edn., Continuation Vol., 1948, p. 175.

APPEAL against sentence.

At Cambridge County Quarter Sessions on Jan. 5, 1951, the appellant, Leslie Heritage, was convicted of stealing a caravan and was sentenced to three years' corrective training to run concurrently with a sentence of imprisonment he was then undergoing.

W. H. Hughes for the appellant.

R. E. Seaton for the Crown.

CASSELS, J., delivered the following judgment of the court. When the court granted leave to this appellant to appeal against his sentence only, it did so because it thought that there might be a question whether or not the convictions "on at least two previous occasions," which, under s. 21 (1) (b) of the Criminal Justice Act, 1948, must be proved before an offender can be sentenced to corrective training, must be convictions prior to the particular offence which has brought the appellant before the court.

On Jan. 5, 1951, at Cambridgeshire Quarter Sessions, the appellant pleaded Guilty to having stolen a caravan on June 11, 1948. He asked that four other cases should be taken into consideration, and he was sentenced to three years' corrective training. By s. 21 (1) of the Act of 1948:

"Where a person who is not less than twenty-one years of age—(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, then, if the court is satisfied that it is expedient with a view to his reformation and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of corrective training for such term of not less than two nor more than four years as the court may determine."

Police officers stated in evidence that on Sept. 6, 1949, at Evesham, the appellant had been put on probation for the larceny as a bailee of a caravan, and that on Oct. 9, 1950, he had been sentenced to eighteen months' imprisonment for obtaining a sum of £5 by false pretences. So, when he appeared before the Cambridgeshire Quarter Sessions he was serving a sentence of eighteen months' imprisonment. For the purposes of s. 21 (1) (b) the conviction on Oct. 9 was regarded as one conviction on a previous occasion, while his being put on probation on Sept. 6, 1949, was regarded as the other, and the court came to the conclusion that the proper order to make was that the appellant should be sent for corrective training, this sentence to be served concurrently with the imprisonment. This led to some confusion, because it is impracticable that a person should be serving at the same time a sentence of imprisonment and one of corrective training. The two things are almost contradictory in terms. It has been argued that in certain circumstances the requirement as to the two previous occasions in s. 21 (1) (b) may be satisfied by showing that, although the offender is before the court for punishment for a much earlier offence,

nevertheless his subsequent offences and punishments show that, in his own interests and those of society, he ought to receive a sentence of corrective training. That may well be so, but that point does not call for decision in this case, and at the moment the court leaves it in the discretion of the courts before whom offenders come to decide whether in the circumstances of the case before them it is right to sentence a person to corrective training for an earlier offence by reason of the fact that he has subsequently been convicted the necessary number of times.

This court has come to the conclusion that if, on Oct. 9, 1950, the appellant had asked that the court should take into consideration this offence which he committed in June, 1948, he might not have stood before the Cambridgeshire Quarter Sessions to receive the sentence which is now under appeal. This court proposes to vary the sentence of three years' corrective training, and to direct that the sentence should be changed to one of eighteen months' imprisonment, to date from Oct. 9, 1950, and to run concurrently with the sentence passed upon him on Oct. 9, 1950.

Sentence varied.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Wild & Hewitson, Cambridge* (for the Crown).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

SCARR v. WURZAL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, JJ.), April 20, 1951.]

Carriage of Goods—Carriage for hire—Restrictions on area of operation—Permit to carry agricultural produce outside twenty-five miles limit—Imported unprocessed hides—Transport Act, 1947 (c. 49), s. 52 (1).

The appellant was the holder of an "A" (public carrier's) licence under the Road and Rail Traffic Act, 1933, s. 2 (2), and by s. 52 (1) of the Transport Act, 1947, it was made a condition of that licence that goods should not be carried in an authorised vehicle more than twenty-five miles from its operating centre. The British Transport Commission granted the appellant a permit under s. 52 (1) to operate vehicles outside that radius to carry, *inter alia*, agricultural produce. The appellant carried outside the radius two hundred unprocessed hides which had been unloaded from a ship.

HELD: although the hides had been imported from abroad they were agricultural produce and not commercial goods, and, therefore, the appellant had not committed any offence.

FOR THE TRANSPORT ACT, 1947, s. 52, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 768.

CASE STATED by Kingston-upon-Hull stipendiary magistrate.

At a court of summary jurisdiction sitting at Kingston-upon-Hull on Sept. 22, 1950, an information was preferred by the respondent against the appellant charging that he had failed to comply with the conditions of an "A" licence, granted under the Road and Rail Traffic Act, 1933, as amended by the terms of a permit granted in connection with the licence under Part III of the Transport Act, 1947, in that when operating a motor vehicle outside the radius of twenty-five miles from his operating centre at Selby he had carried hides from Hull to Leeds. The appellant was found Guilty and fined £2 and ordered to

pay £3 3s. costs. The permit allowed him to carry within named areas outside the radius road and building plant and materials, agricultural produce and requisites, peas, oil, rhubarb, waste paper, and empty barrels. When stopped, the vehicle was operating outside the twenty-five miles limit from Selby but within a prescribed area and was carrying from Hull to Leeds two hundred unprocessed raw hides collected from the Albert Dock, Hull, where they had been unloaded from a ship. For the appellant it was contended that the hides were "agricultural produce" within the terms of the permit. For the respondent it was contended that no carrier applying for a permit to use his vehicle for carrying agricultural produce could have thought it gave him authority to carry bundles of skins from a dock to a tannery. The magistrate, being of opinion that the hides, having come from somewhere unknown to a dock at Hull, had become commercial goods and were no longer pure and simple agricultural produce, found the offence proved.

H. C. Scott for the appellant.

J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the stipendiary magistrate for Kingston-upon-Hull, before whom the appellant was charged with failure

"to comply with the conditions of a licence granted to him under Part III of the Transport Act, 1947, and the regulations made thereunder, in that, when operating a motor vehicle outside a radius of twenty-five miles from his operating centre at Selby in the county of York, did carry thereon hides from Hull to Leeds."

The appellant, who was found Guilty of the offence and fined £2, is a haulier, holding an "A" licence, and under the Transport Act, 1947, s. 52 (1), a carrier who has an "A" licence must not carry a load on a motor vehicle more than twenty-five miles from his operating centre. The British Transport Commission, however, can give permits enabling a carrier to go more than the twenty-five miles, and in this case the commission granted him a permit to carry beyond that limit:

"Road and building plant and materials in the administrative counties of Yorkshire and Lancashire; agricultural produce and requisites in the administrative counties of Yorkshire and Lancashire and to Hyde and Stockport; peas in the administrative counties of Yorkshire and Lancashire and to Newcastle and London; oil in the administrative counties of Yorkshire and Lancashire and to Norwich; rhubarb in the administrative counties of Yorkshire and Lancashire and to Norwich, Stretford and North Walsham; waste paper from Norwich to Selby; empty barrels from Norwich to Selby."

At the material time he was carrying to a tannery unprocessed hides which he had loaded on his lorry at Hull docks. He contends that unprocessed hides are agricultural produce, and it is conceded that had these been the hides of animals which had been killed in this country, or, at any rate if the animals had been reared and fed in this country and then killed, they would have been agricultural produce, just the same as sheep fleeces would be agricultural produce if they were taken from a farmer who was sheepshearing. It is, however, said by the prosecution, and the magistrate so found, that hides brought here by ship cannot be "agricultural produce," but that they have become commercial goods. I do not think that that contention is sound. This permit enabled the appellant to carry goods brought here from foreign parts—for instance, oil and building plant and materials. Most of the soft timber used in building comes from Scandinavia or Russia and some from Canada, and so it is clear that

the appellant was granted a permit which enabled him to use his vehicles for the carriage of imported goods. That being so, we have to consider whether or not hides are agricultural produce. It seems to me that they are, just as wheat is an agricultural product. I have come to the conclusion that the appellant's contention is good and the appeal must succeed.

OLIVER, J.: I agree.

CASSELS, J.: I agree.

Conviction quashed.

Solicitors: *J. H. Milner & Son*, agents for *Mainprize, Rignall & Whitworth*, Hull (for the appellant); *Treasury Solicitor* (for the respondent).

[Reported by F. GUTTMAN, ESQ., Barrister-at-Law.]

VICTORIA MOTORS (SCARBOROUGH), LTD. AND ANOTHER v. WURZAL.

Observations of LORD GODDARD, at p. 1016, criticised. WURZAL DOWKER. [1953] 2 All E.R. 883.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Cassels, J.J.), April 19, 1951.]

Street Traffic—Stage carriage—Special occasion—Conveyance of guests once a week from holiday camp to railway station—Road Traffic Act, 1930 (c. 43), s. 61 (2)—Road Traffic Act, 1934 (c. 50), s. 25 (1).

For the convenience of the guests staying at a holiday camp, the camp company arranged that a motor coach company should supply a coach each Saturday morning to take any guests who were leaving the camp to the station. The camp company informed their guests of the arrangement, and any guest who wished to travel by the coach bought a ticket from the camp company and gave it up to the coach driver, all the money for the tickets being handed over by the camp company to the coach company. Between June 3 and Aug. 19, 1950, the coach company supplied coaches on every Saturday, as required by the camp company. On Aug. 19, 1950, a motor coach belonging to the coach company took guests from the camp to the station under this arrangement. The coach company did not hold a road service licence in respect of the vehicle under the Road Traffic Act, 1930, s. 72 (1). Each of the companies was charged with an offence under s. 72 (10), it being alleged that the coach company permitted the vehicle to be used as a stage carriage without a road service licence and that the camp company caused the vehicle so to be used, in contravention of the sub-section. The companies contended (*inter alia*) that, as all the conditions set out in the Road Traffic Act, 1934, s. 25 (1), had been satisfied, the occasion was a "special occasion" within the meaning of the proviso to s. 61 (2) of the Act of 1930, so that a road service licence was not required.

HELD: the proviso to s. 61 (2) of the Act of 1930 and s. 25 (1) of the Act of 1934 must be read together, and, for an occasion to be a "special occasion" within the meaning of the proviso to s. 61 (2) so that a road service licence would not be required, it was necessary, not only that all the conditions laid down in s. 25 (1) of the Act of 1934 should be satisfied, but also that the occasion should be a special occasion in itself, *i.e.*, an occasion of the kind illustrated in the proviso to s. 61 (1) of the Act of 1930; taking passengers every Saturday for a number of weeks from a holiday camp to the railway station was not a "special occasion" within

the meaning of the proviso to s. 61 (2) of the Act of 1930; and, therefore, compliance with all the provisions of s. 25 (1) of the Act of 1925 did not make the journey on Aug. 19, 1950, a "special occasion" so as to render a road service licence unnecessary, and the companies were guilty of the offences charged.

Observations of DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* (*ante*, p. 614), applied.

FOR THE ROAD TRAFFIC ACT, 1930, s. 61, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 625; and FOR THE ROAD TRAFFIC ACT, 1934, s. 25 (1), see *ibid.*, p. 728.

Case referred to:

- (1) *Reynolds v. G. H. Austin & Sons, Ltd.*, [1951] 1 All E.R. 606; 115 J.P. 192.

CASE STATED by Scarborough justices.

On Aug. 19, 1950, under an arrangement between the first appellants, Victoria Motors (Scarborough), Ltd., and the second appellants, Scarborough Holiday Chalets, Ltd., a motor coach belonging to the coach company was used to convey guests leaving the holiday camp of the chalet company from the camp to the railway station. Each guest who used the coach paid to the chalet company 9d. for a ticket to enable him to do so, and the chalet company handed the whole of this sum to the coach company. The coach company did not hold a road service licence in respect of the coach.

On Oct. 6, 1950, at a court of summary jurisdiction sitting at Scarborough, on informations preferred by the respondent, acting on behalf of the licensing authority for the Yorkshire Traffic Area, both the appellants were charged, *inter alia*, with having committed offences against the Road Traffic Act, 1930, s. 72, the coach company being charged with having unlawfully permitted the use of the vehicle as a stage carriage, within the meaning of the Road Traffic Acts, 1930 to 1934, on various roads in the borough of Scarborough on Aug. 19, 1950, otherwise than under a road service licence, in contravention of s. 72, and the chalet company being charged with unlawfully causing the vehicle to be so used, in contravention of the section. The appellants contended that, as they had complied with all the conditions set out in the Road Traffic Act, 1934, s. 25 (1), the vehicle must be deemed to be used on a special occasion for the conveyance of a private party; that "special occasion" was defined by s. 25 (1) of the Act of 1934, and the meaning of the words was not in accordance with any narrower definition applied before the passing of that Act; and that the coach was not being used as a stage carriage or in any such manner as to require a road service licence. The respondent contended *inter alia* that the vehicle was not being used on a special occasion as the journey was one of a series of journeys regularly undertaken on Saturdays. The justices held that the occasion was not a special occasion and found the offences proved. The appellants appealed from their decision.

Van Oss for the appellants.

J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: The first appellants (to whom I shall refer as "the coach company") are Victoria Motors (Scarborough), Ltd., motor coach proprietors, and the second appellants (to whom I shall refer as "the chalet company") are Scarborough Holiday Chalets, Ltd., a company which own a holiday camp outside Scarborough. They were each convicted before the borough justices at Scarborough (i) of an offence against s. 67 of the Road Traffic Act, 1930, and (ii) of an offence against s. 72 of the Act. It is now conceded by counsel for the respondent that the convictions under s. 67 cannot be supported,

and the question for our decision is whether they were rightly convicted under s. 72.

The case arises in this way. As accommodation at the camp was let from Saturday to Saturday, a considerable number of guests who had been spending a holiday at the camp left it each Saturday, and, for their convenience, the chalet company arranged that the coach company should supply a motor coach each Saturday to take the guests from the camp to the railway station. The fact that a motor coach would be available was announced by a loudspeaker in the camp dining-room on Friday mornings and the guests who wanted to travel by the coach would then go to the office of the chalet company and pay 9d., in return for which they received a ticket which they later handed to the driver of the coach. Thus, under the arrangement between the two companies, the chalet company collected the money for the tickets and handed it over, later, to the coach company. The chalet company informed the coach company each week how many coaches would be required, according to the number of guests travelling. Between June 3 and Aug. 19, 1950, the coach company supplied coaches on every Saturday morning, as required by the chalet company. On Aug. 19, 1950, the coach company supplied under this arrangement a motor coach in respect of which they did not hold a road service licence under s. 72 (1) of the Act of 1930. It was contended by counsel for the appellants that a road service licence was not necessary, because the occasion on which the vehicle was being used was a "special occasion for the conveyance of a private party," within the meaning of the proviso to s. 61 (2) of the Act.

The Road Traffic Act, 1930, s. 61 (1), as amended by the Road Traffic Act, 1934, s. 24, divides public service vehicles into the following classes:

- "(a) Stage carriages; that is to say motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages as hereinafter defined; (b) Express carriages; that is to say motor vehicles carrying passengers for hire or reward at separate fares none of which is less than one shilling or such greater sum as may be prescribed . . .
- (c) Contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum."

As an express carriage is one which carries people at separate fares of not less than a shilling, the vehicle in respect of which the appellants were convicted was not an express carriage, but, as it carried passengers for hire or reward at separate fares, it was, if it came within the sub-section, a stage carriage. There is this proviso to the sub-section:

"Provided that a motor vehicle adapted to carry less than eight passengers [*i.e.*, an ordinary motor car] shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares."

In other words, a taxi-cab may stand at a railway station near to a racecourse to take up passengers for a race meeting at so much a head.

By s. 61 (2):

"It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."

That sub-section covers the case of a motor coach used, *e.g.*, to take visitors to an exhibition, when the fare which is charged includes, not only the journey, but also the entrance fee to the exhibition. Section 61 (2) continues:

"Provided that a vehicle used on a special occasion for the conveyance

of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

If, therefore, a vehicle is used on "a special occasion," there need not necessarily be a road service licence in force in regard to the vehicle, as required by s. 72 (1) of the Act. The proviso to s. 61 (1), which deals with taxi-cabs and vehicles of a private nature, throws some light on what the legislature meant by "a special occasion" in the proviso to s. 61 (2). The illustrations given in the proviso to s. 61 (1), *viz.*, "race meetings, public gatherings and other like special occasions," are not exhaustive, and "a special occasion" can include, *e.g.*, a day's excursion, a Sunday school party, a mothers' union party, and taking people to a dance or a football match.

Difficulties having arisen under the proviso to s. 61 (2) of the Act of 1930, the Road Traffic Act, 1934, s. 25, imposed certain conditions in regard to the use of vehicles on special occasions for the conveyance of private parties. Section 25 (1) of the Act of 1934 provides:

"For the purposes of the proviso to s. 61 (2) of the principal Act, a vehicle shall be deemed to be used on a special occasion for the conveyance of a private party where it is used on a journey in relation to which the following conditions are satisfied, and not otherwise (that is to say): (a) arrangements for the bringing together of all the passengers for the purpose of making the journey as a party must have been made by some person, not being the holder of the public service vehicle licence in respect of the vehicle or a person acting on behalf of the holder of such a licence or a person who receives any remuneration in respect of those arrangements; (b) the journey must be made without previous advertisement to the public of the arrangements therefor; (c) all the passengers must, in the case of a journey to a particular destination, be carried to, or to the vicinity of, that destination, or, in the case of a tour, be carried for the greater part of the journey; (d) no differentiation of fares for the journey on the basis of distance or of time must be made; (e) in the case of a journey to a particular destination the passengers must not include any person who, frequently, or as a matter of routine, travels, at or about the time of day at which the journey is made, to that destination from a place from or through which the journey is made."

Counsel for the appellants contends that s. 25 (1) is definitive, and that, if all its conditions are satisfied, whatever the purpose or occasion of the journey, it becomes "a special occasion for the conveyance of a private party," within the proviso to s. 61 (2) of the Act of 1930. If his contention is right, there would seem to be a considerable *lacuna* in the Acts, as s. 25 (1) of the Act of 1934 would enable, *e.g.*, a hotel or a club to run a private omnibus service. I do not think that the construction for which he contends is right. I think that, on their true construction, the proviso to s. 61 (2) of the Act of 1930 and s. 25 (1) of the Act of 1934 should be read together, and that, for a vehicle to be used without a road service licence, not only must the occasion be a "special occasion" within the meaning of the proviso to s. 61 (2) of the Act of 1930, but the conditions laid down in s. 25 (1) of the Act of 1934 must also be satisfied. In other words, even if a private party wished to use a motor coach for a "special occasion" (*e.g.*, to watch an international match), the vehicle could not be used without a road service licence unless the conditions set out in s. 25 (1) of the Act of 1934 were also satisfied. On the other hand, an occasion of a general description does not become a "special occasion" within the meaning of the proviso to s. 61 (2) of the Act of 1930 merely because the conditions set out in s. 25 (1) of the Act of 1934 have been satisfied. Taking visitors from a holiday camp or a hotel every Saturday seems to me to be the antithesis of

a "special occasion." It is a general occasion. Counsel for the appellants contended that the protection given by the Acts to a special occasion could not be taken away because the special occasion happened on a great number of occasions. That may be so, but the occasion must be shown to be a "special occasion" in the first instance, and I do not think that the legislature could have intended a motor coach service between the camp and the station to be called "a special occasion," nor do I think that s. 61 (2) of the Act of 1930 and s. 25 (1) of the Act of 1934 can be construed in such a manner as to include a journey of that kind within the expression. It seems to me to be an occasion of the most ordinary description, and not "special" in any sense of the word.

I am fortified in the opinion which I have formed by the judgment of DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* (1), in which, though it may possibly be said that his view on this point was *obiter*—the other two members of the Divisional Court, HUMPHREYS, J., and myself, did not refer to it—the learned judge clearly showed (*ante*, p. 614) that, in his opinion, the construction which I am now placing on these sections is the right one. Confusion often arises in these cases by the use of the word "deemed," which is now frequently used by Parliamentary draftsmen. If something is to be "deemed" to be something, it necessarily means that it is not in fact the thing which it is to be deemed to be. It has to be regarded as something which it is not. Here, for the proviso to s. 61 (2) of the Act of 1930 to apply, it must first be shown that the vehicle is being used on a special occasion, and, even when the occasion is shown to be special, the proviso is only to apply if the conditions set out in s. 25 (1) of the Act of 1934 are also satisfied. In other words, even if the vehicle is being used "on a special occasion for the conveyance of a private party," the occasion is not a "special occasion" so as to exempt the vehicle from the necessity of a road service licence under s. 72 (1) of the Act of 1930 unless the requirements of s. 25 (1) of the Act of 1934 are also satisfied.

The charge which was preferred against the chalet company under s. 72 (10) of the Act of 1930, was that they

" . . . did unlawfully use the said vehicle as a stage carriage within the meaning of the Road Traffic Acts, 1930 to 1934 . . . otherwise than under a road service licence,"

and counsel for the appellants contended that there was no evidence that the chalet company used the vehicle. In my opinion, that contention completely fails. For the convenience of its guests the chalet company asked the coach company to provide the vehicle, made all the arrangements, and collected the money. It seems to me plain that, if it was not a principal, it was an aider and abettor, and, therefore, under the Summary Jurisdiction Act, 1848, s. 5, it could be charged as a principal. In my opinion, there is nothing in that point.

For these reasons, I think that the justices came to a right decision in a somewhat difficult case. The appeal fails and must be dismissed.

OLIVER, J.: I agree. I was very much impressed by the argument of counsel for the appellants based on the language of s. 25 (1) of the Road Traffic Act, 1934. I could see the force of the argument that the sub-section is in its terms definitive, but, on the whole, I have come to the conclusion that the views expressed by DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* (1), are right, and I agree with LORD GODDARD, C.J.

CASSELS, J.: I also agree.

Appeals dismissed.

Solicitors: *Jaques & Co.*, agents for *Whitfield, Bell & Smith*, Scarborough (for the appellants); *Treasury Solicitor* (for the respondent).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

W. BRUCE, LTD. v. J. STRONG (a firm), KERIL MISCHEFF, LTD. (Third Party), F. ABRAHAM & CO. (a firm) (Fourth Party), BAKIRZIS & CO., LTD. (Fifth Party).

[COURT OF APPEAL (Somervell, Singleton and Denning, L.J.J.), April 12, 13, 1951.]

Arbitration—Stay of legal proceedings—Term of contract that award condition precedent to proceedings—Action by sub-purchasers of goods the subject of the contract—Joinder of original buyer and seller as fourth and fifth parties—Failure by buyer to demand arbitration within time limit—Application for stay by seller—Arbitration Act, 1950 (c. 27), s. 4 (1).

By a contract, dated Oct. 12, 1949, the fifth party contracted through brokers to sell a consignment of figs to the fourth party, c.i.f. London. The contract was made subject to the rules of the London Dried Fruit Trade Association, by r. 21 of which it was provided that all disputes should be referred to arbitration and that the obtaining of an award should be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of the contract. By r. 21A any demand for arbitration had to be made within two months of the arrival of the goods. The fourth party re-sold the goods to the third party, who re-sold them to the defendants, who, on Nov. 3, 1949, re-sold to the plaintiffs. On Dec. 2, 1949, the goods arrived and were found to be under weight, and, on Mar. 14, 1950, proceedings were instituted in the High Court by the plaintiffs against the defendants. The third and fourth parties were made parties to the action, and the fourth party sought to bring in the fifth party, which applied under s. 4 (1) of the Arbitration Act, 1950, to stay the proceedings as between itself and the fourth party in view of the arbitration clause in the contract of Oct. 12, 1949, and also pleaded that under r. 21A a demand for arbitration would be out of time.

Held: (i) the transactions between the fourth party, the third party, the defendants, and the plaintiffs were *res inter alios acta* and irrelevant to the issue raised between the fourth and fifth parties, and the proceedings between the last-named parties should be stayed although the same subject-matter would be under consideration in both the proceedings in the High Court and those in the arbitration.

(ii) on the facts it was open to the fourth party to have demanded arbitration before the expiration of the two months specified in r. 21A, and, therefore, the fifth party was "ready and willing", within the meaning of s. 4 (1) even though it appeared that, if the dispute went to arbitration, that party would rely on the contractual time limit as an answer to the fourth party's claim.

(iii) the fact that the claim of the fourth party against the fifth party might not be ascertainable in *quantum* until the position of the other parties to the action had been determined did not render the reference to arbitration impracticable, for the arbitrator could at once hear evidence on the main part of the fourth party's claim, and, if necessary, postpone determination of the *quantum* of damages.

AS TO STAY OF LEGAL PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 1, pp. 637-644, paras. 1084-1092; and FOR CASES, see DIGEST, Vol. 2, pp. 361-377, Nos. 311-411.

Cases referred to:

- (1) *Scott v. Avery*, (1856), 5 H.L. Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 10 E.R. 1121; 2 Digest 350, 263.
- (2) *Willesford v. Watson*, (1873), 8 Ch. App. 473; 42 L.J.Ch. 447; 28 L.T. 428; 37 J.P. 548; 2 Digest 338, 168.

(3) *Smith, Coney & Barrett v. Becker, Gray & Co.*, [1916] 2 Ch. 86; 84 L.J.Ch. 865; 112 L.T. 914; 2 Digest 379, 420.

(4) *Young v. Buckett*, (1882), 51 L.J.Ch. 504; 46 L.T. 266; 2 Digest 374, 388.

INTERLOCUTORY APPEALS by the fifth party, Bakirzis & Co., Ltd., from an order of PARKER, J., dated Nov. 14, 1950, whereby he refused an application under s. 4 (1) of the Arbitration Act, 1950, to stay proceedings pending arbitration, and from an order of SLADE, J., dated Feb. 23, 1951, and made under s. 25 (4) of the Act, holding that so much of an arbitration agreement between the fifth party and the fourth party, F. Abraham & Co., dated Oct. 12, 1949, as provided that an award thereunder should be a condition precedent to the bringing of an action, should cease to have effect.

The goods which were the subject of the contract between the fifth party and the fourth party were passed on by virtue of three further transactions of sale to the ultimate purchasers, the plaintiffs, who commenced proceedings against their immediate sellers, the defendants, for breach of contract in that the goods were under weight. The defendants brought in the third party, who in turn brought in the fourth party. The fourth party contended that, in view of these proceedings, there should be no stay of action on the application of the fifth party, that no dispute had arisen between the fourth and fifth parties until after the time limit for arbitration had expired, and that the fifth party was not entitled to rely on the arbitration clause when it was clear that if the matter went to arbitration that party would plead the time limit in answer.

Beney, K.C., and *Dare* for the fifth party.

Havers, K.C., and *Ahern* for the fourth party.

SOMERVELL, L.J.: These are two appeals, one from an order made by PARKER, J., refusing to stay proceedings on an application under s. 4 (1) of the Arbitration Act, 1950, and another from an order of SLADE, J., made under s. 25 (4) of that Act. In 1949 there were four transactions of sale. The first was by one of the fifth parties to these proceedings, who on Oct. 12, 1949, sold certain goods to the fourth party. Thereafter there were successive sales of the goods, ending on Nov. 3, 1949, in a sale by the defendants to the plaintiffs. In various respects the contracts were in different terms, though it is common ground that that which was tendered by the fifth party to the fourth party conformed in general with the terms of contract and was tendered on down the chain. The contracts concerned the sale of two consignments of figs, one lot to be in six-ounce packages and the other in four-ounce packages. The goods arrived in this country on Dec. 2, 1949, and by Dec. 7 it was found that some of the packets were under weight. It is in respect of that breach that the plaintiffs ultimately sued the defendants and issued their writ on Mar. 14, 1950. The third and fourth parties were made parties to the action, and the fourth party sought to bring in the fifth party. The fifth party thereupon made an application to stay the proceedings, relying on an arbitration clause in their contract. Both the fifth and the fourth parties were members of the London Dried Fruit Trade Association, and the contract between them was made in accordance with the terms, conditions and rules of that association. Rule 46, which applies to c.i.f. contracts of which this was one, provides:

"To be admissible a claim for loss or excess in weight must be made through the broker within one month of the landing accounts for not less than eighty-five per cent. of the parcel being available."

Rule 50 provides:

"Any dispute arising out of a contract shall be determined by arbitration in London, in accordance with the rules of the association."

Rule 21 provides:

"All disputes upon questions of fact or law, arising from time to time

out of a contract, whether between the parties thereto, or between one of the parties thereto and the trustee in bankruptcy of the other party, shall be referred to arbitration. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until the same has been settled by the arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue the other or take any other legal proceedings in respect of any claim arising out of such contract."

By r. 21A it is provided:

"Any demand for arbitration shall be made in writing within two months after the arrival of the goods, or within two months of the latest date on which they should in ordinary course have arrived if shipped according to contract. Should the demand not be so made, the same shall be considered to be waived and absolutely barred."

On the application by the fifth party the learned master refused a stay, and, on appeal, that order was confirmed by PARKER, J. The fifth party appeals from that decision to this court. After PARKER, J., had refused a stay, the fourth party took out an application under s. 25 (4) of the Arbitration Act, 1950, which provides:

"Where it is provided (whether by means of a provision in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the High Court, if it orders (whether under this section or under any other enactment) that the agreement shall cease to have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute."

Apart from that provision, if there was an ordinary submission to arbitration and nothing expressly or impliedly making an award a condition precedent to an action, and if a writ was issued in respect of a subject-matter which could be claimed to be covered by the arbitration clause and the defendant desired to go to arbitration, he would have to take out a summons to stay, which he has been able to do since the Common Law Procedure Act, 1854, and *prima facie* he would be entitled to a stay. If he does not take out a summons to stay, he cannot rely on the submission to arbitration. If, however, the arbitration clause is in what is often called the *Scott v. Avery* (1) form, *i.e.*, making an award a condition precedent, he can rely in his defence on the failure to observe the condition precedent. Section 25 (4) provides that the High Court can order that the agreement to submit to arbitration shall cease to have effect as regards any particular dispute, in effect striking the condition precedent out of the contract. SLADE, J., made an order under this sub-section.

Section 27 of the Arbitration Act, 1950, provides:

"Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the High Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the provisions

of any enactment limiting the time for the commencement of arbitration proceedings, extend the time for such period as it thinks proper."

It, therefore, may still be possible for a party to apply to the court under that section to extend the time of two months within which, under r. 21A of the rules of the association, a demand for arbitration had to be made.

It appears that the only indication given by PARKER, J., as to the reason for his decision was that, if these proceedings were stayed, the same subject-matter of dispute (though not necessarily the same issues in all respects as between the different parties) would have to be litigated in the proceedings in the High Court as would have to be considered before the arbitrator. If the learned judge had in the main depended on this point I should feel that his decision could not stand. Under the existing third-party procedure it is possible, and in many cases may be very useful, to have before the court the various parties where there is a chain of contracts. It is the last man who is in possession of the goods who suffers the immediate damage, but, if the terms of the contracts are sufficiently similar, that claim can be passed up to the person who originally contracted to sell the goods. The question, however, is whether where, as here, a party to a contract has agreed that disputes under the contract shall be referred to arbitration, that party is to be deprived of that term in his contract because the person to whom he sold has re-sold to a third person who is subject to proceedings in court.

On the general question of the right to stay, LORD SELBORNE, L.C., in *Willesford v. Watson* (2) said (8 Ch. App. 479):

"Then we are told that this is an arbitrary tribunal, final and without appeal, and so forth, and that these are not fit questions to go before the arbitrator. But I think that the legislature and the Act of Parliament under which the court is now asked to act have given the answer to that argument. If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament was passed a *prima facie* duty is cast upon the courts to act upon such an agreement."

Various observations to the same effect were made in *Smith, Coney & Barrett v. Becker, Gray & Co.* (3). LORD COZENS-HARDY, M.R., said ([1916] 2 Ch. 95):

"In my opinion there is nothing in the present case which justifies a contention that this is not a fit question to be decided by the arbitrators. It is a question which falls within the express language of the arbitration clause, and in my opinion it would be very wrong for us to say that this ought not to go to the tribunal which the parties themselves have selected, but ought to be kept in this action in some form. In my opinion the judgment of WARRINGTON, J., was perfectly right on both points . . ."

SWINFEN EADY, L.J., added a general observation at the end of his judgment (*ibid.*, 97) to the same effect. PHILLIMORE, L.J., dealt with the point in rather more detail and referred to cases in which the court have refused a stay. He says (*ibid.*, 101):

"Then the only point left to consider is whether there are special reasons for preventing the parties from applying to that domestic tribunal to which they have agreed. There are cases in which the court has exercised a discretion where it has appeared that there is nothing but a point of law which will have to be decided, and where, if the matter goes to arbitrators, the arbitrators could be compelled to send the case back to the courts of law by one or other of the procedures known under the Arbitration Act. But, to begin with, in this particular case the parties have intended, if they lawfully can, to make the decision of their domestic tribunal conclusive and independent of any act by a court of law; and, secondly—and this is the matter which weighs most with me—an arbitration is necessary

whatever view is taken, because an award by the arbitrators is a condition precedent to the defendants' right to recover that sum of money to which they claim to be entitled. When the court has exercised its discretion and has refused to stay an action because it sees that the matter is merely a point of law, it has done so upon the principle that it is a more convenient mode of trial to have the matter tried directly in the action instead of indirectly by an arbitration and the statement of a case, but it has never refused to stay an action where it is obvious that the case must go to arbitration, and the case must go to arbitration where an award is a condition precedent."

As an award is a condition precedent here, on the principle laid down by PHILLIMORE, L.J., at any rate, the court should clearly grant a stay. Of course, PHILLIMORE, L.J., was not considering the point which I am considering at the moment, but does it make any difference that the buyer has re-sold and the buyer from him has re-sold again and legal proceedings have been invoked in respect of the general subject-matter of the claim which the fourth party desires to make against the fifth party? In my view, without laying down an absolute rule, because there must be a discretion to look at all the circumstances of the case, *prima facie* all these matters are *res inter alios acta* and irrelevant to the consideration of the issue raised as between the fourth and fifth parties who have agreed to arbitration. If that was the only point, I should definitely say that the proceedings should be stayed.

Counsel for the fourth party further submitted that s. 4 (1) of the Arbitration Act, 1950, cannot apply when the time for the demand for arbitration has run out. Section 4 (1) provides:

"If any party to an arbitration agreement . . . commences any legal proceedings in any court against any other party to the agreement . . . in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

Counsel argues that a party cannot say that he is "ready and willing to do all things necessary to the proper conduct of the arbitration" when at the same time he says that the time for arbitration has lapsed. If that argument were right it would mean that where there is a time limit for a demand for arbitration a party could defeat the rights of the other party to have a dispute settled by this procedure merely by waiting until the time had elapsed and then issuing his writ and saying: "You cannot say you are ready and willing because under the terms of the contract the time has elapsed." I cannot think that that is right nor that *Young v. Buckett* (4), a decision of FRY, J., to which we were referred in this connection, helps because the point there was not taken in the sense in which it is sought to be taken here. The latter words of s. 4 (1) mean that the applicant must show his readiness and willingness to do all things necessary in respect of any matter connected with the arbitration according to the contract for arbitration, but it does not mean that he cannot get a stay if the other party has allowed the time to run out. In considering the construction of those words of the sub-section, it is relevant to remember that under s. 27 the court has power to extend the period of time prescribed by this type of agreement if it has elapsed. I do not propose to lay down an absolute rule that in no circumstances might the lapse of time be a relevant consideration for a judge on an application for a stay, but I cannot accept the contention of counsel for

the fourth party that in the circumstances of this case the delay is a good ground for depriving the fifth party of its *prima facie* right to the grant of a stay.

Another point, which was argued before the learned judge, which does not appeal to me, is that in these chain contract cases, the claim as between the fourth party and the fifth party may, in certain events, be unascertainable in *quantum* until the position as between parties lower down the chain has been determined. The defendant may be entitled to add costs which he has incurred as against the plaintiff and recover them from the third party, and so on. Again I express no opinion how that would work out, but if that is right I see no difficulty in saying that the provisions as to compulsory arbitration hold good. The reason for these time limits is that the matters like short weight should be raised promptly while reliable evidence can be obtained. There would be no difficulty in the arbitrator hearing the evidence on matters of fact which can be decided promptly, and leaving over the determination of the final *quantum* of damages if it were necessary. My conclusion, therefore, is that the appeal against the order of PARKER, J., should be allowed. That being so, the decision which SLADE, J., made in favour of the fourth party under s. 25 (4), the effect of which was that the condition precedent could not be relied on, does not arise and must be set aside.

SINGLETON, L.J.: I am of the same opinion. The parties to this appeal, the fourth and fifth parties, by their contract brought in the rules of the London Dried Fruit Trade Association, of which r. 21 provides:

“All disputes upon questions of fact or law, arising from time to time out of a contract, whether between the parties thereto, or between one of the parties thereto and the trustee in bankruptcy of the other party, shall be referred to arbitration. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until the same has been settled by the arbitrators, or by the committee of appeal, as the case may be, and it is expressly agreed that the obtaining an award from either tribunal, as the case may be, shall be a condition precedent to the right of either contracting party to sue . . .”

The goods which were the subject of the contract were passed from hand to hand. When a complaint was made by an ultimate purchaser some time afterwards, proceedings were started by them and they are the plaintiffs in the action. The defendants brought in the third party and the third party brought in the fourth party. It was said at one time that it was a good reason for the master and for the judge refusing to stay the action against the fifth party that there were proceedings by and against the other parties. I am satisfied that that of itself is not sufficient to deprive those who rely on an arbitration clause of their right to have the dispute determined by arbitration. They have chosen for themselves a forum, and, *prima facie*, a duty is cast on the court to act on that agreement.

That which gave me most trouble in the course of the argument was the point raised by counsel for the fourth party under the concluding words of s. 4 (1) of the Arbitration Act, 1950. Counsel submitted that the court ought not to stay the action and direct an arbitration because it could not be said that the party asking that that should be done still remained ready and willing to do all things necessary for the proper conduct of the arbitration. Counsel referred us to the affidavit of the fifth party in support of the summons for a stay, in which it claimed to set up not only r. 21, but r. 21A, which provides:

“Any demand for arbitration shall be made in writing within two months after the arrival of the goods, or within two months of the latest date on which they should in ordinary course have arrived if shipped

according to contract. Should the demand not be so made, the same shall be considered to be waived and absolutely barred."

The concluding paragraph of the affidavit states:

"No demand for arbitration was made within the said period of two months, or at all."

Counsel submitted that a party who said: "I am not asking to have an arbitration because the time for demanding an arbitration has expired," could not be said to be and remain ready and willing to do all things necessary to the proper conduct of the arbitration. In certain cases that question might have to be considered by the judge on an application for a stay. The judge, however, has to exercise a primary discretion in the matter and he must look at the facts, and on the facts of the present case it was open to the fourth party to ask for an arbitration long before the two months expired. I do not think that the fourth party ought to be allowed to do nothing until the time has run and then say: "It is too late for an arbitration, and, therefore, there ought not to be a reference." The fourth party has entered into an agreement as to the manner of settling disputes, and by that it remains bound. I can see difficulty about the application of r. 21A in every case. If it appears that, without any fault on the part of the one who desired the dispute to be determined in a court of law, time had run before a dispute arose so that he was barred from arbitration, I think it might well be that the judge who had to consider an application of this kind would take that into consideration in determining whether or not there should be a stay. That, however, does not arise in the circumstances of this case as a dispute had arisen, I am now satisfied, well within the time and to the knowledge of the fourth party. For these reasons I agree that the appeals should be allowed.

DENNING, L.J.: A clause in this contract provided that any demand for arbitration must be made within two months after the arrival of the goods. The fourth party did not make a demand for arbitration within that time. The fifth party now says the proceedings should be stayed even though the time for arbitration has expired, and it is clear that, if the dispute does go to arbitration, this party intends to insist on the contractual time limit as an answer to the arbitration. At first I was inclined to think that the fifth party could not do that because it would be saying in one and the same breath that the claim ought to go to arbitration and also that it was unwilling to go to arbitration. The answer is that the High Court has power, in case of undue hardship, to extend the time for arbitration. That was the machinery provided by the Act for the very difficulty which has arisen. Any other view would mean that a buyer would only have to let the time pass by and he could then bring proceedings in the courts, whether there was undue hardship or not. That would be absurd because s. 27 would never have any application at all. The remedy to the fourth party, if he has one, is by application under s. 27 to extend the time for arbitration. I agree that the appeals should be allowed.

Appeals allowed.

Solicitors: *Kimbers, Williams, Sweetland & Stinson* (for the fifth party); *Stannard, Bosanquet & Michaelson* (for the fourth party).

[*Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.*]

HILL v. LUTON CORPORATION

[KING'S BENCH DIVISION (Devlin, J.), April 19, 1951.]

Applied. GROUNDSELL v. CUTHBERT
[1952] 2 All E.R. 135.

Public Authority—Limitation of action—Writ issued within period of limitation—Defect in endorsement—Service with statement of claim after expiration of period—Defect in writ cured by statement of claim—Competency of action—Limitation Act, 1939 (c. 21), s. 21 (1).

On Jan. 28, 1950, the plaintiff was injured in an accident to a motor omnibus belonging to the defendants, a public authority. The plaintiff alleged that the accident had occurred through the negligent driving of the defendants' driver, and on July 17, 1950, she issued a writ claiming "damages for negligence and breach of contract." The Limitation Act, 1939, s. 21 (1), requires actions against public authorities to be commenced before the expiration of one year from the date on which the cause of action accrued, and that period expired on Jan. 28, 1951. On Feb. 10, 1951, the writ was served together with a statement of claim. The endorsement on the writ was defective for insufficient particularity, but the statement of claim was framed in terms sufficiently precise to cure the defect in the writ.

HELD: the defect in the endorsement did not render the writ a nullity and void *ab initio*; there was no power to set aside a writ on the ground of a defective endorsement once the defect had been cured by delivery of a proper statement of claim; and, therefore, the action had been brought before the expiration of one year from the date on which the cause of action accrued within s. 21 (1).

AS TO PROCESS TO PREVENT STATUTORY BAR, see HALSBURY, Hailsham Edn., Vol. 20, pp. 783-785, paras. 1085-1087, and AS TO SETTING ASIDE WRIT, see *ibid.*, Vol. 26, p. 36, para. 52; and FOR CASES, see DIGEST, Vol. 32, pp. 536, 537, Nos. 1891-1902.

Cases referred to:

- (1) *Truslove v. Whitechurch*, (1840), 1 Man. & G. 426; 133 E.R. 399; Digest, Practice, 270, 67.
- (2) *Auster* (1914), *Ltd. v. London Motor Coach Works, Ltd.*, (1914), 84 L.J.K.B. 580; 112 L.T. 99; Digest, Practice, 73, 631.
- (3) *Marshall v. London Passenger Transport Board*, [1936] 3 All E.R. 83; Digest Supp.
- (4) *Batting v. London Passenger Transport Board*, [1941] 1 All E.R. 228; 2nd Digest Supp.
- (5) *Battersby v. Anglo-American Oil Co., Ltd.*, [1944] 2 All E.R. 387; [1945] K.B. 23; 114 L.J.K.B. 49; 171 L.T. 300; 2nd Digest Supp.
- (6) *Huntly (Marchioness) v. Gaskell*, [1905] 2 Ch. 656; 75 L.J.Ch. 66; 93 L.T. 785; Digest, Practice, 66, 570.

APPEAL by the plaintiff from an order of a master setting aside the writ in the action and the service of it.

On July 17, 1950, the plaintiff issued a writ against the defendants, a public authority, claiming "damages for negligence and breach of contract" in respect of an injury which the plaintiff had suffered as a result of an accident on Jan. 28, 1950, in which was concerned a motor omnibus, belonging to the defendants, which was alleged to have been driven negligently. On Feb. 10, 1951, *i.e.*, more than twelve months after the date of the alleged cause of the action, the writ was served together with a statement of claim. The defendants contended that the writ was bad and invalid and should be set aside, since, at the date of the expiration of the period within which an action could properly be commenced against the defendants under the Limitation Act, 1939, s. 21 (1), the endorsement was defective. The plaintiff, while admitting that the endorsement was defective for insufficient particularity, contended that the defect in the writ was cured by the statement

of claim, and that the writ was effective as an instrument for commencing the action. It was conceded by the defendants that a defective endorsement could be cured by a properly drafted statement of claim. The master set aside the writ and its service.

Van Oss for the plaintiff.

J. G. K. Sheldon for the defendants.

Cur. adv. vult.

Apr. 19. **DEVLIN, J.**, read the following judgment. This is an appeal from an order of a learned master setting aside the writ in the action and the service thereof. The point arises as a result of the operation of s. 21 of the Limitation Act, 1939, which requires actions against public authorities to be commenced within twelve months after the date of the cause of action. I am told that this sort of point has several times lately been considered in chambers and that no case has found its way to the Court of Appeal. I have been requested by counsel to deliver this judgment in open court so that, if the present case likewise does not reach the Court of Appeal, this judgment may give some guidance to practitioners.

On Jan. 28, 1950, the plaintiff was injured in an accident to a motor omnibus belonging to the defendants which is alleged to have been driven negligently by their driver. On July 17, 1950, the plaintiff issued a writ claiming "damages for negligence and breach of contract." In accordance with what is a very usual practice, the writ, which remains in force for twelve months, was not immediately served. Negotiations were, I daresay, taking place, and the issue of the writ was precautionary. On Jan. 28, 1951, the statutory time limit expired, and a fortnight or so later, on Feb. 10, the writ was served together with a statement of claim. It is admitted by the plaintiff that the endorsement on the writ was defective for insufficient particularity. It is admitted by the defendants that the statement of claim was drafted in terms sufficiently precise to cure the defect in the writ. The position is, therefore, that the writ which was issued within the proper time was defective, and that the document curing the defect was not delivered within the time limit. The defendants contend that the writ is bad and invalid and should be set aside. I do not think the argument is advanced by the use of terms such as "bad" or "invalid" or by reference to authorities in which learned judges have used those terms in relation to defective endorsements generally, but not in relation to the point which has here to be determined. Admittedly, the endorsement is defective and in that sense the writ is bad, but the first question is: What effect does the defect in the endorsement have on the writ as an instrument for commencing an action?

R.S.C., Ord. 2, r. 1, provides that every action in the High Court shall be commenced by a writ of summons which shall be endorsed with a statement of the nature of the claim made or of the relief or remedy required in the action. Order 70, r. 1, provides that non-compliance with any rule shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part. Order 70, r. 1, does not, of course, apply to any proceeding which is a nullity from the start. One of the grounds set out in the defendants' summons is that the writ is a nullity, but counsel for the defendants in his argument fought shy of the word. Apart from an unreported decision of **SLADE, J.**, in chambers, to which I shall later refer, there is no authority which declares that a defective endorsement has that effect. In *Truslove v. Whitechurch* (1) a defective endorsement was treated merely as an irregularity, and the court refused to set the writ aside, setting aside the service only. In *Auster (1914), Ltd. v. London Motor Coach Works, Ltd.* (2) the Court of Appeal considered that in the case of a special endorsement which was defective the proper course was to strike out the endorsement and not to move to set aside the writ. Both these cases are inconsistent with the notion that such a defect renders the writ a nullity. The concession of counsel

for the defendants, which is based on the *dicta* of ROMER, L.J., in *Marshall v. London Passenger Transport Board* (3) ([1936] 3 All E.R. 90), and SIR WILFRID GREENE, M.R., in *Batting v. London Passenger Transport Board* (4) ([1941] 1 All E.R. 229), that the defective endorsement was curable by a properly drafted statement of claim, really precludes the argument that the writ is a nullity. If it were a nullity, the delivery of a statement of claim could not make anything out of it: *ex nihilo nihil fit*. Nor could leave ever be given to amend a defective endorsement for, if it is a nullity, there is nothing to be amended. If a writ is a nullity, it is void *ab initio*, and all that follows on it is likewise void and no appearance or other act of waiver by a defendant can give it any virtue. That would be a drastic consequence of a defect in the endorsement which is, unfortunately, far from uncommon. I am told by the head clerk in the summons and order department that when he inspected recently the writs issued on a day taken at random, out of the twenty-eight that were issued twenty-three bore endorsements defective for insufficient particularity. I mention this in passing because it is regrettable that the requirements for this type of endorsement quite clearly laid down by the Court of Appeal fifteen years ago are still so generally ignored. Solicitors and others responsible for drafting endorsements should take warning that neglect in this respect may lead to expense and inconvenience and, perhaps, to disaster to their clients which in turn may lead to charges of professional negligence. A B C

In the unreported case to which I have referred, SLADE, J., as appears from a transcript of his judgment with which I have been furnished, did say that the writ in that case, which bore an endorsement indistinguishable from the present one, was from the outset completely void and a nullity. He declared the writ a nullity and set aside the service of it. In that case the defect was incurable, for the writ had not been served when it was in force, and the learned judge, following well-established authority, set aside the order for renewal. It was, therefore, to all intents and purposes a nullity. I am satisfied that SLADE, J., used that expression with regard to it without having to measure his words to fit the point which I have to decide. I need hardly say that, if I thought that SLADE, J., had pronounced on that point, I should be most disinclined to differ from him. In my judgment, the writ in the present case, although its endorsement is bad, is effective as an instrument for commencing the action and so remains unless and until it is set aside. D E

The main argument of counsel for the defendants is that the position must be judged at the expiry of the limitation period, that is, on Jan. 28, 1951. If on that date there is a good writ—that is, one with a proper endorsement or an endorsement that has then been cured by the delivery of a proper statement of claim—the Limitation Act, 1939, is satisfied, but, if there is then what he calls a bad writ, the axe falls and destroys the action. I do not think that the Act of 1939 is at all concerned with good or bad endorsements. The only question to be determined under the Act is whether the action has been commenced within the twelve months. In the present case, unless the writ was a nullity, the action was commenced within the twelve months, and that is why, I think, counsel is logically driven to contend that the writ is a nullity. With the contention in that form I have already dealt. Of course, although an action may be commenced by a writ with a defective endorsement, it may be that it cannot be effectively prosecuted without some amendment which can only be granted with the leave of the court. In that case quite a different set of considerations comes into play. The principle which permits the plaintiff to cure defects in his writ by a proper statement of claim operates, however, in the same way as if he were given the right to amend without leave. It is then immaterial that the amendment, whether it be made by delivery of a statement of claim or otherwise, is made after the expiry of the period. It is merely a step in the action which can be taken at any time which the rules permit. F G H

The writ is the only step in the action which is required to be taken before the expiry of the period.

There remains the fact that the writ was initially irregular. Ought it on that ground to be set aside? I gravely doubt that there is power to set aside a writ on the ground of a defective endorsement once that has been cured by delivery of a proper statement of claim. If there is, it is hardly possible to conceive of any ordinary case—that is, where no time bar is involved—where there could be any justification for its exercise. Especially, when the two documents are delivered together, it would be the height of technicality to pick holes in the one in order to fill them from material in the other. Does the intervention of the Limitation Act, 1939, between the two documents introduce any different considerations? It is settled by such cases as *Marshall v. London Passenger Transport Board* (3) and *Battersby v. Anglo-American Oil Co., Ltd.* (5) that the court will not, after the expiry of the period, permit the amendment of a writ or pleading or the renewal of a writ. There are two distinctions between that class of case and the present one. In that class the plaintiff is in the first place seeking the aid of the courts and the courts have determined that they will not grant it if to do so would be to deprive the defendant of a defence otherwise open to him. Here the plaintiff, as I have pointed out, needs no assistance from the court, for the rules allow him as of right to deliver the statement of claim with his writ and thereby to remedy without leave any defect in the latter. It is the defendant who has to come to the court to ask it, in effect, to deprive the plaintiff of that right by setting aside the writ. To set aside a writ for a defective endorsement is a very strong thing to do. I have not been referred to any case where it has been done, even where the defect remained uncured, except *Huntly (Marchioness) v. Gaskell* (6) where the court regarded the endorsement as tantamount to an abuse of process. In the other cases, which I have already considered, where there has been an irregular endorsement, the court has refused to set the writ aside.

Secondly, the Limitation Act, 1939, s. 21, enables the defendant to know with finality at the end of the period or on the service of a writ issued within the period, whichever be the later, what cause of action he has to meet. That would be defeated and the Act emasculated if thereafter new causes of action could be freely introduced. The defendant cannot expect, however, to know his position before the writ is served, and it cannot make the slightest difference to him whether he learns of it then from one document or from two. For these reasons, if I have any discretion in the matter, I should not exercise it to set aside the writ. I have not got to consider, and have not considered, the course which should be followed if the application to set aside had been made before delivery of the statement of claim, and nothing that I have said in relation to the exercise of the power to set aside should be construed as applying one way or the other to that situation.

I think, therefore, that the master's order was wrong. It is right that I should say that the matter was not fully argued before him because at that time, when both sides had not had the opportunity of examining the transcript of the judgment of SLADE, J., the point was thought to be concluded by the *dicta* to which I have referred.

Appeal allowed.

Solicitors: *Machin & Co.* (for the plaintiff); *William Charles Crocker* (for the defendants).

[Reported by F. A. AMIES, ESQ., Barrister-at-Law.]

R. v. LONDON SESSIONS APPEAL COMMITTEE. *Ex parte*
WESTMINSTER CITY COUNCIL.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Streatfeild, JJ.), April 27, 1951.]

Street Trading—Licence—Cancellation—Reversal of council's decision by magistrate—Right of council to appeal to quarter sessions—"Person aggrieved"—London County Council (General Powers) Act, 1947 (c. xlvii), s. 64. A

No appeal lies at the instance of a borough council under s. 64 of the London County Council (General Powers) Act, 1947, against a decision of a court of summary jurisdiction varying the decision of the council to cancel a street trader's licence.

Doubted whether the decision of the court of summary jurisdiction was an "order" within s. 64. B

AS TO LICENSING OF STREET TRADERS IN THE METROPOLIS, see HALSBURY, Hailsham Edn., Vol. 31, p. 693, para. 1019; and FOR CASES, see DIGEST Supplement, Vol. 26, pp. 34, 35, Nos. 1435a-1435k.

Cases referred to:

- (1) *Fulham Metropolitan Borough Council v. Santilli*, [1933] 2 K.B. 357; 102 L.J.K.B. 728; 149 L.T. 452; 97 J.P. 174; Digest Supp. C
- (2) *Stepney Borough Council v. Joffe*, [1949] 1 All E.R. 256; [1949] 1 K.B. 599; [1949] L.J.R. 561; 113 J.P. 124; 2nd Digest Supp.
- (3) *Ex p. Sidebotham. Re Sidebotham*, (1880), 14 Ch.D. 458; 49 L.J. Bcy. 41; 42 L.T. 783; 4 Digest 225, 2114.
- (4) *R. v. London County Keepers of the Peace & JJ.*, (1890), 25 Q.B.D. 357; *sub nom. R. v. London JJ., Ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 26 Digest 460, 1760. D

MOTION for order of *mandamus*.

The cancellation by the applicants, the Westminster City Council, of certain street-trading licences having been reversed on appeal by a metropolitan magistrate, the council sought to appeal to quarter sessions against that decision as being "aggrieved persons" within s. 64 of the London County Council (General Powers) Act, 1947. Quarter sessions held that they had no jurisdiction to entertain the appeal, and the council moved for an order of *mandamus* ordering the appeal committee of quarter sessions to hear the appeal. E

Sir Godfrey Russell Vick, K.C., and *Vernon Gattie* for the council.

Curtis-Bennett, K.C., and *J. C. G. Burge* for the respondents. F

LORD GODDARD, C.J.: Counsel for the Westminster City Council moves for an order of *mandamus* addressed to the appeal committee of London Sessions, directing them to hear an appeal against an order of the magistrate at Bow Street by which he reversed a decision of the council with regard to the cancellation of certain street-trading licences. By s. 25 (1) of the London County Council (General Powers) Act, 1947, it is provided: G

"Any person aggrieved by the refusal of a borough council to register him as a registered street trader or to grant or renew an annual licence or by the cancellation by a borough council of his registration as a registered street trader or by the revocation or variation by a borough council of an annual licence or by any prescription made by a borough council under s. 21 (5) (annual licences) of this Act may appeal to a petty sessional court and on any such appeal the court may confirm reverse or vary the decision of the borough council and may award costs . . ."

By s. 64: H

"Any person deeming himself aggrieved by any conviction or order by a court of summary jurisdiction under any provision of this Act may appeal

to the next practicable court of quarter sessions under and according to the provisions of the Summary Jurisdiction Acts."

It has been said by this court in *Fulham Metropolitan Borough Council v. Santilli* (1), and *Stepney Borough Council v. Joffe* (2), that the widest possible powers are given to the court of summary jurisdiction before whom the appeal is brought and that the appeal to that court is not only on law but also on fact—in other words, the petty sessional court is substituted for the borough council and can make any order which seems right to it. In the present case, the council having cancelled the registration of certain street traders, those traders appealed, and the magistrate reversed the decision of the council.

The question is whether the council have any right of appeal to quarter sessions under s. 64. I adhere to the opinion which I expressed in *Stepney Borough Council v. Joffe* (2), where I said ([1949] 1 All E.R. 259):

"It is, perhaps, not without importance to notice that by s. 64 of the Act from the magistrate's decision a further appeal is given to quarter sessions, which would certainly enable the trader, though not, I think, the borough council, to appeal."

In my opinion, for several reasons, the borough council was not given an appeal by s. 64. First, wherever "borough council" is mentioned in this Act it is always mentioned as the "borough council" and persons who may be affected by the orders of a council are mentioned as a "person." The right of appeal given by s. 64 is to "any person deeming himself aggrieved." In view of the structure of the Act and the expressions used in the earlier sections, if it had been intended to give a borough council an appeal, I should have expected that the Act would have said: "Any person or any borough council deeming themselves aggrieved." Secondly, I do not think that it can be said that, because the borough council's decision has been reversed by the magistrate, that makes the borough council a person aggrieved for the purpose of s. 64. The words of the section are not "any person affected by any order," but "any person aggrieved by any order." I am willing to assume for the purpose of the present case, although I am not convinced of it, that the magistrate's decision reversing the decision of the council may be regarded as an order. The decision reads: "It is ordered that the decision [of the council] be reversed." The best definition of the expression "aggrieved" is in *Ex p. Sidebotham. Re Sidebotham* (3), where JAMES, L.J., said (14 Ch.D. 465):

"But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

It cannot be said that the borough council comes within those words.

In *R. v. London County Keepers of the Peace & JJ.* (4), which was concerned with the question whether the prosecutor in a quasi-criminal case under the Highway Act, 1835, was a person aggrieved, the court held that he was not and had no right of appeal under s. 105 of that Act. It was put that he might be annoyed at finding what he thought was a breach of the law was not a breach, but, LORD COLERIDGE, C.J., said (25 Q.B.D. 361):

"The section does not give an appeal to anybody but a person who is by the direct act of the magistrate 'aggrieved'—that is, who has had something done or determined against him by the magistrate."

Under the statute we are now considering the court of summary jurisdiction has to take into account the same matters as the borough council, and, if the court thinks the cancellation of the licence is not justified, it can restore the licence to the street trader. If the court refuses to grant a licence, the street

trader is a person aggrieved, because his livelihood is affected, and an order is made directly affecting him. In my opinion, the order did not directly affect the council in such a way as to make it a "person aggrieved" within the meaning of the section. For these reasons, I think London Sessions were right in holding there was no appeal given to the council, and, therefore, this application for an order of *mandamus* should be refused.

CROOM-JOHNSON, J.: I am of the same opinion. The jurisdiction conferred on the borough council by the Act of 1947 is to act as a tribunal in connection with the granting or suspending or restoring of the licences of street traders. The council having come to a conclusion, there is a right of appeal by a person whose livelihood has been interfered with and who is aggrieved by the order which the council has made. It has been argued that, if the right of appeal is exercised and the matter comes before a court of summary jurisdiction and that court comes to a different conclusion, that gives the borough council a right of appeal under s. 64 of the Act, because they become aggrieved by reason of their order having been varied or set aside. I should want very plain language and very cogent arguments before I should be disposed to say that the tribunal whose order has been set aside thereupon became persons "aggrieved" so that they can appeal against the order of the court of summary jurisdiction. I share my Lord's doubts whether in the present case there ever was an order within s. 64, although the form of the decision as drawn up uses the word "order." Finally, the distinction which is drawn in the Act between the borough council and a person aggrieved, seems to me to be well-nigh decisive of the whole matter. I think quarter sessions came to a right decision.

STREATFEILD, J.: I agree.

Order discharged.

Solicitors: *Allen & Son* (for the council); *Kingsley Napley & Co.* (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

Affirmed. C.A. [1951] 2 All E.R. 910.

PAYNE v. RAILWAY EXECUTIVE.

[KING'S BENCH DIVISION (Sellers, J.), April 11, 23, 1951.]

Damages—Measure of damages—Service pension—Exclusion in assessment.

The plaintiff, while serving in the Royal Navy, suffered serious injuries in a railway accident for which the defendants admitted liability. As a result of his injuries his earning power had been permanently reduced, and he had been invalided out of the Royal Navy and granted a disability pension under the Royal Warrant, 1946, of £2 16s. 3d. a week.

HELD: in assessing the damages attributable to loss of earnings the disability pension must be disregarded.

AS TO DIMINISHED DAMAGES, see HALSBURY, *Hailsham Edn.*, Vol. 23, p. 725, para. 1017; and FOR CASES, see DIGEST, Vol. 36, pp. 140, 141, Nos. 943-946, and Digest Supp.

Cases referred to:

- (1) *Hicks v. Newport, Abergavenny & Hereford Ry. Co.*, (1857), 4 B. & S. 403, n.; 122 E.R. 510; 36 Digest 141, 945.
- (2) *Carling v. Lebbon*, [1927] 2 K.B. 108; 96 L.J.K.B. 515; 137 L.T. 255; 36 Digest 141, 944.

(3) *Baker v. Dalgleish S.S. Co., Ltd.*, [1922] 1 K.B. 361; 91 L.J.K.B. 392; 36 Digest 140, 943.

(4) *Bradburn v. Great Western Ry. Co.*, (1874), L.R. 10 Exch. 1; 44 L.J.Ex. 9; 31 L.T. 464; 36 Digest 127, 839.

(5) *Shearman v. Folland*, [1950] 1 All E.R. 976; [1950] 2 K.B. 43.

ACTION for damages for negligence.

A The plaintiff, while serving in the Royal Navy, was seriously injured in a railway accident. The defendants admitted liability for the injuries, but contended that in assessing damages for the loss of earning power the disability pension of £2 16s. 3d. a week, which the plaintiff had been awarded after being invalided out of the Royal Navy as a result of the accident, should be taken into account.

B *Fox-Andrews, K.C.*, and *J. Stevenson* for the plaintiff.

H. H. Edmunds for the defendants.

Cur. adv. vult.

Apr. 23. **SELLERS, J.**, read the following judgment. The defendants have admitted liability in this case and the court has only to assess the damages. The plaintiff's claim gives rise to the question whether a pension paid to him under the Royal Warrant, 1946 (Cmd. 6489), in respect of the injuries received by him in the accident in question should be taken into account or should be excluded from consideration in calculating the damages to be awarded.

D On Apr. 17, 1948, the plaintiff was serving in the Royal Navy. His ship had arrived at Rosyth, and he was granted leave. He left Scotland by train for his home at Swindon. At Winsford, Cheshire, the train met with a serious accident, and he was badly injured. His injuries and his medical history from that date have been agreed in a detailed medical report, and no issue of fact arises. At the end of September, 1949, the plaintiff was discharged from hospital and invalided out of the Royal Navy, being granted a hundred per cent. disability pension of £2 5s. a week, the disability being wholly due to the injuries received in the accident. After a period of special training he became a telephonist with the General Post Office at Swindon, and since early 1950 he has been doing night duty for which he has been paid £4 14s. 6d. He can do this sedentary work, and there is every reason to think that it will continue to be available with such benefits of pension and otherwise as are appropriate to a civil servant in his grade and occupation. The plaintiff's disability was later assessed as ninety per cent. and his personal pension reduced to £2 0s. 6d. E a week, but, as he was married in January, 1950, he is now receiving a further 9s. 0d. in respect of his wife and 6s. 9d. for the child which was born recently, a total of £2 16s. 3d. F

The submission on behalf of the defendants was that this substantial pension, if taken into account, wipes out, or, at least, greatly reduces, any difference between the plaintiff's weekly income in his disabled condition and what he would have earned on an average after he left the Royal Navy on the completion of the period of service for which he had been called up. His work and earnings before he joined the forces in 1947 give some indication of what would have been his earning capacity and his probable industrial work if uninjured. After leaving school at fourteen the plaintiff assisted his father in the work of spraying with paint high buildings, mainly barns and other farm buildings. The father H was trying to build up such a business for himself and his son, and had acquired the equipment for it. Unfortunately, the father was injured, the son was called up, and the project was abandoned, but I think the plaintiff showed aptitude for the work and might well have resumed employment of that character but for his injuries. Such employment would have given him in all probability substantially higher wages than he is likely to earn in his disabled state. The question, therefore, whether the plaintiff's pension has to be taken into consideration or not is of fundamental importance. If the pension is to be excluded

from consideration a substantial sum will have to be awarded for loss of earnings over many years, as the plaintiff is now only twenty-two years old.

In support of the defendants' argument that the pension should be taken into account, reliance was placed on the many authorities dealing with the assessment of damages under the Fatal Accidents Act, 1846. Damages to be awarded under that Act must take into account any pecuniary benefit accruing to the dependant in consequence of the death of the deceased except where the two statutory directions to the contrary apply. By the Fatal Accidents (Damages) Act, 1908, any sum paid or payable on the death of the deceased under any contract of assurance or insurance is to be disregarded, and by the Widows, Orphans and Old Age Contributory Pensions Act, 1936, any widow's pension, additional allowance, or orphan's pension payable under the Act is similarly to be disregarded. Previously, there had been taken into account in reduction of damages insurance moneys: *Hicks v. Newport, Abergavenny & Hereford Ry. Co.* (1), and a widow's pension: *Carling v. Lebbon* (2), and it is still the rule in such cases that a pension from the Crown should be taken into consideration notwithstanding that the pension is dependent on the bounty of the Crown: *Baker v. Dalgleish S.S. Co., Ltd.* (3). All these cases relate to assessments of damages under s. 2 of the Fatal Accidents Act, 1846, which provides that

" . . . the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought . . . "

As far back as 1874 a distinction was drawn by BRAMWELL, B., between that assessment and a claim such as the present. In *Bradburn v. Great Western Ry. Co.* (4) the court refused to deduct some accident insurance money from the damages otherwise recoverable by the injured plaintiff. PIGOTT, B., held (L.R. 10 Exch. 3) that

" . . . there is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract, which is the cause of his receiving it,"

and recently, in *Shearman v. Folland* (5), ASQUITH, L.J. ([1950] 1 All E.R. 978), quoted from MAYNE ON DAMAGES, 11th ed., p. 151:

"Matter completely collateral, and merely *res inter alios acta*, cannot be used in mitigation of damages."

He pointed out that it is easier to formulate the maxim than to apply it, that insurance affords a classic example of something which the law treats as collateral, and that, if the wrongdoer were entitled to set off what the plaintiff was entitled to recoup under his policy, he would, in effect, be depriving the plaintiff of the benefit from the premiums paid and appropriating the benefit to himself.

The plaintiff has become entitled to the pension by reason of his naval service, it being one of the benefits such service affords. The pension would have been paid if the accident had been without any negligence on the part of the railway company. It was argued for the plaintiff that a pension must be disregarded in making the assessment just as insurance is to be disregarded, and that as a matter of principle a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was serving in the Royal Navy at the time and had consequently received a pension. I agree with that contention. Just as the wrongdoer cannot appropriate to himself the benefit of the premiums paid by the injured party to cover accident risks, so he cannot, I think, appropriate the benefits accruing from the injured party's service which similarly

entitles him to those benefits. If A and B are similarly injured in the same accident and each, by reason of service in the forces, receives a pension of £2 10s. weekly in respect of those injuries, and if, on leaving the forces, each earns £5 weekly, then, if A's earning capacity, if uninjured, is assessed at no more than £5 he would receive from the wrongdoer who caused his incapacity full compensation, and, in addition, would receive the pension of £2 10s. weekly, but, if B's earning capacity, if uninjured, was assessed at £7 10s. weekly he would receive just the same damages as A, and would be wholly uncompensated by the wrongdoer for his loss of the additional earning power if the pension has to be taken into account. I do not apprehend that it was, or could be suggested, that the pension could be applied in reduction of damages for pain and suffering or loss of the enjoyments of life.

In my opinion, the plaintiff's damages must take into account a probable loss of earnings, and no account should be taken, in assessing that loss, of the pension the plaintiff is receiving. [His LORDSHIP assessed the damages for loss of earnings at £3,000 and for injuries, pain, and suffering at £2,500, and gave judgment for the plaintiff for £5,500 with costs].

Judgment for the plaintiff.

Solicitors: *Pennington & Son*, agents for *Lemon, Humphreys, Parker & Mather*, Swindon (for the plaintiff); *M. H. B. Gilmour* (for the defendants).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re ADAMS (deceased). SURSHAM v. FARQUHARSON AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), April 19, 1951.]

Legitimation—Legitimatio per subsequens matrimonium—Child born before annulment of mother's first marriage for incapacity—Legitimacy Act, 1926 (c. 60), s. 1 (2)—Law Reform (Miscellaneous Provisions) Act, 1949 (c. 100), s. 4 (1).

By her will, dated July 18, 1921, a testatrix, who died on Nov. 20, 1924, directed her trustees *inter alia* to set aside a fund, to be called N.'s trust fund, and to pay the income thereof to her son N. during his life, and after his death to pay both capital and income of the fund to his lawful child or children living at his death equally if more than one. If N. should die without leaving a child living at his death, the testatrix directed that N.'s trust fund should be paid to her daughter. On Jan. 11, 1937, N. married F., but in May, 1938, they separated. On May 7, 1939, F. gave birth to a child, whose birth she registered, naming A. as the father. In 1940 and 1942 F. bore further children, whose birth certificates did not show the name of the father. On Aug. 26, 1947, a decree annulling the marriage between N. and F. on the ground of N.'s incapacity to consummate it was made absolute. On Sept. 24, 1947, F. and A. were married and the births of F.'s three children were re-registered under the Legitimacy Act, 1926, s. 1 (1), as the children of F. and A. On Mar. 24, 1950, N. died without having re-married. N.'s trust fund was claimed on behalf of F.'s children having regard to the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4 (1).

HELD: section 4 (1) had no retrospective effect so as to apply to the consequences of a decree of nullity pronounced before the Act came into operation as regards the legitimacy of F.'s children; in any event, on the evidence,

had the marriage between N. and F. been dissolved and not annulled, the children would not have been N.'s legitimate children; and, therefore, s. 4 (1) did not apply so as to entitle the children to N's trust fund.

EDITORIAL NOTE. The Matrimonial Causes Act, 1950, s. 9, replaces (with effect from Jan. 1, 1951) the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4 (1), which is applicable in this case. Section 9 does not differ in any material respect from the repealed s. 4 (1).

FOR THE LAW REFORM (MISCELLANEOUS PROVISIONS) Act, 1949, s. 4, see HALSBURY'S STATUTES, Vol. 42, p. 574.

Cases referred to:

- (1) *Newbould v. A.-G.*, [1931] P. 75; 100 L.J.P. 54; 144 L.T. 728; Digest Supp.
- (2) *Re Bromage*, [1935] Ch. 605; 104 L.J.Ch. 299; 153 L.T. 313; Digest Supp.

ADJOURNED SUMMONS to determine whether, on the true construction of the will of the testatrix and in the events which had happened, having regard to the Law Reform (Miscellaneous Provisions) Act, 1949, s. 4 (1), certain infants were entitled to a trust fund subject to the trusts of the said will as the legitimate children of Norman Adams, deceased, the son of the testatrix, notwithstanding that the marriage of the said Norman Adams with the mother of the infants had been annulled on the ground of his incapacity to consummate it.

Denys B. Buckley for the plaintiff, one of the trustees of the will of the testatrix.

A. F. M. Berkeley for the first defendant, the daughter of the testatrix.

Rink for the remaining defendants, the infants.

DANCKWERTS, J.: By her will, dated July 18, 1921, after the appointment of executors and a specific bequest of jewellery, clothing and personal effects, the testatrix devises and bequeaths all the rest and residue of her estate whatsoever and wheresoever unto and to the use of her executors and trustees, their heirs, executors and administrators according to the nature thereof on certain trusts, first, to pay the funeral and testamentary expenses, by cl. 6 to permit her husband to have the use and enjoyment of a leasehold house for his life or until he re-marries, and by cl. 7 as from the date of her death to pay the remainder of the income of her estate during her husband's life or until he re-marries to her son, Norman, and her daughter, Margaret, the first defendant, in equal shares. By cl. 8 the testatrix directs that, if her husband re-marries, her trustees, as from the date thereof and until his death, are to pay all the income from her estate to her said son and daughter in equal shares. She directs her trustees, after the death of her husband,

"to set aside and retain out of my estate such an amount thereof as will equal, as near as possible, the net capital amount my daughter will on the death of my husband inherit from her paternal grandmother's estate and the portion of my estate so set aside is to be called Norman's trust fund."

The fact was that, as a result of that clause, the whole of the residuary estate of the testatrix became set aside as Norman's trust fund, and, consequently, it is only necessary to consider the subsequent provisions of the will relating to Norman's trust fund. By cl. 11 the testatrix directs that after the death of her husband her trustees shall pay the income of Norman's trust fund to her said son, Norman, for his life. By cl. 12, after the death of her said son, Norman, she directs her trustees to pay the said Norman's trust fund, both capital and income, to his lawful child or children living at his death, in equal shares if more than one. By cl. 13 she provided:

"If my said son shall die without leaving a child living at his death then I direct my trustees on the death of my son Norman to pay the

said Norman's trust fund both capital and income and all accretions thereto to my said daughter for her separate use and benefit."

It is on those two clauses, 12 and 13, that the question which I have to decide arises: Did the son, Norman, leave a lawful child or children living at his death, or did he die "without leaving a child living at his death," in which case the first defendant, Margaret, claims to be entitled to Norman's trust fund.

The testatrix died on Nov. 20, 1924, and probate of her will was granted on Feb. 6, 1925. Her husband re-married on Sept. 24, 1936, and died on Jan. 13, 1944. On Jan. 11, 1937, the son, Norman, was married to a lady whom I will call Freda. Apparently, according to the evidence which is not disputed or tested in cross-examination in any way, in May, 1938, *i.e.*, over a year later, they separated. Another year later, on May 7, 1939, Freda had a son. The birth certificate in relation to that child shows that he was registered by the mother, but, instead of Norman's name being inserted as the name of the father, the name of another man was inserted. Two further children were born to Freda, each of them daughters, on Oct. 29, 1940, and July 19, 1942, and in each of those two cases the birth certificates show that the mother registered the birth of the child and the space for the father's name was left blank. On July 10, 1947, a decree *nisi*, which was made absolute on Aug. 26, 1947, was made by the Probate, Divorce and Admiralty Division of the High Court annulling the marriage between Freda and Norman on the ground of the incapacity of Norman to consummate the marriage. On Sept. 24, 1947, Freda married the gentleman whose name appears on the birth certificate of Freda's first child, and thereupon the three children's births were re-registered pursuant to the provisions contained in the Legitimacy Act, 1926, as the children of Freda and the gentleman in question, on the footing that they were made legitimate by that marriage, and, therefore, also on the footing that previous to that marriage they were illegitimate. On Mar. 24, 1950, Norman died without having married again.

In *Newbould v. A.-G.* (1) it was held by LORD MERRIVALE, P., that a final decree annulling a marriage on the ground of the incapacity of one of the parties to it to consummate it has retrospective operation, so that the decree amounts to a declaration that there is no marriage. The contract of marriage may be impeached and declared null and void if there was incapacity to implement it, notwithstanding that in certain cases the right to complain to the court may be lost by reason of the conduct of the party complaining. Accordingly, it was held that in a case where a marriage has been annulled for that reason the provisions of the Legitimacy Act, 1926, s. 1 (1), applied, and the restriction contained in s. 1 (2) of that Act did not apply. Section 1 provides:

"(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens. (2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

It was held in *Newbould v. A.-G.* (1) that where, at the date of the birth of the child in question, there was a marriage that was subsequently annulled through incapacity, there was, in effect, not a marriage for the purpose of s. 1 (2), and, therefore, s. 1 (1) of the Act was effective.

So far, it would appear that Freda's three children are not the children of Norman, and, therefore, no claim by them can arise under the will of his mother, but on Dec. 16, 1949, before Norman's death, the provisions of the Law Reform

(Miscellaneous Provisions) Act, 1949, came into force. By s. 4 (1) of that Act it is provided:

"Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment."

Counsel for the three infant children felt compelled to argue that by virtue of this section, they are to be regarded as the legitimate children of Norman, and, therefore, became entitled under the provisions of the will of the testatrix to succeed to Norman's trust fund in equal shares. If that be right, the result is very odd because it is plain that before the passing of this Act these children were made legitimate by the subsequent marriage of their parents, and are, therefore, the legitimate children of that subsequent marriage. Now it is said, notwithstanding that, they are the legitimate children of Norman whose marriage was annulled on the ground of incapacity. It would be unfortunate if I had to apply s. 4 so as to upset arrangements which appear to be entirely satisfactory to the parties concerned and disrupt what appears to be a happy and satisfactory family, but I am not bound to reach that result.

In the first place, it appears to me that there is nothing in s. 4 (1) of the Act of 1949 which has a retrospective effect so as to cause any difficulty in regard to the provisions of the Legitimacy Act, 1926, in the present case. There is no provision that, where a decree has been granted in the past, the child shall be deemed always to have been legitimate.

There is also another ground, and I think, perhaps, this second is the more satisfactory one on which to decide this case. Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved and not annulled is to be legitimate. It seems to me that, if the present case had been one of divorce, on the evidence the children would not have been Norman's legitimate children, they being the children of someone else. In some respects the facts appear to me to be rather stronger than those in *Re Bromage* (2), a decision of LUXMOORE, J., for in that case the husband and wife, who had separated, had four children before the date of the separation, whereas in the present case Norman's marriage was annulled on the ground of incapacity and he never married again, which is some indication that he would not be likely to have a child. The form of the registration of births of the children in the present case is consistent with their not being Norman's children and inconsistent with their being Norman's children. The evidence that the parties separated in May, 1938, is not impugned in any way, and I think I must accept that as being an accurate statement of the facts. Therefore, it seems to me that, on the facts of this case, the three infant defendants cannot be considered to have been the children of Norman Adams, and, therefore, they are not entitled to any rights under the will of Norman Adams' mother. Accordingly, I think I am entitled to make an order authorising the trustees of the will to distribute and deal with the fund in the said will called Norman's trust fund on the footing that Norman Adams died without leaving any lawful child living at his death.

Order accordingly.

Solicitors: *Bolton, Jobson & Yate-Lee* (for the plaintiff); *Simmonds, Church Rackham & Co.* (for the first defendant); *A. F. & R. W. Tweedie* (for the infant defendants).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

WILTSHIRE STANDING JOINT COMMITTEE v. WILTSHIRE
COUNTY COUNCIL.

KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Streatfeild, JJ.), April 27, 1951.]

Compulsory Purchase—Police purposes—Duty of county council—Police Act, 1946 (c. 46), s. 15.

On a request by the standing joint committee a county council are obliged to acquire a piece of land which is required for police purposes (*Ex p. Somerset County Council* (1889) (58 L.J.Q.B. 513), followed), even though, to do so, they have to exercise compulsory powers of purchase (subject to the authority of the Minister of Local Government and Planning) and though they are reasonably satisfied that other and equally suitable sites are available.

AS TO RELATIONS OF STANDING JOINT COMMITTEE WITH COUNTY COUNCIL, see HALSBURY, Hailsham Edn., Vol. 21, p. 112, para. 194; and FOR CASES, see DIGEST, Vol. 33, pp. 107, 108, Nos. 719, 720.

Case referred to:

- (1) *Ex p. Somerset County Council*, (1889), 58 L.J.Q.B. 513; 61 L.T. 512; *sub nom. Re Somerset County Council*, 54 J.P. 182; 33 Digest 107, 719.

CASE STATED under s. 29 of the Local Government Act, 1888.

By the Police Act, 1946, s. 15, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 6 (1) and sched. IV, a county council may be authorised by the Minister of Health (now the Minister of Local Government and Planning) to purchase compulsorily any land which is required for the purpose of any of the functions of the police authority for the county. On June 8, 1950, the Wiltshire Standing Joint Committee passed the following resolution: "The chairman reported that efforts had been made to find an alternative site for the erection of a new police station at Chippenham and two further sites had been inspected, but both were found to be unsuitable. Resolved: That the committee approve of the site owned by Captain J. W. Rooke, O.B.E., for the erection of this police station and that the county council be asked to exercise their compulsory powers for the acquisition of this site." The resolution was reported to the county council at a meeting on July 25, 1950. The questions submitted for the decision of the court appear in the judgment.

Capewell, K.C., and *Squibb* for the standing joint committee.

Percy Lamb, K.C., and *Widgery* for the county council.

LORD GODDARD, C.J., delivered the judgment of the court as follows. The questions which are submitted for our opinion are:

"Has the county council any general discretion to refuse to acquire compulsorily for police purposes a particular piece of land which the standing joint committee has requested them so to acquire"?

It should be stated that that is for the purpose of providing a police station. The second question is:

"If the answer to the first question is in the negative, has the county council any discretion to refuse to acquire compulsorily for police purposes a particular piece of land which the standing joint committee has requested them so to acquire if they are reasonably satisfied that other and equally suitable sites are available for the police purposes in question"?

In our opinion, the answer to both those questions must be in the negative. We are bound by the decision of this court in *Ex p. Somerset County Council* (1). That case, in our opinion, decides that the county council are obliged to acquire,

on any request by the standing joint committee in connection with any expenditure on acquisition of property or maintenance of property, a piece of land which is required for police purposes. Obviously, the acquisition of land for a police station is acquisition of land for police purposes. I do not propose to go through all the sections of the Act of 1888, because the sections were fully considered by the court in that case, and we are of opinion that that case is binding on us.

The only further matter which has to be mentioned is this. It appears, and this is really the gist of the matter which is submitted to us, that in this case the standing joint committee have determined that it is necessary for their purposes that a property should be acquired in the borough of Chippenham which the owner is not willing to sell and it may be that compulsory powers of purchase will have to be exercised. The Police Act, 1946, s. 15, as amended by the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 6 and sched. IV, provides:

"The council of any county or county borough being a separate police area may be authorised, by the Minister of Health, to purchase compulsorily any land, whether situated within or without the county or borough, which is required for the purpose of any of the functions of the police authority for the county or borough."

In the earlier Acts which dealt with this matter it is clear that compulsory powers could be put in force, because under s. 65 of the Local Government Act, 1888, which was repealed by the Local Government Act, 1933, s. 307 and sched. XI, Part III, and replaced by the section to which I have just referred, there is a reference to compulsory powers being exercised by the county council.

Counsel for the county council, while admitting that the county council would have to buy the land or buildings required by the standing joint committee for a police station if they could be obtained from a willing seller, submitted that they could not be acquired by putting into force their compulsory powers. In the opinion of the court, the position must be looked at in this way. The standing joint committee have the right, under the statutes as interpreted in the *Somerset County Council* case (1), to require the county council to buy. The county council, therefore, are not able to say that they cannot buy, if they have in reserve compulsory powers, because the answer would be that they can buy, for, if they cannot buy by agreement, they can buy by compulsion. They can be told that that is the land, or the buildings, which are required, and, accordingly, they can be requested to acquire them. Under the Act of 1946 the Minister of Health [now the Minister of Local Government and Planning under the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I., 1951, No. 142), art. 3 (1) and sched. I] has to give his consent to the compulsory purchase. The only difference that that makes is that the county council must apply to the Minister for his permission to exercise those compulsory powers. If the Minister refuses, then another state of affairs would arise, and, no doubt, his decision would override the decisions of the county council and the standing joint committee. In our opinion, the mere fact that compulsory powers may have to be exercised is not, in any way, an answer to the requirement of the standing joint committee that the county council should acquire this site. For these reasons, we answer the questions submitted to us in the Case in the negative.

Order accordingly.

Solicitors: *Collyer-Bristow & Co.*, agents for *P. A. S. Stringer*, clerk of the county council, Trowbridge (for the standing joint committee and for the county council).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

LEEMAN v. STOCKS.

[CHANCERY DIVISION (Roxburgh, J.), April 16, 17, 1951.]

Sale of Land—Contract—Memorandum—Signature of party to be charged—Sale by public auction—Agreement signed only by purchaser—Vendor's name and initials inserted at head of agreement by auctioneer before auction—Admissibility of evidence of intention of parties that document should be final written record of contract—Law of Property Act, 1925 (c. 20), s. 40 (1).

On Aug. 16, 1950, a dwelling-house belonging to the vendor was offered for sale by public auction on his instructions, and the purchaser was the highest bidder. Before the auction began, the auctioneer obtained a printed agreement form and wrote in "W. E. Stocks" (the vendor's name and initials) as the name of the vendor, "Sept. 16, 1950," as the date for completion, and other particulars in relation to the property, and he stuck a sixpenny stamp on the form. After the bidding was over, the auctioneer inserted in the document the purchaser's name and address, a description of the premises, the purchase price, and the name of the purchaser's solicitor. With the intention of binding the purchaser by the contract, the auctioneer asked him to sign the document over the stamp, and the purchaser did so. The auctioneer retained the document, but neither he nor the vendor "signed" it in the ordinary sense of the word. The auctioneer informed the vendor of the sale, and the vendor expressed no dissatisfaction. In an action by the purchaser for specific performance of the agreement, the vendor contended that the action was not maintainable as there was no sufficient memorandum in writing to satisfy the Law of Property Act, 1925, s. 40 (1).

HELD: (i) in procuring through his agent (the auctioneer), the purchaser's signature to the document so as to bind the purchaser, the vendor was, by his agent, recognising his name which was written at the beginning of the document as the affixing of his mark to the document, and, as the purchaser signed the document on the understanding that it contained the terms of his contract with the vendor, whose name appeared in the document, and as it was the intention both of the purchaser and of the vendor's agent that this should be the final written record of the contract which had already been made between the parties, the document was a sufficient memorandum to satisfy the Law of Property Act, 1925, s. 40 (1), and, accordingly, the purchaser was entitled to specific performance of the contract, it being immaterial that the document was a formal one, as it had been used with informality by the auctioneer.

Evans v. Hoare ([1892] 1 Q.B. 593), applied.

(ii) although the document itself contemplated by its terms that it should be signed by both parties, evidence was admissible to show that neither the purchaser nor the auctioneer, acting on behalf of the vendor, intended any other signature to be added to the document and that it was the intention of the parties that the document should be the final written record of the contract.

Hubert v. Treherne (1842) (3 Man. & G. 743), distinguished.

(iii) the name of the vendor was inserted in the document by the vendor's agent in anticipation of the result of the auction sale, and, when the purchaser signed the document, the vendor's name was in it in relation to the contract which had then come into existence as a binding contract between the vendor and the purchaser, and, therefore, it was immaterial that the vendor's name was inserted in the document before the auctioneer knew who would be the purchaser. It was also immaterial that the vendor's Christian names were not written out in full before his surname in the document.

AS TO SIGNATURE ON MÉMORANDUM OF CONTRACT, see HALSBURY, Hailsham Edn., Vol. 7, pp. 124-130, paras. 177-184; and FOR CASES, see DIGEST, Replacement Volume 12, pp. 172-181, Nos. 1119-1210.

Cases referred to:

- (1) *Schneider v. Norris*, (1814), 2 M. & S. 286; 105 E.R. 388; 12 Digest, Replacement, 175, 1153.
- (2) *Evans v. Hoare*, [1892] 1 Q.B. 593; 61 L.J.Q.B. 470; 66 L.T. 345; 56 J.P. 664; 12 Digest, Replacement, 174, 1143.
- (3) *Hubert v. Treherne*, (1842), 3 Man. & G. 743; 11 L.J.C.P. 78; 133 E.R. 1338; 12 Digest, Replacement, 175, 1158.

ACTION.

The plaintiff claimed specific performance of an agreement in writing, dated Aug. 16, 1950, or, alternatively, of an oral agreement of that date, confirmed by a memorandum signed by the defendant or his agent, whereby the defendant agreed to sell to the plaintiff certain premises for the sum of £1,140.

The property was offered for sale at a public auction on Aug. 16, 1950, the plaintiff being the highest bidder. At the auctioneer's request the plaintiff then signed a document purporting to be an agreement on which the auctioneer had filled in the defendant's name as vendor and other particulars relating to the sale, but neither the auctioneer nor the vendor had "signed" the document in the ordinary sense of the term. The defendant contended that there was no agreement in writing and no memorandum in writing of the alleged oral agreement sufficient to satisfy the Law of Property Act, 1925, s. 40 (1). The plaintiff applied for summary judgment under R.S.C., Ord. 14A, but the defendant resisted the application on the grounds (a) that the case was not within the Order, and (b) that, even if it were within the Order, the application should not have been made in the circumstances of the case. The master held that the case was not within the Order and refused the application.

Lord Hailsham for the purchaser.

Parbury for the vendor.

ROXBURGH, J.: This is an interesting point not directly covered by authority. Mr. W. E. Stocks, whom I shall call the vendor, put up certain premises, known as 54, Fox Street, Scunthorpe, for sale by public auction on Aug. 16, 1950. The sale was advertised for 7 p.m. The vendor's solicitor was late in keeping the appointment, and Mr. Trafford, the auctioneer, obtained a form from another solicitor, who was not in any way acting for any of the parties but was interested in another property. The form was for a sale by private treaty with a number of provisions inapplicable to the proposed sale of No. 54, Fox Street. The document was edited by that solicitor, who inserted therein a date for completion, namely, Sept. 16, 1950, and a clause relating to an immersion heater. The solicitor also supplied a sixpenny stamp. The auctioneer inserted "W. E. Stocks" as the name of the vendor. All this was done before the sale, which began shortly after 7.30 p.m., the vendor's solicitor still not having arrived. The plaintiff, who bid £1,140, was the highest bidder, and, after the bidding was over, he went up to the auctioneer's table. The auctioneer then inserted in the document, which I have described, the name of the highest bidder, *viz.*, the plaintiff, whom I shall call the purchaser, and his address, a description of the premises, and the price, £1,140, and he asked the purchaser for the name of his solicitor. The purchaser gave this and the auctioneer added it to the document. Accordingly, at that moment the document read as follows:

"Memorandum of agreement made this Aug. 16, 1950, between W. E. Stocks (the vendor) of the one part and Frank Leeman . . . (the purchaser) of the other part whereby it is agreed as follows: (i) The vendor will sell and the purchaser will purchase all that the messuage or dwelling-house

known as 54, Fox Street, Scunthorpe, in the county of Lincoln, for the sum of £1,140 on account of which there has this day been paid the sum of £—— by way of deposit.”

No deposit, however, was paid. The document continues:

“(ii) The property is sold subject to the common form conditions of sale of the Lincolnshire Incorporated Law Society and so far as they are not inconsistent with these conditions. (iii) The vendor is selling as absolute owner.”

Clause (iv), cl. (v) and cl. (vi) relate to title. Clauses (vii) and (viii) provide:

“(vii) Completion of the sale and purchase shall take place on Sept. 16, 1950. (viii) The immersion heater is included in the sale. As witness the hands of the parties hereto the day and year first before written. Purchaser’s solicitor, R. A. C. Symes & Co., Scunthorpe.”

The auctioneer then asked the purchaser to sign the document over the stamp which had already been affixed, and the purchaser did so. The auctioneer did not sign the document. The purchaser, who was not then represented by a solicitor (*i.e.*, no solicitor was present on his behalf at the auction), did not ask the auctioneer to sign the document or any counterpart thereof. After obtaining the plaintiff’s signature, the auctioneer retained the document. He then saw the vendor and told him that he had sold the property for £1,140, and the vendor expressed no dissatisfaction. The auctioneer did not, however, produce the document to the vendor. When asked why he had obtained the purchaser’s signature, his answer was: “In order that the [purchaser] should be bound by a contract.” Neither the auctioneer nor the vendor signed the document in the ordinary sense in which that word is used, but the question is whether, when the vendor by his agent (for this purpose, the auctioneer), procured the purchaser to sign the document in order to bind the purchaser by a contract, the vendor was not by his same agent (the auctioneer) recognising his name which was written at the beginning of the document as the affixing of his mark to the document.

There is some authority on this difficult subject to which I must shortly refer. In his judgment in *Schneider v. Norris* (1), LORD ELLENBOROUGH, C.J., said (2 M. & S. 288):

“I cannot but think that a construction, which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing, would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If indeed this case had rested merely on the printed name, unrecognised by, and not brought home to the party as having been printed by him, or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt, whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance, as if he had written *Norris & Co.* with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract.”

In *Evans v. Hoare* (2), which is in many ways nearer the present case, the plaintiff had entered the service of the defendants, Messrs. Hoare, Marr & Co., as ledger clerk at a certain salary. On Feb. 19, 1890, the following document was drawn up by one Harding, a clerk of the defendants, who was acting with

the defendants' authority, and presented by Harding to the plaintiff for signature, and signed by the plaintiff:

"5, Campbell Terrace, Cannhill Road, Leytonstone, E. Feb. 19, 1890. Messrs. Hoare, Marr & Co. . . . Gentlemen, In consideration of your advancing my salary to the sum of £130 per annum, I hereby agree to continue my engagement in your office for three years, from and commencing Jan. 1, 1890, at a salary at the rate of £130 per annum aforesaid, payable monthly as hitherto. Yours obediently, George E. Evans."

The question arose whether there was a sufficient memorandum in writing to charge the defendants. The case arose in the Mayor's Court and went up to a Divisional Court on appeal. DENMAN, J., said ([1892] 1 Q.B. 596):

"In fact, the document was drawn up by one Harding, who was authorised by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature. It appears to me that the case falls within the principle of the decisions cited in the favour of the plaintiff, especially *Schneider v. Norris* (1) . . . Nor can I doubt that both Harding and the defendants intended that this document, when signed by Evans, should be the final memorandum of the contract binding upon the defendants as well as the plaintiff."

Likewise, in the case now before me, I have no doubt at all that the auctioneer, who was for this purpose the agent of both parties, intended that this document should be the final memorandum of the contract, binding on the vendor as well as on the purchaser. DENMAN, J., went on to say (*ibid.*):

"Mr. Witt contended that the cases relied upon were all cases where the document was sent out by the person charged. I do not think that this is necessary, if by the expression 'sent out' is meant more than submitted for signature to the other party. If the party sued has authorised an agent to lay before the party suing a document containing his name in full as that of the party with whom the contract is made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is a sufficient 'agreement or memorandum thereof, signed by a party authorised thereunto' within s. 4 of the Statute of Frauds."

Holding, as I do—and no argument to the contrary has been addressed to me on this point—that writing "W. E. Stocks" is as good as writing out the full Christian names as well as the surname of Mr. Stocks, the vendor, it seems to me that that passage in the judgment of DENMAN, J., applies to the facts of the case now before me. The auctioneer had authority to lay before the purchaser a document containing the vendor's name in full

" . . . as that of the party with whom the contract [had been] made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing . . . "

The last words do not quite fit the case now before me, because an oral contract had already been made, but I do not think that that makes any difference. " . . . and he thereupon signs"—that is what the purchaser did, and, therefore, it seems to me that what happened in the present case comes within the ambit of the words of DENMAN, J. CAVE, J., said (*ibid.*, 597):

"I am of the same opinion. The case put forward on behalf of the plaintiff was based on the grounds which have been stated by my brother DENMAN; and it was further contended that the plaintiff had served, and must, therefore, be entitled to recover something in respect of such service. It is obvious, however, that this latter contention is not well founded; for the plaintiff had not completed any one month of service under the contract. The real point to be decided is, whether the document

in question is a memorandum or note in writing of an agreement signed by the party to be charged, or by some other person lawfully authorised, within the meaning of s. 4 of the Statute of Frauds (29 Car. 2, c. 3). The Statute of Frauds was passed at a period when the legislature was somewhat inclined to provide that cases should be decided according to fixed rules, rather than to leave it to the jury to consider the effect of the evidence in each case. This, no doubt, arose to a certain extent from the fact that in those days the plaintiff and the defendant were not competent witnesses. Several cases were referred to in the course of the argument, which it was contended could not be distinguished from the present case; but it is difficult to ascertain whether the circumstances of the different cases are the same, or rather whether the circumstances in which the different cases are similar or dissimilar are material or immaterial to the point under consideration. No doubt, in attempting to frame a principle, one is obliged to depart somewhat from the strict lines of the statute. I am of opinion that the principle to be derived from the decisions is this. In the first place, there must be a memorandum of a contract, not merely a memorandum of a proposal . . .”

There is no doubt that there was a contract in the case now before me, because the oral contract was concluded by the fall of the hammer. The only question is whether there is a sufficient memorandum to satisfy s. 40 (1) of the Law of Property Act, 1925. CAVE, J., went on to say (*ibid.*):

“ . . . and, secondly there must be in the memorandum, somewhere or other, the name of the party to be charged, signed by him or by his authorised agent. Whether the name occurs in the body of the memorandum, or at the beginning, or at the end, if it is intended for a signature there is a memorandum of the agreement within the meaning of the statute. In the present case it is true that the name of the defendants occurs in the agreement; but it is suggested on behalf of the defendants that it was only put in to show who the persons were to whom the letter was addressed. The answer is that there is the name, and it was inserted by the defendants’ agent in a contract which was undoubtedly intended by the defendants to be binding on the plaintiff; and, therefore, the fact that it is only in the form of an address is immaterial.”

Counsel for the vendor sought to escape from the ambit of those decisions by submitting, first, that the name of the vendor was not in the first instance inserted with reference to a contract with the plaintiff in these proceedings. It was not. It was inserted before the auction and before the auctioneer knew who would be the highest bidder. It was inserted in anticipation of the result of the auction sale, but that seems to me to be a distinction without a difference. At the time when the document was put before the purchaser for signature the vendor’s name was in the document in relation to a contract between the purchaser and the vendor which had then come into existence and was a binding contract, though it would not be actionable without a memorandum to satisfy the Law of Property Act, 1925, s. 40 (1). Secondly, counsel for the vendor points out that the letter in *Evans v. Hoare* (2) was an informal document, whereas the document in this case is a formal document. That is, perhaps, true, but, though the document in this case was a formal document, it was used by the auctioneer with great informality.

The next point raised by counsel for the vendor is the real point in the case, and it is one which has given me much food for reflection. Counsel for the vendor contends that the document itself contemplates by its own terms that it should be signed by both parties. That is true if the document is regarded in isolation, but it is equally certain that, when the auctioneer obtained the purchaser’s signature thereto, neither the purchaser nor the auctioneer, acting on behalf

of the vendor, ever intended any other signature to be added to that document. It was the intention both of the purchaser and of the vendor's agent, the auctioneer, that this should be the final written record of the contract. Counsel for the vendor, however, says that, although I may find the facts in that way, and I do so find them, by so doing I am extending the ambit of *Evans v. Hoare* (2) to an unwarranted extent. I do not agree. I find support for my conclusion in *Hubert v. Treherne* (3) in which the defendants, directors of a gas company, accepted a tender from the plaintiff to convey coal for them over a period of three years for a certain consideration. A draft of the articles of agreement was prepared on the orders of the directors of the company, and the following minute was entered in the company's books:

"April 2, 1839. The agreement between the company and Mr. Thomas Hubert, for carrying our coals from ships in the Pool to Thames Bank Wharf, for a period of three years was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert."

The articles were as follows:

"Articles of agreement made, concluded, and fully agreed upon, this Mar. 25, 1839, between Thomas Hubert of Millbank Street, in the city of Westminster, lighterman, of the one part, and Edmund Treherne, Walter Hawkins, and Nathaniel Saxon, trustees and directors of the Equitable Gas Light and Coke Company, of the other part."

Then there is a lengthy formal draft, which ends:

"And for the due performance of this agreement, each of the said parties hereto, bindeth and bind himself and themselves unto the other and others of them, by these presents. As witness our hands."

These articles were not subscribed by the plaintiff, or by the defendants, or by any other person. A fair copy of the draft agreement was, apparently, sent to the plaintiff, but for some reason, which is not material to the present case, the court was not satisfied, notwithstanding the minute of Apr. 2, 1839, that the handing of the fair copy to the plaintiff was authorised by the defendants.

The position in *Hubert v. Treherne* (3) was at once like and unlike the position in the present case. So far as the form of the agreement is concerned, the resemblance is close. Plainly, in *Hubert's* case (3) the agreement *per se* contemplated signature by both parties. Plainly, in the present case, the agreement *per se* likewise contemplates signature by both parties. There is, however, the important difference that in *Hubert v. Treherne* (3) there was no evidence outside the language of the agreement. Here there is evidence which is, in my judgment, conclusive, if it is admissible. I think there is no doubt that *Hubert v. Treherne* (3) is an authority for the proposition that evidence is admissible and that, while the form of the agreement is a matter of such importance that, in the absence of any other evidence, a document in this form would not be held to be a sufficient memorandum to satisfy the Statute of Frauds, nevertheless the fact that the document *per se* contemplated signature by both parties would not be treated as conclusive, or, indeed, as paramount evidence of the fact that the signature of both parties was actually required, if there is evidence to the contrary which the court accepts. TINDAL, C.J., said (3 Man. & G. 753):

"To hold that the mere introduction of the names of the parties was sufficient, would be almost to repeal the statute. Suppose this agreement had been prepared not by the secretary of the company, but by their attorney; could it have been contended that the insertion by him of his client's names would have been a signature within the statute? Yet I am not aware that the power of an attorney differs from that of a secretary or any other person who may be employed to prepare such an instrument. Then look at the form of these articles of agreement, which conclude thus:

'As witness our hands.' The words evidently show that the names of the contracting parties were meant to be subscribed, and that it was not intended that the insertion of the names in the body of the instrument should operate by way of signature."

If that were all, the decision in *Hubert's* case (3) would, no doubt, be of great assistance to the vendor in the case before me, but COLTMAN, J., said (*ibid.*, 754):

"It is very important that this statute should not be frittered away. Here, it appears that it was intended that the signature of the parties should be affixed. This differs from the case of a bill of parcels delivered out in the usual manner as a complete and perfect instrument. It is said the parties treated the articles of agreement as a perfect instrument . . ."

Therefore, he plainly recognised that evidence of that matter was admissible. Then he continues (*ibid.*):

" . . . It is not certain that the plaintiff saw the articles; and there was no sufficient evidence of any authority to give out the copy on behalf of the directors."

It is thus plain that he might have reached a different conclusion if the plaintiff had seen the articles and there was conclusive evidence of authority to give out the copy on behalf of the directors. ERSKINE, J., was even more explicit. He said (*ibid.*):

"It does not appear that these articles of agreement were signed by the defendants, or by an agent thereunto lawfully authorised by them."

These passages seem to me to make it perfectly clear that it is open to the court to investigate the circumstances to see whether the document came into being as a perfect agreement, and, if the court on the evidence finds that it did, then *Hubert v. Treherne* (3) seems also to recognise that the court is not prevented from so holding by any impediment in law. Accordingly, I hold that there is a sufficient memorandum to bind the vendor, and I make the usual decree for specific performance in a purchaser's action.

Order accordingly.

Solicitors: *Joynson-Hicks & Co.*, agents for *R. A. C. Symes & Co.*, Scunthorpe (for the purchaser); *Sharpe, Pritchard & Co.*, agents for *E. D. Tyssen Drakes*, Caistor (for the vendor).

[*Reported by R. D. H. OSBORNE, ESQ., Barrister-at-Law.*]

BOYD-GIBBINS v. SKINNER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Oliver and Sellers, JJ.), April 30, 1951.]

Street Traffic—Built up area—Road with no lighting by lamps—Speed limit signs erected by local authority—Prima facie proof that road to be deemed to be in built up area—Road Traffic Act, 1934 (c. 50), s. 1 (1) (b).

The respondent, who had driven his motor car at a speed exceeding thirty miles an hour on a road where there was no lighting by means of lamps, but where speed limit signs had been erected by the local authority, was found Not Guilty at quarter sessions of an offence under s. 1 (2) of the Road Traffic Act, 1934, on the ground that the prosecution had not formally proved that a direction had been given under s. 1 (1) (b) of the Act that the road was to be deemed to be a road in a built up area.

HELD: the presence of the speed limit signs, which must be deemed to have been lawfully erected by the local authority, was *prima facie* proof that a direction had been given under s. 1 (1) (b), and, in the absence of evidence to displace that proof, the respondent should have been convicted.

FOR THE ROAD TRAFFIC ACT, 1934, s. 1 and s. 36, see HALSBURY'S STATUTES, Second Edn., Vol. 24, p. 710 and p. 736, respectively.

Case referred to:

(1) *Swift v. Barrett*, (1940), 163 L.T. 154; 104 J.P. 239; 2nd Digest Supp.

CASE STATED by the appeal committee of Surrey Quarter Sessions.

At a court of summary jurisdiction at Camberley the respondent was found guilty of unlawfully driving a motor car at a speed exceeding thirty miles an hour on a road in a built up area, contrary to s. 10 of the Road Traffic Act, 1930, and was disqualified for driving for six months. On his appeal to quarter sessions he contended that it was necessary for the prosecution to prove that the road was in a built up area. Admittedly there was no system of lighting on the road furnished by means of lamps and the respondent contended that as it had not been formally proved by the production of the original order in writing that a direction was in force that the road should be deemed to be in a built up area the case for the prosecution lacked a necessary ingredient of proof, and that the mere presence of speed limit signs could not prove that the road was restricted. The prosecution contended that the direction given by an order could be, and should be, presumed from the presence of the signs. The appeal committee held that the case was not proved, and quashed the conviction.

Du Cann and *B. S. Horner* for the appellant.

T. M. Eastham for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of Surrey Quarter Sessions who heard an appeal by the present respondent, Arthur George Boyd-Gibbins, against his conviction before a court of summary jurisdiction of driving "a certain motor car on a certain road in a built up area at a speed exceeding thirty miles per hour, contrary to s. 10 of the Road Traffic Act, 1930." On the hearing of the appeal it was proved or admitted that two police constables saw a car being driven on this road by the respondent at from fifty-three to fifty-six miles an hour. That was not disputed. The Case then goes on:

"The said police constables stopped the said car and pointed out the offence of driving at a speed exceeding thirty miles an hour in a built up area to the respondent. At the same time they gave the respondent the statutory warning of an intended prosecution. The respondent replied: 'I was talking to my passenger and did not see the signs.' Later the respondent said: 'I did not know there were any signs.' The traffic signs were visible on that date."

There were no lamp-posts on the road in question, and the appeal committee held that, that being so, the road was not in a built up area within the meaning of s. 1 (1) of the Road Traffic Act, 1934, unless there was in force a direction that it was to be deemed to be a road in a built up area, and no proof had been given that such a direction was in force. The court has come to the conclusion that the appeal committee came to a wrong decision, because, in our opinion, there was *prima facie* evidence which was not displaced that this road had been prescribed as a built up area.

Section 1 of the Road Traffic Act, 1934, provides:

"(1) Subject to the provisions of this Act, it shall not be lawful for any person to drive a motor vehicle on a road in a built up area at a speed exceeding thirty miles per hour. For the purposes of this Act a length of road shall be deemed to be a road in a built up area—(a) if a system of

street lighting furnished by means of lamps placed not more than two hundred yards apart is provided thereon, unless a direction that it shall be deemed not to be a road in a built up area is in force under this section; or (b) if a direction that it shall be deemed to be a road in a built up area is in force under this section; and not otherwise . . . (4) A direction that a length of road shall be deemed not to be a road in a built up area notwithstanding that such a system of lighting as aforesaid is provided thereon, or that a length of road shall be deemed to be a road in a built up area notwithstanding that such a system of lighting as aforesaid is not provided thereon, may be given—(a) as respects any length of road elsewhere than in the London Traffic Area as constituted by the London Traffic Act, 1924, by the local authority, by means of an order made by them after giving public notice of their intention to make an order under this sub-section and after consultation with the chief officer of police and with the consent of the Minister . . .”

By s. 1 (7):

“It shall be the duty of the local authority—(a) to erect and maintain the prescribed traffic signs in such positions as may be requisite in order to give effect to general or other directions given by the Minister for the purpose of securing that adequate guidance is given to drivers of motor vehicles as to the places where a length of road begins, and ceases, to be a road in a built up area, or as to a direction being in force as respects a length of road that it shall be deemed to be, or not to be, a road in a built up area . . .”

The Minister has prescribed signs under s. 48 of the Road Traffic Act, 1930, and s. 1 of the Road Traffic Act, 1934.

Counsel for the appellant invited the court to hold that the appeal committee were wrong because of the provisions of sched. II to the Emergency Laws (Transitional Provisions) Act, 1946. Under s. 48 of the Road Traffic Act, 1930, the Minister has power to prescribe various road signs, and by s. 49:

“Where a police constable is for the time being engaged in the regulation of traffic in a road, or where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road . . . any person driving or propelling any vehicle who—(a) neglects or refuses to stop the vehicle or to make it proceed in or keep to a particular line of traffic when directed so to do by the police constable in the execution of his duty; or (b) fails to conform to the indication given by the sign, shall be guilty of an offence.”

In *Swift v. Barrett* (1) the defendant was charged with failing to observe a “halt” sign, and the court held that it was necessary for the prosecution to prove that the sign was of the prescribed size, colour and type, in accordance with s. 48 (2) of the Road Traffic Act, 1930. One reason for that was that there was a provision in s. 36 of the Act of 1934 that traffic light signals should be presumed to be of the authorised type, but there was no provision with regard to other signs. Accordingly, the Emergency Laws (Transitional Provisions) Act, 1946, s. 15 and sched. II, provides:

“Section 36 of the Road Traffic Act, 1934 (which provides that certain traffic signs shall be presumed to comply with statutory requirements unless the contrary is proved) shall apply to all traffic signs and accordingly shall have effect as if the words ‘(being a sign for regulating by means of light signals the movement of traffic)’ were omitted therefrom.”

I do not think that section has anything to do with this case. There was no question here whether the sign conformed in colour, size and type with what was prescribed, nor was it one of the signs within s. 48 and s. 49 of the Act

of 1930. I doubt whether it is a sign for regulating the movement of traffic. It is a sign giving notice that there is a piece of the road where the maximum speed is thirty miles an hour. I, myself, would understand the signs, mentioned in s. 49, for "regulating the movement of traffic or indicating the route to be followed by traffic" as signs indicating that there should be a right turn or left turn, or "halt," or "slow," or "keep left." However that may be, the respondent was not summoned for failing to conform to the indication given by the sign. He was summoned for driving at a speed of over thirty miles per hour in a built up area.

In my opinion, in view of the provisions of s. 1 (7) of the Road Traffic Act, 1934, the prosecution have established a *prima facie* case. It would, indeed, be a serious thing if the police, every time they prosecuted a person for driving over thirty miles an hour on a stretch of road which was deemed to be in a built up area, had to produce a witness from the local authority to give formal proof of the order containing the direction that the road was to be so deemed. Even then, possibly, the point would be taken that it had not been proved that the order had been made after consultation with the chief officer of the police and with the consent of the Minister as required by s. 1 (4) (a). I do not know whether that would be a good point if it was taken, but, if it were, in many cases it would put to great expense a defendant who was ordered to pay the costs. Under s. 1 (7) of the Road Traffic Act, 1934, it is the duty of the local authority—and we must presume that the local authority carry out their duties—

"to erect and maintain the prescribed traffic signs . . . in order to give effect to general or other directions given by the Minister for the purpose of securing that adequate guidance is given to drivers of motor vehicles . . ."

that the particular stretch of road is a restricted road. If, therefore, there is a sign of the type prescribed by the Minister under s. 1 (8) erected at the beginning of a length of road indicating a speed limit of thirty miles an hour, that, in my opinion, is *prima facie* evidence that all necessary steps have been taken to prescribe that that road should be regarded as being in a built up area.

We shall, therefore, send the case back to the appeal committee with an indication that they were wrong in holding that it was necessary for the prosecution to prove the order of the local authority. The fact that it was proved or admitted that appropriate signs had been erected was, in my opinion, *prima facie* proof that the necessary directions and steps had been taken to direct that the road be deemed to be in a built up area.

OLIVER, J.: I agree with my Lord's judgment, and I have only one word to say to qualify that agreement. I should like to reserve the question whether a thirty miles an hour sign is a "sign for regulating the movement of traffic." At the moment, I am inclined to think it is, but in every other respect I agree with my Lord's judgment.

SELLERS, J.: I agree. I think that the final words of s. 1 (7) of the Act of 1934 reinforce what my Lord has said. Those words are:

" . . . and if the local authority make default in executing any works required for the performance of the duty imposed upon them by this subsection, the Minister may himself execute the works and recover summarily as a civil debt from the local authority the expenses incurred by him in so doing."

Therefore, there are two authorities who are responsible for putting up these necessary signs giving guidance to drivers. In those circumstances, as my Lord has said, the signs in themselves provide sufficient *prima facie* evidence of the road being deemed to be in a built up area. I, too, would like to reserve the other point (which does not arise here) whether such a sign is a "sign for regulating the movement of traffic." My present opinion is that, just as a

"halt" sign or "go slow" sign, so a thirty miles an hour sign might be so regarded, especially having regard to s. 49 of the Act of 1930, which speaks of:

" . . . where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic . . . "

The second words seem to direct attention to the special sign which indicates control of movement, and that might leave it open to argument whether the thirty miles an hour sign is not properly to be regarded as a sign for regulating traffic.

Case remitted.

Solicitors: *Johnson, Law & Co.* (for the appellant); *Wontner & Sons* (for the respondent).

[*Reported by F. GUTTMAN, Esq., Barrister-at-Law.*]

Re MARTIN'S MORTGAGE TRUSTS. C. & M. MATTHEWS, LTD. v. MARSDEN BUILDING SOCIETY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins, L.J., and Morris, J.), April 19, 20, 1951.]

Moneylender—Enforcement of security—Loan secured by second mortgage—Sale of mortgaged property by first mortgagee—Claim by moneylender of surplus proceeds—Law of Property Act, 1925 (c. 20), s. 105—Moneylenders Act, 1927 (c. 21), s. 13 (1).

Mortgage—Sale—Application of proceeds—Claim by moneylender as second mortgagee—Claim against mortgagor statute-barred—"Person entitled to the mortgaged property"—Law of Property Act, 1925 (c. 20), s. 105—Moneylenders Act, 1927 (c. 21), s. 13 (1).

In 1933 M. granted to the defendants a first mortgage on a dwelling-house belonging to him. In January, 1940, the plaintiffs, a firm of licensed moneylenders, lent M. £40 to be repaid with interest at $8\frac{1}{2}$ per cent. per annum by monthly instalments of £5. The loan, the whole of which was to be immediately repayable if default were made in the payment of any instalment, was secured by a promissory note and a second mortgage of the house. On Sept. 11, 1940, M. died, then owing £32 4s. 8d. On Oct. 22, 1949, the defendants, as first mortgagees, sold the house, and, after they had paid their principal, interest and costs, had some £412 in hand. On Sept. 21, 1950, the plaintiffs claimed, under the Law of Property Act, 1925, s. 105, the balance, or, alternatively, payment thereof of the amount due to them.

HELD: (i) the plaintiffs' claim could only be asserted by setting up a title under their mortgage and, therefore, it was in effect a claim to enforce a "security taken . . . in respect of any loan" made by them within s. 13 (1) of the Moneylenders Act, 1927, and, the original default having occurred more than a year before the commencement of the proceedings, the claim was barred by the sub-section.

Re Thomson's Mortgage Trusts ([1920] 1 Ch. 508), distinguished.

(ii) as the plaintiffs could bring no action to enforce their claim, they could not be described as "entitled to the mortgaged property" within s. 105 of the Act of 1925, and, therefore, were not entitled to the application of the sale moneys in payment of their debt.

AS TO APPLICATION OF PROCEEDS OF SALE OF MORTGAGED PROPERTY, see HALSBURY, Hailsham Edn., Vol. 23, pp. 442-444, paras. 650-653; and FOR CASES, see DIGEST, Vol. 35, pp. 513-517, Nos. 2434-2468.

Cases referred to:

- (1) *Re Thomson's Mortgage Trusts*, [1920] 1 Ch. 508; 89 L.J.Ch. 213; 123 L.T. 138; Digest Supp.
- (2) *Edmunds (Edmund) v. Waugh*, (1866), L.R. 1 Eq. 418; 35 L.J.Ch. 234; 13 L.T. 739; 1 Digest 9, 64.

APPEAL by the plaintiffs, C. & M. Matthews, Ltd., a firm of licensed money-lenders, against an order of HARMAN, J., dated Feb. 2, 1951, made on an originating summons.

The plaintiffs claimed as second mortgagees, in the matter of the statutory trusts affecting the purchase money of the property comprised in a legal charge dated Oct. 19, 1933, and made between Henry Charles Brett Martin and the Marsden Building Society, the defendants, that they were entitled to be paid the amount of the purchase money remaining after the defendants, who as first mortgagees had sold the mortgaged property, had paid to themselves the amount of their mortgage, with interest and costs, or, alternatively, that they should be paid out of the said balance of the purchase money the amount outstanding in respect of the debt owed to them, with interest. The plaintiffs had stipulated for interest at $82\frac{1}{2}$ per cent. per annum, but in calculating the amount owing to them for the purposes of the present claim they limited the interest to forty-eight per cent. per annum. HARMAN, J., made no order on the summons except that the defendants should, after paying their proper costs, charges and expenses as mortgagees and their taxed costs of the present proceedings, lodge the balance of the purchase money in their hands in court.

A. L. Figgis for the plaintiffs.

E. G. Wright for the defendants.

SIR RAYMOND EVERSHED, M.R.: I will ask JENKINS, L.J., to deliver the first judgment.

JENKINS, L.J.: In 1933 the mortgagor, Henry Charles Brett Martin, granted a first mortgage of No. 20, Woodleigh Avenue, North Finchley, London, to the defendants. As regards that mortgage, no question arises. On Jan. 29, 1940, the plaintiffs lent Mr. Martin £40, payment of which was secured by a promissory note together with a second mortgage of the premises, 20, Woodleigh Avenue. The terms of the note are somewhat remarkable, although I dare say not out of the way in a moneylending transaction. The amount of £40 was to be repaid with interest at the rate of $82\frac{1}{2}$ per cent. per annum by monthly instalments of £5, and, in the event of default in the payment of any instalment, the whole of the balance was to become payable on demand, with interest due at the same rate to the date of the demand, together with simple interest on such balance of principal and interest at the same rate of $82\frac{1}{2}$ per cent. per annum from the date of such demand until payment. Mr. Martin kept up his payments for a few months, and by Sept. 6, 1940, he had paid £18, which, so far as principal alone was concerned, would have reduced the debt to £22, but, of course, the interest had been accruing so that he then owed £32 4s. 8d. On Sept. 11, 1940, Mr. Martin died. Nobody obtained a grant of administration to his estate, so, at the time when these proceedings were brought, he had no personal representative. The learned judge thought that justice could not be done in the case wholly in the absence of anyone to represent the estate of Mr. Martin, and, accordingly, the defendants were appointed to represent his estate for the purposes of these proceedings, and so they appeared before the court in a dual capacity. On Oct. 22, 1949, the defendants, having obtained the leave which was then still necessary under the Courts (Emergency

W Powers) Act, 1943, and the relevant rules, sold the property under their power of sale, and after they had paid themselves their principal, interest and costs, there remained in their hands a balance of £412 15s. 1d.

T The plaintiffs, as second mortgagees, were notified of this state of affairs, and they requested that they should be paid the balance. The defendants had their doubts in the matter on account of the Moneylenders Act, 1927, s. 13, on which the question in this case really turns, and the Moneylenders Act, 1900, s. 1, which enables the court to re-open unconscionable bargains. The defendants took up the position that they would not pay except under an order of the court, and it was in those circumstances that the plaintiffs issued the summons to which this appeal relates. That step was taken on Sept. 21, 1950, and it should be noted that by this time the debt, with interest thereon from the mortgagor's death down to August, 1950, computed (by way of concession) at the reduced rate of forty-eight per cent., amounted to no less than £182. The Moneylenders Act, 1927, s. 13 (1), so far as material, provides:

"No proceedings shall lie for the recovery by a moneylender of any money lent by him after the commencement of this Act or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by him, unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued. Provided that—(a) if during the period of twelve months aforesaid or at any time within any subsequent period during which proceedings may by virtue of this proviso be brought, the debtor acknowledges in writing the amount due and gives a written undertaking to the moneylender to pay that amount, proceedings for the recovery of the amount due may be brought at any time within a period of twelve months from the date of the acknowledgment and undertaking; (b) the time limited by the foregoing provisions of this section for the commencement of proceedings shall not begin to run in respect of any payments from time to time becoming due to a moneylender under a contract for the loan of money until a cause of action accrues in respect of the last payment becoming due under the contract."

F There was no acknowledgment within proviso (a) during the relevant period of twelve months, so that proviso is not relevant to the present proceedings except that it was pointed out in the course of argument that it differs from the statutory provision as to acknowledgment applicable, for instance, to the case of an ordinary simple contract debt, in that the acknowledgment here in question, in order to be effective, must be given within the relevant period of twelve months. Proviso (b) is material, and it is common ground that under that proviso the cause of action in respect of the loan under the promissory note arose very much more than one year before Sept. 21, 1950, when this summons was issued.

G The position, therefore, is that the plaintiffs are precluded by s. 13 (1) from bringing any proceedings for the recovery of the sum lent to Mr. Martin or any interest in respect thereof or for the enforcement of any agreement or security taken in respect of the loan, because the period of twelve months from the date on which the cause of action accrued has long since expired. That is plainly the case, and it would not be disputed so far as an ordinary action against Mr. Martin's personal representatives was concerned—an action simply claiming payment of the money. It is in effect conceded that this would also apply in regard to any proceedings to enforce the security constituted by the second charge, so far as those proceedings took the form of proceedings to enforce the mortgage against the deceased debtor's estate, such as proceedings for foreclosure. There is, however, the question, to which I must return, whether the present proceedings are proceedings to enforce the security at all, and, if they are, whether, being proceedings brought, not against the mortgagor, but against

the first mortgagees, are proceedings founded on a separate and independent cause of action which, if it were the relevant cause of action for the purposes of s. 13 (1), might only be said to have accrued on Oct. 22, 1949, or, perhaps, on the date on which notice was received by the plaintiffs that the money representing the surplus proceeds of sale was in the hands of the defendants. It is claimed on the part of the defendants, especially in their capacity as the persons appointed to represent the estate of the debtor, that, in view of s. 13 (1), the present proceedings will not lie, and the question is whether that contention is well-founded or not. On the other side, reliance is placed on the Law of Property Act, 1925, s. 105, which regulates the disposal of the surplus proceeds of sale in the hands of a mortgagee after he has sold in exercise of his statutory power of sale and paid himself his principal, interest and costs. Section 105 provides:

"The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses properly incurred by him as incident to the sale or any attempted sale, or otherwise; and, secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof."

The learned judge held that these proceedings, although in form an application by the plaintiffs for execution of the statutory trusts affecting the proceeds of sale, are, nevertheless, proceedings for the enforcement of the security consisting of the second mortgage within the meaning of the Moneylenders Act, 1927, s. 13 (1). He further held that the plaintiffs' claim to the residue of the money failed, because in view of the operation of that section they could not be described as persons entitled to the mortgaged property—entitlement, in the view of the learned judge, connoting enforceable entitlement, *i.e.*, a title which could be asserted in a court of law. It was, in effect, on those two grounds that he dismissed the summons.

The argument of counsel for the plaintiffs has two branches. First, he says that these are not proceedings to enforce the security, but merely proceedings for execution of the trusts affecting the surplus proceeds of sale; secondly, he says that s. 13 (1) is an ordinary limitation section which bars the remedy but does not extinguish the right. He says, in effect, that, although the plaintiffs' security is somewhat maimed and curtailed by the operation of s. 13 (1), it is still a mortgage enforceable in any way open to the plaintiffs, provided only that they do not have to come to the court to have it enforced. Putting those two submissions together, counsel claims that s. 13 (1) places no obstacle in his way, and that the defendants should have been ordered to pay over the fund to the plaintiffs. In making those submissions, his mainstay has been the decision of EVE, J., in *Re Thomson's Mortgage Trusts* (1). In that case, to state the facts in as simple a form as possible, there was a series of mortgages, and the first mortgagee sold, paid himself the amount owing on his security, and had a surplus over. The first mortgagee contended, and I do not think it was disputed, that there were large arrears of interest on the second mortgage which were irrecoverable as being barred under the Real Property Limitation Act, 1833, s. 42, and owing to the dual interest possessed in the matter by the first mortgagee (he being also a sub-mortgagee of a third mortgage) it was to his advantage if he could limit the amount payable to the second mortgagees to the amount of the principal with so much of the interest accrued thereon as was not statute barred. Section 42 provided that no action or suit should be brought for the recovery of interest on money charged on or

payable out of land except within the prescribed period after the right to receive the same had arisen. The prohibition, therefore, was against the bringing of an action or suit for the recovery of such interest. The statutory provisions then in force with respect to surplus proceeds arising out of the sale of mortgaged property were contained in the Conveyancing Act, 1881, s. 21 (3), and were the same as the provisions in s. 105 of the Act of 1925.

The effect of the decision of EVE, J., was that the proceedings before him, which took the form of a claim by the second mortgagees and their sub-mortgagee for payment out of the surplus of the amount of principal, interest and costs due under the second mortgage to the sub-mortgagee thereof, were not an action or suit by them for the recovery of interest. His view of the matter was that this was simply a claim for the due execution of the trusts affecting the surplus proceeds, and, in the view he took of the statutory obligation which arose on the prior claims being satisfied, the first mortgagee's possession ([1920] 1 Ch. 513)

"must be treated as the possession of the person rightfully entitled to have the fund handed to him,"

(that person being sub-mortgagee of the second mortgage), and on this footing the application (*ibid.*)

"is no more to be treated as an action to recover interest within the meaning of s. 42, than was the petition for payment out in *Edmunds (Edmund) v. Waugh* (2)."

EVE, J., said further (*ibid.*, 514):

"... assuming that my view of the construction to be placed on the Conveyancing and Law of Property Act is not sound and that Bruty [the first mortgagee] as has been argued, is a trustee of the fund for all subsequent incumbrancers, he is not in my opinion entitled in the execution of the trusts *mero motu*, or at the instigation of any one or more of his cestuis que trust to withhold from any cestui que trust a fund, his title to which is unextinguished though his right to recover it by action may be barred."

Having dealt in that way with the nature of the interests of subsequent incumbrancers in a fund representing the proceeds of sale under a first mortgage, he expressed the view that, even if the first mortgagee was a trustee for all the incumbrancers, the application before him was not an action or suit within the meaning of s. 42. Counsel for the plaintiffs places strong reliance on that case. He says that here the claim concerns a trust fund in the hands of the first mortgagees which is subject to the trusts imposed by s. 105, and those trusts oblige the first mortgagees to pay the surplus over to the person entitled to the mortgaged property or authorised to give receipts for the proceeds of sale thereof. He says that the plaintiffs are the persons so entitled and authorised, and that there is nothing in s. 13 of the Act of 1927 to prevent the plaintiffs' claim to this trust fund being asserted, any more than in the view of EVE, J., there was anything in the Real Property Limitation Act, 1833, s. 42, to prevent the second mortgagees and their sub-mortgagee claiming a transfer to the latter of the whole surplus notwithstanding that some part of the interest due under that mortgage was statute barred.

The arguments based on *Re Thomson's Mortgage Trusts* (1) are of considerable force, but, giving this matter the best consideration I can and comparing the circumstances of this case with those of *Re Thomson's Mortgage Trusts* (1), I do not think that case should govern the decision here. The relevant statute of limitations in *Thomson's* case (1) prohibited an action or suit being brought for the recovery of part of the interest due under the second mortgage, and I think it is relatively easy to come to the conclusion that a claim under the trust corresponding to the terms of s. 105 of the Act of 1925 to have the surplus

transferred to the sub-mortgagee of the second mortgage (which is how the learned judge regarded the matter) would not fairly answer the description of an action or suit to recover interest. The words here are entirely different. The prohibition, so far as relevant, imposed by s. 13 (1) of the Act of 1927, extends to any proceedings for enforcement of any security given in respect of any loan made by the moneylender. Those are very wide words, and, in my judgment, as HARMAN, J., held, looking at the substance of the case, this claim by the plaintiffs was nothing more nor less than a claim to enforce the security which they took in respect of the £40 loan, the second mortgage.

It is contended by counsel for the plaintiffs that this is not enforcement of the security, but that it is a proceeding purely between the second mortgagees and the first mortgagees concerning the application of the trust fund representing the surplus proceeds. That, he said, is not enforcement, which connotes some form of proceeding against the debtor or those claiming under him, and he further says that what happens in a case of this kind is that the first mortgagee on behalf of himself and all subsequent incumbrancers enforces the security by sale of the property and thereafter the matter resolves itself simply into the proper disposal of the proceeds arising out of such enforcement. I think that is too narrow a view. I think that any proceedings should be regarded as proceedings for the enforcement of a security within the meaning of s. 13 (1) if they assert a right to payment of the amount secured or to payment of the fund subject to the security and the right is one which can only be asserted by setting up a title under the mortgage. It is plain in this case that in order to have a *locus standi* in the matter, in order to claim to be a beneficiary under the statutory trusts at all, the plaintiffs had perforce to found their proceedings on the assertion that by virtue of their second mortgage they were now entitled to this balance. That, in my judgment, is enough to make the present proceedings amount, within the meaning of s. 13 (1) of the Act of 1927, to proceedings to enforce the security. Nor, in my view, can that conclusion be displaced by the contention based on *Re Thomson's Mortgage Trusts* (1), that possession by the first mortgagee as trustee is tantamount to possession on the part of the second mortgagee claiming a transfer of the fund. It seems to me that this argument carries the matter no further, for the first mortgagee is only in possession of the fund on behalf of the second mortgagee, on the footing that the second mortgagee is the proper person to receive it. If a dispute arises and it becomes necessary for the second mortgagee to institute proceedings in which he sets up and asserts his mortgage to make out his claim that the fund is held in trust for him, then these proceedings are, in my view, proceedings to enforce his security. In the view I take, therefore, the learned judge was right in holding that these were proceedings for the enforcement of the second mortgage and as such were barred under s. 13 (1) of the Act of 1927. As I mentioned earlier, there was an argument raised by counsel for the plaintiffs as to the date on which the cause of action arose within the meaning of s. 13 (1), *quoad* the enforcement of the security. That depends on the view one takes of the nature of the proceedings here under consideration. If they were proceedings of some kind other than proceedings for the enforcement of the second mortgage, then it might well be that the cause of action arose at some time other than the date on which the mortgage originally became enforceable. That, however, is *prima facie* the relevant date, and, in my view, these proceedings, although their form was dictated by the fact that before they were launched there had been a sale of the property comprised in the security, were nothing more or less than proceedings to enforce the security, *i.e.*, the second mortgage, and I have no doubt that the right to enforce that security arose on the occasion of the original default, and, therefore, far more than a year before the date of the commencement of the proceedings. In my view, therefore, once it has been accepted that these are proceedings to enforce the second mortgage, the argument falls to the ground.

Counsel laid great emphasis on the contention that s. 13 (1) was not apt to extinguish a right as opposed to barring a remedy. In that general contention I am in agreement with him. Nevertheless, I am not prepared to hold that a person whose claim is wholly statute barred in the sense that he cannot bring any kind of action in any court to enforce it can properly be described as a person entitled to the mortgaged property or authorised to give receipts for the proceeds of the sale thereof within s. 105, and I think, as did the learned judge, that there is a real ground of distinction between this case and *Re Thomson's Mortgage Trusts* (1), in that the sub-mortgagee of the second mortgage there concerned had admittedly got something due to him. He had his principal due to him and some interest. The only question was the amount of interest which was properly payable to him. In the present case, the relevant limitation has had the effect of depriving the plaintiffs of any claim at all in respect of the loan or any security for it which they can assert by any form of legal proceeding. Accordingly, the result, in my view, is that the summons issued by the plaintiffs was a proceeding to enforce their security, and, the time prescribed by s. 13 (1) of the Act of 1927 having run, it was a proceeding which, by the express terms of the section, did not lie, and was, therefore, rightly dismissed. I cannot say I regard the result as particularly satisfactory, but I think it necessarily follows from the terms of the limitation imposed by s. 13. Accepting counsel's contention that the plaintiffs' rights are not extinguished, one gets the position that the plaintiffs still have a debt owing to them, but a debt which they cannot recover by means of any legal process. On the other hand, the debtor's estate still owes the money, in the sense that the debt is not extinguished although it cannot be sued for. Thus, one feels that the position arrived at by the present decision is something of a stalemate. I do not propose to speculate on what may happen in the future, or decide questions in advance, but, in the event of this fund being paid into court, as I think it must be as the matter stands at present, and of a personal representative of Mr. Martin being constituted and applying for payment out, the plaintiffs might well raise the point that the representatives of Mr. Martin cannot in equity claim payment of the fund out of court without first discharging their debt, on the ground that, although not recoverable by action, it is still a subsisting debt which in equity ought to be paid as a condition of any payment out to the mortgagor's estate, the application for that purpose being, in effect, equivalent to a claim for redemption. I have no doubt that, if the court took that view—and I am not saying that it would, nor am I deciding that question one way or the other in advance—the payment which would have to be made as a condition of allowing the balance of the fund to come out of court to the personal representative would be a payment arrived at after taking a fair and proper account of the amount which should be considered as justly due, having regard to any relevant provisions of the Moneylenders Acts as to rate of interest and so forth. For these reasons I think this appeal fails.

MORRIS, J.: I am entirely of the same opinion. The borrower borrowed £40 on Jan. 29, 1940, and the rate of interest was $82\frac{1}{2}$ per cent. The note or memorandum of the contract relating to the loan recited the amount of the loan and that it was on the security of the promissory note and of the legal charge granted by the borrower on his property at No. 20, Woodleigh Avenue. The note further recited that the borrower authorised the moneylenders, the plaintiffs, out of the £40 to deduct and retain the sum of £7 10s., which was to be accepted by the plaintiffs in full settlement of some earlier promissory note. Those matters might all have been relevant if the court had been considering the righteousness of this transaction. The Moneylenders Act, 1900, s. 1 (1) provides:

“Where proceedings are taken in any court by a moneylender for the recovery of any money lent after the commencement of this Act, or the

enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a court of equity would give relief, the court may re-open the transaction, and take an account between the moneylender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges, as the court, having regard to the risk and all the circumstances, may adjudge to be reasonable . . .”

It is provided by the Moneylenders Act, 1927, s. 10 (1):

“Where, in any proceedings in respect of any money lent by a moneylender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per cent. per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved, presume for the purposes of s. 1 of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per cent. per annum, is excessive.”

The borrower died in September, 1940, and it is common ground that the latest date down to which there could have been any action brought against the estate of the borrower for money due from the borrower has long since passed. When, in 1949, the defendants, as first mortgagees, gave notice to the moneylenders of the sale of the property, certain correspondence followed. The plaintiffs said that they noted that there was a substantial surplus in hand, and they asked that that surplus should be forwarded to them in order that their legal charge might be satisfied. The defendants said that they did not know exactly what the surplus was then likely to be, but they thought it was about £400, and the plaintiffs asked that they should have the surplus handed to them. The defendants asked to see the second charge, and they also asked if they might have a statement showing how the amount claimed was arrived at. That statement was sent in January, 1950, showing an amount then claimed of £171 10s. The moneylenders claimed interest as from the date in September, 1940 down to December, 1949, not at the rate agreed, but at forty-eight per cent., they having voluntarily agreed to state their interest at that figure. When the defendants received the account they wrote, on Jan. 18, 1950, and said that they were extremely concerned at the disclosure of the rate of interest being charged and at the large amount of interest that the moneylenders required to have paid to them. They said:

“The society feel that they might leave themselves open to serious criticism if they paid out on second charge sums embodying the interest claimed in this case, and wonder if they should not pay the moneys into court.”

In my judgment, that was a very proper attitude for them to have adopted. Once they had had disclosed to them the terms of this contract, it must have

been apparent that there were circumstances which might call for a re-opening by the court. The plaintiffs then said that they would take proceedings, and in due course they did so. In those proceedings the position was that the plaintiffs still asked for the whole of the balance to be paid to them, or, alternatively, the balance claimed down to August, 1950, which was by then £182 11s. In those proceedings before the learned judge the borrower's estate was not represented, and it was not possible for the court, had there been occasion then to re-open the transaction, to have the information before it as to the circumstances of the loan. It might well be that there would be evidence, if the matter were investigated, suggesting, on the one hand, that the risk was great, but, on the other hand, there might be evidence that the risk was slight. The plaintiffs were claiming to be beneficiaries under the trust, but were claiming to say that they should fix the amount for which they were beneficiaries, fixing it first by reference to the contract, but then by reference to the contract as altered by them so as to reduce the rate of interest to forty-eight per cent. Speaking for myself, it does not seem to me that by a mere reduction of the rate to forty-eight per cent., they can cure the mischief which, on the face of it, the contract seems to include. When the proceedings were before the learned judge, the defendants took the point that s. 13 (1) of the Act of 1927 prevented the proceedings being brought, and once that point was taken it was for the learned judge to adjudicate on it. In my judgment, he came to the correct conclusion.

In *Re Thomson's Mortgage Trusts* (1), EVE, J., said that he did not think that the application was an action or suit within the meaning of the Real Property Limitation Act, 1833, s. 42, but was "in substance" an action by a beneficiary for the execution of the trust. In my judgment, the proceedings that were before the learned judge in the present case were, in substance, proceedings for the enforcement of a security taken in respect of a loan made by the money-lenders. That is also the common sense of the matter, and I am in entire agreement with the reasons assigned by my Lord. Those proceedings were not commenced before the expiration of twelve months from the date on which the cause of action accrued, and I am of the opinion that the learned judge came to the correct conclusion.

SIR RAYMOND EVERSLED, M.R.: I have not found this case an entirely easy one, and, as JENKINS, L.J., has observed, the result may be regarded as not very satisfactory, although any regret which I may feel on that account is not unqualified by the considerations to which MORRIS, J., has referred in regard to the nature of this transaction and by the fact that for ten years after the borrower met his death the plaintiffs, although, no doubt, they were in difficulties, took no step whatsoever towards realising their claim, during which period the somewhat small capital sum owing of £32 had, by the incidence of interest at the more modest rate of forty-eight per cent., been swollen to some six times its original dimensions. I agree with my brethren in thinking that the learned judge correctly decided the question. Counsel for the plaintiffs has argued that these proceedings are proceedings, not to enforce the security, but to enforce in the plaintiffs' favour the statutory trusts specified by the Law of Property Act, 1925, s. 105. Alternatively, he says, if they are in some sense proceedings to enforce the security, the cause of action on which they are founded arose, and arose only, when the trusts specified by s. 105 became first operative, *i.e.*, when the proceeds of sale came to the hands of the defendants, events which occurred at such a time that the limitation in the Moneylenders Act, 1927, s. 13 (1), would not bar the plaintiffs' right. I am unable to accept this argument. If, as this alternative really supposes, these proceedings are in some measure an enforcement of the security, then, to my mind, the cause of action first arose when, according to the contract, the right to enforce the

security first occurred, and, admittedly, that was at a date long outside the period allowed by s. 13 (1).

On the question whether these are proceedings to enforce the security at all, as JENKINS, L.J., has observed, counsel for the plaintiffs has much relied on the decision of EVE, J., in *Thomson's* case (1), and, particularly, on the reasoning underlying the decision that the possession there of the first mortgagees of the surplus proceeds of sale was in the eye of the law the possession of the plaintiffs, the second mortgagees, but, to my mind, it is of the essence of that decision that the plaintiffs in that case could enforce their security, and it was for that reason, and because they were therefore within the terms of the statutory trusts, that the possession of the first mortgagees could be properly treated as the possession of the plaintiffs. That distinction, I think, was rightly noted and relied on by HARMAN, J., apart from the further distinction between the language of s. 42 of the Act of 1833, with which EVE, J., was concerned, and the language of the Moneylenders Act, 1927, s. 13 (1). Although the form of these proceedings is an application for the execution of the trusts, I think the substance of them is plainly a proceeding to enforce a security. They are concerned with a sum of money in the hands of first mortgagees representing surplus proceeds of sale. The plaintiffs lent a sum of money to a deceased borrower. What is their interest or concern in this sum of money? What rights have they in regard to it? Surely only a right by virtue of their contract to satisfy themselves out of these moneys. In so far as they say that, they are enforcing their security, and in so far as they have to come to the court to establish that right, they are taking proceedings to enforce their security. To put it in another way, it seems to me that the only way in which the plaintiffs qualify as beneficiaries under s. 105 is on the footing that they can and do assert in the court their right to enforce the security, *i.e.*, to take and satisfy themselves out of these sums of money. For these reasons, as well as for those stated by my Lords, I think that HARMAN, J., rightly concluded this matter, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *M. A. Jacobs & Sons* (for the plaintiffs; *Bentleys, Stokes & Lowless* (for the defendants).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

NOTE.

POLSKY v. S. AND A. SERVICES, LTD. S. AND A. SERVICES, LTD. v. POLSKY.

[COURT OF APPEAL (Cohen, Denning and Hodson, L.JJ.), April 19, 20, 1951.]

Bill of Sale—Assurance of personal chattels by way of security—Purported sale of car followed by hire-purchase agreement—Bills of Sale Act (1878) Amendment Act, 1882 (c. 43), s. 3.

APPEALS by S. and A. Services, Ltd., from orders of LORD GODDARD, C.J., dated Dec. 7, 1950, and reported *ante*, p. 185.

The appellants (referred to hereafter as "the defendants") were the defendants in the first action and the plaintiffs in the second. In the first action the plaintiff claimed a declaration that a hire-purchase agreement, made between him and the defendants on June 22, 1948, was a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and, being unregistered, was void under s. 8 of the Act, and that he was at all material times the owner of the motor car which was the subject-matter of the agreement. In the second action, in which the plaintiff in the first action was the defendant, the defendants (as plaintiffs) claimed the return of the car and damages for its detention.

On June 21, 1948, the plaintiff purchased from a dealer a motor car for the sum of £895 and paid for it by cheque. On June 22, wishing to obtain a sum of £400 to pay into his bank to meet the cheque, the plaintiff entered into a transaction with the defendants who carried on the business of financing the purchase of cars. Their usual practice was to buy a car from a dealer on behalf of a purchaser, the purchaser himself paying part of the purchase price either to the defendants or direct to the dealer and the defendants paying the remainder, and then to let the car on hire-purchase terms to the purchaser, the car remaining the property of the defendants until the full purchase price had been paid by the purchaser. On this occasion, although the plaintiff had purchased the car himself and merely sought a loan of £400, the transaction was carried out by means of the documents which were used by the defendants when financing purchases of cars, and they purported to buy the car from the plaintiff and to let it out to him under a hire-purchase agreement, dated June 22, 1948. In the proposal form signed by the plaintiff the value of the car was given as £895 and it was stated that an initial payment of £495 had been made, leaving £400, plus £50 for charges, as "balance of hire" to be paid by the plaintiff in eighteen monthly payments of £25 each. Among the other documents signed by the plaintiff in connection with the purported sale and hire of the car, one contained a receipt saying: "Received cheque £400 payment for the car," and another contained a statement by the plaintiff that he clearly understood that he was selling the car to the defendants. Soon after the transaction the plaintiff sold the car, but he continued to pay the instalments under the agreement with the defendants. When six instalments had been paid, the defendants learned of the sale and claimed possession of the car on the ground that the plaintiff had broken the terms of the hire-purchase agreement. The plaintiff offered to pay at once the full amount outstanding under the agreement (*i.e.*, £250 and £50 for charges), but the defendants claimed that they were entitled to the car, or its value at the time (*viz.*, £800), and they brought an action for possession against the purchaser, who brought in the plaintiff as a third party, and the plaintiff, by arrangement, took over the defence of the claim. The plaintiff thereupon brought an action against the defendants claiming a declaration that the hire-purchase agreement was a bill of sale within the meaning of the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, being in reality an assurance of personal chattels as security for a debt, and that, as it was unregistered, it was void under s. 8 of the Act. LORD GODDARD, C.J., held that the facts set out in the proposal form were incorrect and that the transaction was not a genuine sale and re-hire, but was merely a loan of £400 by the defendants to the plaintiff on the security of the car, and that, therefore, the hire-purchase agreement was a bill of sale within s. 3 of the Act of 1882, and, as it was not registered, was void under s. 8.

Cases referred to:

- (1) *Bishopsgate Motor Finance Corp'n., Ltd. v. Transport Brakes, Ltd.*, [1949] 1 All E.R. 37; [1949] 1 K.B. 322; [1949] L.J.R. 741; 2nd Digest Supp.
- (2) *Pearson v. Rose & Young, Ltd.*, [1950] 2 All E.R. 1027; [1951] 1 K.B. 275.
- (3) *Elsey & Co., Ltd. v. Palmer*, (1924), (unrep.), quoted in JONES AND PROUDFOOT'S NOTES ON HIRE PURCHASE LAW, 2nd ed., p. 99.

Melford Stevenson, K.C., and *Hallis* for the defendants (the plaintiffs in the second action).

Laskey for the plaintiff (the defendant in the second action).

The COURT OF APPEAL agreed with the decision of LORD GODDARD, C.J., and with the reasons given by him for the decision, and they dismissed the appeals.

Appeals dismissed.

Solicitors: *Gouldens* (for the defendants); *Canter, Hellyar & Co.* (for the plaintiff).

C.N.B.

Re BLECKLY (deceased). BLECKLY AND OTHERS v. BLECKLY.

[COURT OF APPEAL (Sir Raymond Evershed, M.R., Jenkins, L.J., and Morris, J.), April 25, 1951.]

Will—Class gift—Closing of class—Gift to children on attaining specified age—Gift in futuro subject to life interest—No member of class existing at cesser of life interest—Closing of class on attainment of specified age by one member of class.

By a codicil to his will a testator, who died on Feb. 20, 1925, gave £10,000 to his executors on trust to invest and pay the income thereof to his daughter-in-law, then the wife of his son H., "during so much of her life as she shall remain the wife or widow of [H.] . . . [and] subject to the interest of my daughter-in-law therein my executors shall hold the said sum of £10,000 . . . upon trust for all or any the children or child of [H.] who shall attain the age of twenty-one years if more than one in equal shares." In 1927 H.'s marriage, of which there was no issue, was dissolved. In the same year H. re-married, and in March, 1929, a daughter was born. In 1950 the daughter, having attained the age of twenty-one years, and there being then in existence no other child of H., claimed the whole fund. H. was still living.

Held: the rule in *Andrews v. Partington* (1791) (3 Bro. C.C. 401), being a rule of construction, might be excluded if the language of the will were sufficiently clear; the fact that the daughter was not born until after the cesser of the life interest subject to which H.'s children took was not sufficient to exclude the rule; and, applying the rule, the class of remaindermen closed on the attainment of the age of twenty-one by the daughter, who was, therefore, entitled to the whole fund.

Decision of HARMAN, J. (ante, p. 628), reversed.

AS TO THE RULE IN *ANDREWS v. PARTINGTON*, see HALSBURY, Hailsham Edn., Vol. 34, pp. 271-276, paras. 322-325; and FOR CASES, see DIGEST, Vol. 44, pp. 768-781, Nos. 6266-6379.

Cases referred to:

- (1) *Andrews v. Partington*, (1791), 3 Bro. C.C. 401; 29 E.R. 610; 44 Digest 768, 6266.
- (2) *Re Chartres*, [1927] 1 Ch. 466; 96 L.J.Ch. 241; 137 L.T. 52; 44 Digest 785, 6422.
- (3) *Ellison v. Airey*, (1748), 1 Ves. Sen. 111; 27 E.R. 924; 44 Digest 1166, 10100.

- (4) *Re Emmet's Estate*, (1880), 13 Ch.D. 484; 49 L.J.Ch. 295; 42 L.T. 4; 44 Digest 769, 6282.
- (5) *Mainwaring v. Beevor*, (1849), 8 Hare 44; 68 E.R. 266; 44 Digest 569, 3865.
- (6) *Armitage v. Williams*, (1859), 27 Beav. 346; 54 E.R. 135; 44 Digest 772, 6305.

APPEAL by the defendant against an order of HARMAN, J., dated Feb. 15, 1951, and reported *ante*, p. 628.

The plaintiffs, as trustees of a codicil of Herbert Sanderson Bleckly, applied by originating summons for the determination of the question whether, on the true construction of the said codicil, a legacy, subject to a life interest during widowhood or widowhood, to "all or any the children or child of my son Herbert who shall attain the age of twenty-one years if more than one in equal shares" was payable to the first child of Herbert to attain twenty-one (there being no other child of Herbert then living) where no child was living at the date of the cesser of the life interest. HARMAN, J., held that the legacy was not so payable, but ought to be retained by the trustees for the benefit of all the children of Herbert, including both the child *in esse* and also any children of Herbert who might be born in the future.

Wigan for the defendant, the daughter of Herbert Bleckly, the younger.
Shebbeare for the plaintiffs, the trustees of the will.

SIR RAYMOND EVERSHED, M.R.: The question raised by this appeal is whether, having regard to the facts of this case, the so-called rule in *Andrews v. Partington* (1) applies so as to entitle the defendant, Miss Teresa Bleckly, to claim that she is now indefeasibly entitled to a certain sum of money representing a legacy bequeathed by the testator's codicil. HARMAN, J., came to the conclusion that the facts were such as to exclude the application of the rule. He observed, justly, that the rule is artificial, designed to defeat what would, at first sight, appear to be the intention of the testator, and, moreover, has been the subject of adverse comment by judges, particularly, to take a modern instance, by ASTBURY, J., in *Re Chartres* (2). The learned judge thought that he was not shackled by the rule, and, being free to construe the words of the codicil according to their ordinary meaning, he reached a conclusion adverse to the defendant. I have been persuaded to a different result.

The testator, who was the grandfather of the defendant, died in 1925. His will, dated in April, 1924, is not itself relevant, but by a contemporary codicil he made a bequest in these terms:

"I give to my executors free of duty the sum of £10,000 upon trust to invest the same (with power to vary investments at discretion) and to pay the income thereof to my daughter-in-law Gette Bleckly the wife of my son Herbert Allis Bleckly during so much of her life as she shall remain the wife or widow of my said son and so that during the period of her marriage to him the same shall be for her separate use without power of anticipation Subject to the interest of my daughter-in-law therein my executors shall hold the said sum of £10,000 and the investments for the time being representing the same and the future income upon trust for all or any the children or child of my son Herbert Allis Bleckly who shall attain the age of twenty-one years if more than one in equal shares as tenants in common."

For the purpose of considering the application of this so-called rule and leaving aside for the moment the significance of any special language operative to exclude it if otherwise applicable, the terms of the gift may conveniently be stated thus. There was a gift of a limited interest in income to B, and, subject thereto, a gift of corpus to the children of A on attaining the age of twenty-one. The circumstances which have rendered this case unusual and outside the

direct scope of any reported decision arise out of the subsequent events, for in April, 1927, that is some two years after the death of the testator, the marriage referred to by him between his son and his daughter-in-law, Gette Bleckly, was dissolved. Shortly afterwards the son married his present wife. The first Mrs. Bleckly is, I understand, still alive, but there was no issue of that first marriage. Of the second marriage there has been issue one daughter, the defendant, who was born on Mar. 7, 1929, and is now, therefore, over twenty-one. No other children have been born save one boy, born before the defendant, who lived only for a few days. The defendant's father, that is, the testator's son, is now in the fifties and his present wife is also about fifty. It may, therefore, be regarded as unlikely, especially after so long an interval, that they should themselves have any more children, but there is the possibility that by death or otherwise their marriage should terminate and that thereafter the son should marry a third time and by a third wife have further children. The defendant claims that her interest in the legacy would be unaffected and undiminished by any further children that her father might by subsequent marriage or otherwise have, for, says she through her counsel, the rule in *Andrews v. Partington* (1) has now closed the class capable of taking under the codicil and she is the only qualified member of that class. There being no one else directly concerned, counsel for the trustees has assisted the court by suggesting the contrary view and supporting the judgment of HARMAN, J. Counsel for the trustees says that though it is true that this rule is well established, it is not enthusiastically applied in any case and that the circumstance which is essential for its application is that when the first marriage was dissolved—i.e., when the limited interest of B (reverting to my simple statement of the problem) ceased—there should be some person in existence capable of taking under the gift of corpus, and that in the absence of such a person there is no warrant for the application of the rule. To apply it here would be to extend its scope, and for reasons already sufficiently indicated that, it is argued, is not a course which the court should adopt.

The whole matter turns, I think, on the one circumstance that there was a gap between the cesser of the limited interest when Mrs. Gette Bleckly ceased to qualify as the recipient of the income of the fund and the birth of the defendant. It is conceded as being now well established by authority that if—and again I refer to the simple statement of the problem—a child of A had come into existence during the subsistence of the limited interest in favour of B there would be no escape from the application of the rule, so that the first child so coming into existence who attained twenty-one would acquire an interest incapable thereafter of being diminished. The question is whether, in logic or on other grounds, we should say that the result is the same though the first member of the class to take the corpus did not come into existence until after the determination of the interest of B?

One small matter I would mention before I attempt to state the reasons for my conclusion. In the course of his judgment the learned judge observed, and observed correctly, that on the dissolution of the first marriage Mrs. Gette Bleckly ceased to be the wife of Herbert Bleckly, but he went on to say that, therefore, she could not ever become his widow. I do not desire to express any final view on a highly improbable set of circumstances, but I would reserve this question. Supposing that hereafter, Mr. Herbert Bleckly's present marriage having terminated, he re-married Mrs. Gette Bleckly, and Mrs. Gette Bleckly then survived him. She would at least have a case for saying that she was then his widow. Whether that would have any effect on the operation of the codicil I am not concerned to state. I do not think that that possibility affects the answer to the question we have to determine, which is whether the defendant has now acquired an indefeasible interest in the corpus of the fund not capable of being diminished, although it may affect the form of order proper to be made. The possibility does, however, I think, illustrate a point made by counsel

for the defendant that if the learned judge is right there would be added to the disrepute of the rule a strange caprice as regards its application. Counsel thus emphasised his point. He said that, if the facts had been slightly different, if the interest of the life tenant B had been terminable, not on dissolution of the marriage, but on some other event, then, if the defendant had been born before the termination, the rule would have applied, but, if she had been born a year or two later when Mr. Bleckly and Mrs. Bleckly, her parents, were a year or two older, the rule would not (according to my judgment) have applied and it would be necessary to hold up the final distribution until the death of her father. I add that if by re-marriage Mrs. Gette Bleckly became the son's widow within the meaning of the codicil, then, when her interest ceased at her death, it would be plain that the person who was entitled to the corpus had come into existence long before that event, and, therefore, it might be, that by the event of re-marriage the situation would be reversed and, *Andrews v. Partington* (1) having been excluded, would become once more applicable. I express no view on those matters save to say again that the consideration of this not wholly fanciful state of affairs seems to me to illustrate possible caprice (if the judgment appealed from is right) in the application or non-application of the rule.

The rule may or may not be regarded as in all respects sensible, but, if it be firmly established and if there be no escape from its application to facts corresponding to those in *Andrews v. Partington* (1) (in this court, at any rate), then it seems to me that it should be, I do not say extended, but applied logically and made, whatever its disrepute, as a rule coherent. I think with all respect to the learned judge that, if its application were excluded here, it would have to be on the mere ground that the facts in this case differed in the one respect I have mentioned from the facts in the cases to which *Andrews v. Partington* (1) admittedly applies, and, therefore, notwithstanding any correspondence in other respects between the two classes of case, the court ought not to apply the rule here. The rule is stated conveniently in HAWKINS ON WILLS, 3rd ed., at p. 96:

“Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded.”

Prima facie, if that rule be correctly stated, it covers this case. The argument to the contrary depends on finding some exception or qualification to it. In *Andrews v. Partington* (1), a decision of LORD THURLOW, L.C., a gift of residue was made to all the children of A to be paid at a specified age, twenty-one, or, in the case of daughters, on earlier marriage. In other words, there was no previous limited right or interest. LORD THURLOW, L.C., in his judgment, which is very shortly reported, said (3 Bro. C.C. 404):

“... where a time of payment was pointed out, as where a legacy is given to all the children of A when they shall attain twenty-one, it was too late to say, that the time so pointed out shall [not] regulate among what children the distribution shall be made ... It must be among the children *in esse*, at the time the eldest attains such age. He said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than is that of a marriage settlement, where nobody doubts that the same expression means all the children.”

The report of the judgment is not rendered more helpful by the circumstance that the word “not” which I have read appears in brackets, and it seems open to some doubt whether it was or was not used, but, whether it was used or not, it is, I think, clear that the Lord Chancellor said (I am paraphrasing his language): “Where a legacy is given to all the children of A when they shall attain twenty-one, the distribution would be among the children *in esse*

at the time the eldest attains such an age." LORD THURLOW stated his wonder at the origin of the rule. To me that language seems to fly in the face of the testator's intention if ordinary emphasis be given to such language as "to or between all or any of the children of A" who attain a particular age. In truth, it seems clear that the rule is founded on *Ellison v. Airey* (3), decided by LORD HARDWICKE, L.C., some forty years earlier. It is plain that a rule of such antiquity cannot be lightly discarded or, I think, whittled away, and I think it is also, *prima facie*, undesirable to introduce into it undue refinements which are apt to cause difficulty to persons who may wish to regulate their affairs according to their understanding of the law applicable in cases of this character.

In *Re Emmet's Estate* (4), which was nearly a hundred years later than the founding authority of *Andrews v. Partington* (1), the rule was treated as thoroughly well established. SIR GEORGE JESSEL, M.R., said in that case (13 Ch.D. 490):

"There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund."

That language was used in reference to the affirmation by him of the rule, and I have read it because, in speaking of it as a rule of convenience, it is to be noted that the convenience is not a mere administrative convenience—*i.e.*, to give the trustees an early quittance of their responsibility. It is a rule of convenience because, if a child has attained twenty-one and has therefore qualified, that child might have a sense of injustice if he or she were made to wait, perhaps a very long time indeed, to enjoy his or her patrimony and in apprehension of the possible event of the re-marriage of his or her father and the arrival, long afterwards, of further children to share in the fund. I think, without indulging in any kind of moralising, that such a state of affairs might fairly be thought undesirable from everybody's point of view. At any rate, that is the basis of it, and I think it entitles the rule to this blessing (to be set against the disrepute which it is said to have earned), that it is founded on an intention on the part of the court not to make persons in the position in which the defendant finds herself in this case wait for a long time and to avoid a situation between her and her father which would be not wholly free from embarrassment.

In *Re Chartres* (2) ASTBURY, J., was obviously disinclined to apply the rule, and the circumstances lent some force to his disinclination. In that case there was a gift to the children of A at twenty-one, subject, however, to a power of appointment in A among such children. A released his power of appointment so that the children of A then became absolutely entitled at twenty-one. There was only one member of that class, and he had long since attained twenty-one and had died, appointing his father his personal representative. The effect, therefore, of the application of the rule by that strange concatenation of events was that A was able, as personal representative, to get payment of the fund which was given to his son. The learned judge, who carefully analysed the rule and the cases in which it had been applied, felt himself forced nevertheless to accede to the application.

I have derived great assistance from the formulation which counsel for the defendant made for us of four types of case which are material for consideration. The first class is where there is a gift to all the children of A, *i.e.*, a gift to a class without any intervening life or limited interest and without any qualification as to age or otherwise. The second class is the same as the first, but with the interposition of a life or other limited interest—for example, a gift to B for life and then to the children of A. The third class is the one precisely covered by *Andrews v. Partington* (1), a gift to the children of A on attaining twenty-one.

The last class (to which it is conceded, *prima facie*, the same rule also applies) is a gift to B for life and subject thereto to the children of A who attain twenty-one. The argument against the defendant proceeds by analogy from the first two to the second two. In each of the first two the class of persons entitled is limited to those members of the class *in esse* at the death of the testator or on the determination of B's limited interest (as the case may be) and is not enlarged by letting in children born thereafter, for it is the policy of the law that the persons entitled should be ascertained as early as possible, but, taking class (i) (a gift *simpliciter* to all the children of A), what if the testator dies and there are no such persons then in existence? Similarly, in the case of a gift to B for life and then to the children of A, what if B dies and again there are no persons in existence claiming as the children of A? In either case, the gift must fail altogether unless one can treat the class as still alive so as to comprehend children born thereafter, such children being then capable of making the gift effective. It is to be noted that neither class (i) nor class (ii) is within the statement of the rule which I read from Mr. HAWKINS' book, but it is said that analogous principles should apply. If, therefore, we consider classes (iii) and (iv) and suppose that at what I will call the material date there were no children in existence capable of taking under the gift of corpus, the question arises whether you should adopt the same practice as with classes (i) and (ii) and say that in that event all children thereafter coming into existence should be entitled to come in and qualify. I have given my reason for suggesting that in classes (i) and (ii) you must allow after-born children to qualify, for otherwise the gift must wholly fail. It seems to me there is no such necessity in classes (iii) and (iv). Take the third, and simpler, class, that of *Andrews v. Partington* (1), a gift to the children of A on attaining twenty-one. That is, on the face of it, defined as a gift to all persons of that class who attain a particular age, and, if the rule is that the class is closed when the eldest attains that age, there appears on the face of it to be no reason to qualify it or seek to make an exception to it merely because at the testator's death there are no children in existence. In other words, it seems to me in that case that the non-existence of members of the class at the testator's death does not logically have any relevance to the application of the rule. The same, I think, is equally true of the fourth class, which is the class with which we are here concerned. One could, no doubt, make another rule or an exception to the general rule, no less artificial than the general rule, and say that the rule in *Andrews v. Partington* (1) was limited in its application to cases in which on the death of the testator or the cesser of the prior interest (whichever was the relevant date) there were in existence some members of the class ultimately to take, and that in other cases all children, whenever born, were entitled to qualify. That is something which can be intelligibly and simply stated, but I can find no basis for it in the authorities which have been cited. What I have read from the cases and from Mr. VAUGHAN HAWKINS' book gives no indication of there being any such qualification to the rule, and for the reasons which I have tried to state there seems to me to be no reason in logic for it.

I, therefore, think that there is no sensible ground for saying that in this particular case the rule in *Andrews v. Partington* (1) does not apply though it would admittedly have applied had the defendant happened to be born during the pendency of the prior life or other limited period. The question is obviously doubtful, and for that reason, very understandably, the trustees brought the matter to the court. There is no decision on all four with the facts of this case in the books. Moreover, in JARMAN ON WILLS, 7th ed., vol. 3, pp. 1665 and 1666, it is stated to be a matter of doubt whether in events such as have occurred here the rule does apply. We have, with the assistance of learned counsel, examined the cases referred to in the note to the text, and I do not think that they provide any direct authority for the view that in such circumstances as exist here the rule ought not to be applied. This much, however,

should be stated. Although this rule is called a rule of convenience (and it may have sometimes been referred to as a rule of law), I think counsel for the trustees was right in suggesting that it is, in truth, a rule of construction. It may be artificial, it may be said to defeat the apparent intention of the testator, but it is a rule of construction and must, therefore, give way to the language of the will in question if the language is sufficiently clear to displace it. That the application of the rule or any analogy to it can be displaced by appropriate language emerges, I think, from *Mainwaring v. Beevor* (5), which was followed in *Armitage v. Williams* (6). In *Armitage v. Williams* (6) there was a gift to a class on attaining twenty-one, and at the relevant date, viz., the death of the testator, no members of the class existed. It was, therefore, a case in class (iii) of the classification of counsel for the defendant, but analogous to this case in that there was no member of the family alive at the relevant date. SIR JOHN ROMILLY, M.R., decided the case on the special language of that will, which, he said, brought it within the authority of *Mainwaring v. Beevor* (5) (not itself a case to which the rule in *Andrews v. Partington* (1) would otherwise have applied), and thought that, having regard to the special language used, the class of persons to take must be kept open until the last possibility of its membership being increased. That, I think, is the nearest case which appears in the books to the present, though it is, because it turned on the special language used, different in essentials from this case.

I repeat that, if the language of the will so requires on its fair construction, the rule must give way to the language. On the other hand, the rule being now more than two hundred years old (if you take the authority of *Ellison v. Airey* (3) as the right *terminus a quo*), the will must be read in the light of the existence of the rule, and it is, I think, clear that merely stating that the class to take is "all or any" the children of A on attaining twenty-one will not be sufficient without more to exclude the application of the rule. If the testator added words of emphasis indicating that the class was to participate at whatever date the members might be born, the result might well be otherwise. Appreciating, however, as I fully do, the *prima facie* significance which the reader would attach to the words used by the testator in this codicil, nevertheless I do not think them sufficient, in the light of the rule, to negative its application if otherwise on an appropriate comprehension of the rule it is applicable. I think I have sufficiently stated the matters to which we have been referred. I think, for the reasons which I have given, that the rule ought to be applied in this case and that to exclude it would be, whatever the disadvantages of the rule and however insensible its origin, to give it another effect, namely, to make it incoherent and capricious in its effect. With all respect, therefore, to HARMAN, J., I think the defendant ought to succeed and that the class of persons to take under the codicil is now closed.

JENKINS, L.J.: I agree. The rule in *Andrews v. Partington* (1) is a somewhat battered veteran, but it still remains on its feet after upwards of two hundred years. Many judges have expressed their disapprobation of it and their reluctance to apply it. Nevertheless, it has long been regarded as a rule so well established that it must be followed in cases to which it is properly applicable.

In the present case the relevant circumstances in relation to the rule in *Andrews v. Partington* (1) are that, whereas at the date when the prior interest determined there was no member of the class in existence, a member of the class was subsequently born and has lived to attain a vested interest. It is to be observed that, as the testator's son, Herbert, is still alive, the class is, of course, one which is susceptible of increase. The question is whether, in those circumstances, the rule comes into operation so as to make the entire fund immediately payable to the defendant on the ground that the class closed on her attaining the age of twenty-one years. In my judgment, notwithstanding

the view which the learned judge formed to the contrary, the answer to that question should be: "Yes." I think this result follows from the rule as enunciated in HAWKINS ON WILLS and from its application in accordance with the reason underlying it. It must be remembered that the rule, however distasteful and however artificial it has been held to be, is, nevertheless, not merely arbitrary. It is founded on reason, and the reason underlying it has been clearly stated by SIR GEORGE JESSEL, M.R., in *Re Emmet's Estate* (4) (13 Ch.D. 490), in the passage to which my Lord has already referred. The essence of the reason, as appears from that passage, is (*ibid.*):

"There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund."

As to the terms of the rule, I refer again to HAWKINS ON WILLS, 3rd ed., p. 96, where the rule is thus stated:

"Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded."

Applying that simple formulation to the present case, the first child who had become entitled to receive any share was the defendant, and, in the events which happened, she became so entitled on her attaining the age of twenty-one years, the prior interest in the income having previously determined. *Prima facie*, therefore, that was the period of distribution, and no child subsequently coming into existence would be entitled to share, but the formulation of the rule obviously requires some qualification when it is, as here, applied in relation to a gift in remainder. MR. HAWKINS thus deals with that type of case at p. 97 of his book:

"If the gift be in remainder after a life interest, as a bequest to A for life and after his decease to the children of B payable at twenty-one, the period of distribution is the later of the two events to which payment is postponed: thus, if a child attains twenty-one in the lifetime of A, children born afterwards in A's lifetime are admissible; and if at the death of A no child has attained twenty-one, children born after A's death before the first child attains twenty-one are admissible."

Applying that formulation of the rule to the present case, at the death of A, the equivalent to which event for the present purpose is "at the dissolution of the marriage between Herbert and Gette," no child had attained twenty-one because there was no child in existence. After that event children born after A's death, or, in the present case, after the dissolution of the marriage, before the first child attains twenty-one are admissible. The defendant was a child born after the event corresponding to A's death in this formulation of the rule and was not merely a child born before the first child attained twenty-one but was herself the first child to attain twenty-one. The date of her attainment of twenty-one, therefore, became the period of distribution, as being the later of the two relevant events, as matters turned out, and it would appear to follow that according to the rule as applied to gifts in remainder she became exclusively entitled.

It is said, however, that there is an exception to the rule which excludes its application to the present case. The rule would admittedly take effect as stated in MR. HAWKINS' book if, at the termination of the prior interest, there had been some potential member of the class in existence. Then, *ex concessis*,

the rule as stated at p. 97 would apply and the class would close on the attainment of twenty-one by the first child to attain that age. But in the present case there was no member, or potential member, of the class in existence at the date when the prior interest determined. It is said that this circumstance excludes the rule. Treating the rule, as I have said it ought to be treated, as a rule based on reason and not as a mere arbitrary rule, I cannot see any justification for that exception. If the reason and justification for the rule is as stated by SIR GEORGE JESSEL, M.R., in *Re Emmet's Estate* (4), it must be equally right to apply it whether the first member of the class to attain twenty-one came into existence before or after the termination of the prior interest. In whichever order those events happened, the period of distribution must still be the same and the administrative difficulties and inconveniences if the rule is excluded must also be the same. Therefore, I would not, for my part, admit this exception unless there were some authority clearly enjoining me to do so.

We have been referred to no case in which the rule has been applied where the order of events was as I have stated it here, *i.e.*, where the first member of the class only came into existence after the termination of the prior interest. On the other hand, there has been cited no case which has treated that circumstance as excluding the application of the rule to the case of a gift to a class at twenty-one after a life interest. As my Lord has said, a doubt is expressed in JARMAN ON WILLS, 7th ed., vol. 3, at p. 1665:

"Where the gift is to the children of A on attaining twenty-one, and no child of A is in existence at the testator's death, it is doubtful whether all the children of A who attain twenty-one will be entitled, or only those who are in existence when the eldest attains that age."

A similar doubt appears in THEOBALD ON WILLS, 10th ed., p. 236:

"It seems doubtful whether, if there are no children at the testator's death, all would be admitted whether born before or after the eldest attains twenty-one."

Both passages, it seems, actually refer to the case of an immediate gift to a class at twenty-one where there is no member or potential member of it in existence at the death of the testator. I should add, and I think this is really what has given rise to the doubt that is naturally entertained by the trustees in this case, this passage in JARMAN at p. 1667:

"The law on the subject does not seem to have been clearly settled in MR. JARMAN's time, but he considered that on principle, notwithstanding some apparently adverse authority, the rule applicable to bequests of personal estate is that 'a bequest to A for life, and after his death to the children of B, is not defeated by the non-existence of an object at the death of A, but will take effect in favour of all the subsequently born children as they arise.' The correctness of the rule thus stated is clearly established."

That passage, which, as I understand it, is intended to refer to the case where the attainment of twenty-one is not a necessary qualification for membership of the class, is supported by a statement to similar effect in THEOBALD at p. 235.

I think there is a distinction between the case of a gift to A for life with remainder to the children of B *simpliciter* and a gift to A for life with remainder to the children of B who attain the age of twenty-one years. In the former case, the only period of distribution marked out by the will is the termination of A's life interest. Obviously, in the event of there being no children of B in existence at the death of A, that period of distribution cannot be applied, for the result of so doing would be to defeat the gift completely. In those circumstances, I think it may necessarily follow that the matter is at large, and that, whether it be convenient or not, the class is thrown open to admit all

after-born children, but in a case of the present type, equivalent for the purposes of the rule to a gift to A for life with remainder to the children of B who shall attain the age of twenty-one years, the position is different. The period of distribution there marked out by the testator is, as is said in the passage in *HAWKINS ON WILLS*, to which I have already referred, the later of the two events, *i.e.*, the death of A, the taker of the prior interest, or the attainment of twenty-one by the first of the children of B to attain that age. There is, therefore, in my view, no ground for not applying the rule in that type of case merely because the first child of B is not born until after the death of A, or, as in the present instance, the previous determination of A's interest. For these reasons, in addition to those given by my Lord, although I confess to some sympathy with the learned judge, I do not think his dislike for the rule should have led him to exclude it in this particular case. In my judgment, this is a case where, on the language of the will and in the events which have happened, the rule, according to the reason on which it is based, whatever one may think of the soundness or sufficiencies of the reason, ought to have been applied by the learned judge, and, accordingly, I think that this appeal should be allowed.

MORRIS, J.: I agree.

Appeal allowed.

Solicitors: *Bower, Cotton & Bower*, agents for *Slater, Heelis & Co.*, Manchester (for all parties).

[Reported by F. GUTTMAN, Esq., Barrister-at-Law.]

Re HALL (deceased). BARCLAYS BANK, LTD. v. HALL AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), April 17, 1951.]

Administration of Estates—Legacy—General legacy—Bequest of shares—Shares forming part of testator's estate—Right of legatee to dividends declared before satisfaction of legacy.

By his will, a testator, who at the date of his death owned large numbers of redeemable preference shares and ordinary shares in H., Ltd., gave "the following number of £1 five per centum redeemable preference shares" in H., Ltd. to persons thereafter named, and he also gave a certain number of shares in H., Ltd. to be enjoyed by persons in succession. The court having decided that the legacies were general, on the question of interest or dividends in respect thereof,

HELD: the legatees were not entitled to the dividends accruing after the expiration of one year from the date of the testator's death up to the date when the legacies were satisfied, but, during that period, only to interest at the rate of four per cent. per annum.

AS TO INTEREST AND ACCRETIONS ON LEGACIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 354-356, paras. 662-666; and FOR CASES, see DIGEST, Vol. 23, pp. 405, 406, Nos. 4754-4764.

ADJOURNED SUMMONS to determine, *inter alia*, whether certain bequests of shares, which the learned judge had held to be general legacies, carried, as from the expiration of a year from the testator's death until the satisfaction thereof the dividends declared on the shares, or interest at four per cent. per annum.

By his will, dated Jan. 22, 1944, Hugh John Hall, who died on May 21, 1945, gave and bequeathed (by cl. 6) "the following number of £1 five per centum redeemable preference shares in Hall & Hall, Ltd., . . . to the persons set out below . . ." There followed a list of persons, against the name of each of whom there was specified a number of "such shares." Clause 7 was similar in form, but related to ordinary shares. Clause 8 provided that, if any of the legatees named in cl. 6 and cl. 7 died in the testator's lifetime, the gifts to them should fall into residue. By cl. 9 (as substituted by a codicil dated Feb. 11, 1944) the testator gave and bequeathed "6,500 £1 five per centum redeemable preference shares and 1,500 £1 ordinary shares in Hall & Hall, Ltd.," to his executor to be enjoyed in succession by certain persons, and cl. 10 (as so substituted) was in similar form. At the date of his will and at the date of his death the testator was the absolute owner of ten thousand redeemable preference shares and eleven thousand ordinary shares of the company. The number of redeemable preference shares of the company given by the will and codicil amounted to ten thousand, and the number of ordinary shares so given was 9,900. On Oct. 31, 1948, the executor transferred the shares to the legatees mentioned in cl. 6 and cl. 7, and appropriated shares to satisfy the bequests in cl. 9 and cl. 10 of the will. In view of the provisions of the articles of Hall & Hall, Ltd., it would not have been possible for the executor to buy shares to satisfy the bequests of shares if the testator had not owned sufficient of the said shares to satisfy the bequests he made.

Droop for the plaintiff, the executor.

J. W. Mills for the first and second defendants, legatees.

Cross, K.C., and *P. H. B. W. Foster* for the residuary legatee.

DANCKWERTS, J.: I have held in this case that certain legacies of redeemable preference shares or ordinary shares in Hall & Hall, Ltd., are general legacies. The question which I have now to decide is whether the legatees whose legacies were satisfied on Oct. 31, 1948, by the transfer to them of shares held by the testator at the date of his death are entitled to claim the benefit of the dividends which were paid in respect of the shares which they received as from the expiration of one year from the testator's death. Counsel for the legatees in question has claimed that, although I have held that these are general legacies, they are hybrid legacies. It seems to me that that is not an accurate term to ascribe to a legacy of this kind, but, even if it be in any respect a relevant term, it seems to me that, like the mule, the legacies have no pride of ancestry or hope of posterity until they are satisfied by the allocation of shares to the legatees in question, and that it is only from that date that the legatees are entitled to the produce of those shares. Therefore, until Oct. 31, 1948, they remained what they are, that is to say, general legacies, and the legatees are entitled only to payment of four per cent. per annum from and after the expiration of one year from the testator's death until the date of satisfaction.

Order accordingly.

Solicitors: *Cree, Godfrey & Wood*, agents for *Thomas K. Dobson & Co.*, Weybridge (for the plaintiff and the third defendant); *Owry & Co.* (for the first and second defendants).

[Reported by H. Mc.L. MORRISON, Esq., Barrister-at-Law.]

PERRINS v. PERRINS AND ANOTHER.

[KING'S BENCH DIVISION (Lord Goddard, C.J., Croom-Johnson and Streatfeild,

ished. MEAD v. PLUMTREE. 1951.]

All E.R. 723.

Planning—Enforcement notice—No appeal against notice—Subsequent summons for contravention—No power to question validity of notice—Town and Country Planning Act, 1947 (c. 51), s. 24 (3).

A Before the provisions of the Town and Country Planning Act, 1947, relating to the control of the development of land came into operation on July 1, 1948, certain land was used for placing thereon caravans intended for human habitation and for camping purposes. That use continued after July 1, 1948, and on July 28, 1949, the local planning authority served on the owner and occupier of the land an enforcement notice under s. 23 (1) of the Act requiring him to discontinue the development of the land constituted by such use. The owner did not apply to the local authority under s. 23 (3) of the Act for permission to continue to use the land as theretofore, nor did he appeal to a court of summary jurisdiction under s. 24 (4). On the hearing of an information against the owner under s. 24 (3) for permitting the use of the land in contravention of the notice the justices held that they were entitled to inquire into the validity of the notice, and that, as there had been no change in the use of the land after July 1, 1948, there had been no development of the land in contravention of the Act as alleged in the notice, and, accordingly, they dismissed the information.

D HELD: the enforcement notice not having been challenged within the twenty-eight days laid down by s. 23 (3) and (4) it took effect on the expiration of that period under s. 23 (3); after the expiration of that period it was not open to the justices to question its validity; and the case must be remitted to them with a direction to convict.

FOR THE TOWN AND COUNTRY PLANNING ACT, 1947, s. 23 (1) (2) (3) (4) and s. 24 (1) (3), see HALSBURY'S STATUTES, Vol. 40, pp. 762-764.

E CASE STATED by Southport justices.

F At a court of summary jurisdiction sitting at Southport on Sept. 15 and Oct. 9 and 10, 1950, an information was preferred by the appellant, the town clerk of Southport, against the respondents, charging them with offences under the Town and Country Planning Act, 1947, s. 24 (3). The information alleged that on or about July 28, 1949, Southport County Borough Council, as the local planning authority under the Act, served on the owner and occupier of certain land at the rear of 167 Rufford Road, Crossens, an enforcement notice under s. 23 (1) of the Act requiring the use of the land as a site for the placing thereon of caravans intended for use for human habitation and for camping purposes to be discontinued, and that on June 30 and July 10, 1950, the respondents unlawfully permitted the land to be so used in contravention of the said notice and without the grant of permission under Part III of the Act, contrary to s. 24 (3). The enforcement notice recited that caravans had been allowed on the land on a date subsequent to July 1, 1948, the date when the provisions relating to the control of the development of land contained in Part III of the Act came into operation, without the permission required under the Act and that the planning authority considered it expedient that steps should be taken before June 30, 1950, to restore the land by discontinuing its use as a camping site and by removing all caravans, tents, conveyances, sheds and similar structures used or intended to be used for camping purposes. The land had in fact been used for caravans and for camping purposes before July 1, 1948.

H The appellant contended that, the time for appealing against the notice having expired, it was not competent for the respondents to challenge the validity of the notice, and that the justices must hold it to be good without further proof. The respondents contended that since the land was being used on July 1, 1948,

for caravans and for camping purposes and as no material change had been made in the use of the land after that date there had been no development within the meaning of s. 12 of the Act of 1947. The justices held that nothing exonerated them from requiring proof of relevant matters of fact in the notice, and that, as the appellant had failed to satisfy them that any material change had been made in the use of the land after July 1, 1948, there had been no such development as was alleged in the notice and the permission given by the respondents to the use of the land complained of was not contrary to s. 24 (3) of the Act. They, A therefore, dismissed the informations. The appellant appealed.

Baucher for the appellant.

Clover for the respondents.

LORD GODDARD, C.J.: This is a Case stated by Southport borough justices before whom the respondents were charged for that

"on or about July 28, 1949, the council of the county borough of Southport being the local planning authority for the purposes of the Town and Country Planning Act, 1947, served on the owner and occupier of certain land . . . at Crossens . . . an enforcement notice requiring the use of the said land as a site for the placing thereon of caravans intended for use for human habitation and for camping purposes to be discontinued and that the respondents severally on June 30, 1950, and July 10, 1950, respectively . . . unlawfully permitted the land . . . to be used as a site for the placing thereon of caravans intended for use for human habitation in contravention of the said notice and without the grant of permission in that behalf under Part III of the Town and Country Planning Act, 1947."

When the information came before the justices the enforcement notice was proved and the respondents endeavoured to show that it was bad on the ground that they had not developed the land since July 1, 1948, but had only used it for the same purpose as they had been using it before that date. The justices were of opinion that nothing in s. 24 (3) of the Act exonerated them from requiring proof of relevant matters of fact averred in the enforcement notice. In other words, they decided that they were entitled to go into the validity of the notice. Secondly, they held that, the appellant having failed to satisfy them that any material change had been made in the use of the land after July 1, 1948, there had been no development thereof as alleged in the notice and the permission given by each of the respondents on June 30, 1950, and July 10, 1950, for the land to be used as a site for the placing thereon of caravans intended for use for human habitation was not contrary to s. 24 (3).^F

I cannot agree with the justices in any respect. The Town and Country Planning Act, 1947, is too clear for argument on this point. Under s. 23 power is given to the local authority to serve a notice requiring that there shall be no development on particular land, and it is provided in sub-s. (1):

"If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

They can, therefore, serve the notice if it appears to them that there has been development since the date on which the Act came into force. By sub-ss. (2) and (3):

"(2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have

been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land or the carrying out on land of any building or other operations. (3) Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein: Provided that—(a) if within the period aforesaid an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect.”

That means that the person on whom the notice is served may ask the local authority to withdraw or vary the notice. The sub-section continues:

“(b) If within the period aforesaid an appeal is made to the court . . . by a person on whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal.”

Therefore, the person served can go either to the local authority and ask them to withdraw the notice, or he can appeal to the petty sessional division of the place where the land is situate. There is a further appeal to quarter sessions.

Whether the council were right or wrong in the view they took, it seems to me that the Act provides that, if the local authority serve a notice and it is not challenged within twenty-eight days, it becomes effective. In s. 24 (1) there is a provision with regard to the position arising where the notice requires something to be done other than mere discontinuance of use, such, for instance, as the demolition of a building which has been put up in contravention of the notice. If any steps required by the notice have not been taken, the local authority may themselves go on to the land and demolish it, or do whatever work is necessary, and can sue in the civil courts for the cost of the work. It is expressly provided that if the person who is sued

“having been entitled to appeal to the court under the last foregoing section, failed to make such an appeal, he shall not be entitled in proceedings under this sub-section to dispute the validity of the action taken by the local planning authority upon any ground which could have been raised by such an appeal.”

That provision seems to have been expressly enacted to limit the defences that might be pleaded. It leaves it open for a person sued to take other objections, for instance, that the work done by the local authority was unnecessary, in the sense that they have done more work than was necessary, or that the work was done at an unreasonable cost, or something of that kind, but it does not entitle him to take objection to the notice. If he is not entitled to take objection to the notice when he is summoned for the cost of doing the work, it would be very odd if he could still take objection when he is prosecuted under sub-s. (3) for failing to observe the terms of the notice.

We have to see what is the offence created. The words of s. 24 (3) are:

“Where, by virtue of an enforcement notice, any use of land is required to be discontinued . . . then if any person, without the grant of permission in that behalf under this Part of this Act, uses the land or causes or permits

the land to be used, or carries out or causes or permits to be carried out those operations, in contravention of the notice, he shall be guilty of an offence . . . ”

The offence is the doing of something in contravention of a notice which the previous section says shall be effective at the end of twenty-eight days unless an appeal is brought. Therefore, it is not for the justices, when a person is prosecuted for the offence of contravening the notice, to go into the question whether the notice was good or bad. When once the notice has become effective, it is the duty of the recipient, who has had the opportunity of appealing against it and has not appealed, to abide by it. For these reasons, in my opinion, it is clear the justices were wrong. The case must go back to them with an intimation that the offence was proved and it is their duty to convict.

CROOM-JOHNSON, J.: concurred.

STREATFIELD, J.: I am of the same opinion. In my view, s. 23 having provided specific machinery for obtaining either the cancellation or the variation of the enforcement notice, it is not open to a person who is subsequently prosecuted for failing to carry out something required under the notice to question its validity. He has let by the opportunity of challenging the notice afforded by s. 23, and, having done so, he has no defence to a prosecution under s. 24 (3).

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. E. Perrins*, town clerk, Southport (for the appellant); *Pritchard, Englefield & Co.*, agents for *Sydney Haworth*, Southport (for the respondents).

[*Reported by F. A. AMIES, Esq., Barrister-at-Law.*]

BOLTON AND OTHERS v. STONE.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Reid and Lord Radcliffe), March 5, 6, May 10, 1951.]

Negligence—Sport—Cricket—Injury from ball hit from ground into highway.

During a cricket match a batsman hit a ball which struck and injured the respondent who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to seventeen feet above the cricket pitch. The distance from the striker to the fence was some seventy-eight yards and that to the place where the respondent was hit about one hundred yards. The ground had been occupied and used as a cricket ground for about ninety years, and there was evidence that on some six occasions in a period of over thirty years a ball had been hit into the highway, but no one had been injured. The respondent claimed damages for negligence from the appellants, as occupiers of the ground.

HELD: for an act to be negligent there must be, not only a reasonable possibility of its happening, but also of injury being caused thereby; on the facts, the risk of injury to a person on the highway resulting from the hitting of a ball out of the ground was so small that the probability of such an injury would not be anticipated by a reasonable man; and, therefore, the appellants were not liable to the respondent.

Decision of the COURT OF APPEAL ([1949] 2 All E.R. 851), reversed.

AS TO DEGREE OF CARE ORDINARILY REQUIRED, see *HALSBURY*, Hailsham

Edn., Vol. 23, pp. 571-587, paras. 825-840; and FOR CASES, see DIGEST, Vol. 36, pp. 16-21, Nos. 68-101.

Cases referred to:

- (1) *Bourhill v. Young*, [1942] 2 All E.R. 396; [1943] A.C. 92; 111 L.J.P.C. 97; 167 L.T. 261; 2nd Digest Supp.
- (2) *Glasgow Corp'n. v. Muir*, [1943] 2 All E.R. 44; [1943] A.C. 448; 112 L.J.P.C. 1; 169 L.T. 53; 107 J.P. 140; 2nd Digest Supp.
- (3) *Donoghue v. Stevenson*, [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.
- (4) *Castle v. St. Augustine's Links, Ltd.*, (1922), 38 T.L.R. 615; 36 Digest 186, 300.
- (5) *Blyth v. Birmingham Waterworks Co.*, (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 36 Digest 6, 1.
- (6) *Fardon v. Harcourt-Rivington*, (1932), 146 L.T. 391; Digest Supp.
- (7) *Rylands v. Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest 187, 311.

APPEAL by the defendants, members of the committee of the Cheetham Cricket Club from an order of the Court of Appeal dated Nov. 2, 1949, and reported [1949] 2 All E.R. 851, reversing a decision of OLIVER, J., dated Dec. 20, 1948, and reported [1949] 1 All E.R. 237, whereby he dismissed the respondent's claim for damages for negligence and nuisance.

The respondent, Miss Stone, claimed damages for injuries received when she was struck by a cricket ball while standing on the highway in a road adjoining a cricket field occupied by the club of which the respondents (who were sued on behalf of themselves and all other members of the club) were members. OLIVER, J., held that there was no evidence of negligence and that nuisance had not been established. The Court of Appeal held that there was no nuisance, but (SOMERVELL, L.J., *dissentiente*) that, there being a foreseeable risk of a ball being hit into the road, the appellants had failed in their duty to take reasonable care to avoid injury to anyone in the road. In the House of Lords the respondent conceded that, in the circumstances, nuisance could not be established unless negligence was proved.

Sir Walter Monckton, K.C., and *Sime* for the appellants.

Nelson, K.C., *Burton, K.C.*, and *F. L. Clark* for the respondent.

The House took time for consideration.

May 10. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal reversing a decision of OLIVER, J. The action under review was brought by a Miss Stone against the committee and members of the Cheetham Cricket Club in respect of injuries said to be caused by their negligence in not taking steps to avoid the danger of a ball being hit out of their ground, or as the result of a nuisance, dependent on the same facts, for which they were responsible.

The facts as found by the learned judge are simple and undisputed. On Aug. 9, 1947, Miss Stone, the respondent, was injured by a cricket ball while standing on the highway outside her house, 10, Beckenham Road, Cheetham Hill. The ball was hit by a batsman playing in a match on the Cheetham Cricket Ground which is adjacent to the highway. The respondent brings an action for damages against the committee and members of the club—the striker of the ball is not a defendant.

The club has been in existence, and matches have been regularly played on this ground, since about 1864. Beckenham Road was constructed and built up in 1910. For the purpose of its lay-out, the builder made an arrangement with the club that a small strip of the ground at the Beckenham Road end should be exchanged for a strip at the other end. The match pitches have always been, and still are, kept along a line opposite the pavilion, which was

the mid-line of the original ground. The effect is that for a straight drive—the hit in the case in question—Beckenham Road has for some years been a few yards nearer the batsman than the opposite end. The cricket field, at the point at which the ball left it, is protected by a fence seven feet high, but the upward slope of the ground is such that the top of the fence is some seventeen feet above the cricket pitch. The distance from the striker to the fence is about seventy-eight yards, not ninety yards as the learned judge states, and to the place where the respondent was hit, just under a hundred yards. A witness, Mr. Brownson, who lives in the end house—one of the six at the end nearest the ground and opposite to that of the respondent—said that five or six times during the last few years he had known balls hit his house or come into the yard. His evidence was quite vague as to the number of occasions, and it has to be observed that his house is substantially nearer the ground than the respondent's. Two members of the club of over thirty years' standing agreed that the hit was altogether exceptional to anything previously seen on that ground. They also said—and the learned judge accepted their evidence—that it was only very rarely indeed that a ball was hit over the fence during a match. On these facts the learned judge acquitted the appellants of negligence and held that nuisance was not established.

In the action and on appeal the respondent contended as stated above that the appellants were negligent or guilty of creating a nuisance in failing to take any sufficient precautions to prevent the escape of cricket balls from the ground and the consequent risk of injury to persons in Beckenham Road. In her submission it was enough that a ball had been driven into the road even once. Such an event gave the appellants warning that a ball might be hit into the road, and the appellants, knowing this, must, as reasonable men, also know that an injury was likely to be caused to anyone standing in the road or to a passer-by. The argument was, however, as she said, strengthened when it was remembered that a ball had been driven over the fence from time to time even though at somewhat remote intervals. Such an event was known to the appellants to have occurred, and, if they had considered the matter, they ought to have envisaged the possibility of its repetition.

The question, however, remains: Is it enough to make an action negligent to say that its performance may possibly cause injury or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence? In the present case the appellants did not do the act themselves, but they are trustees of a field where cricket is played, are in control of it and invite visiting teams to play there. They are, therefore, and are admitted to be, responsible for the negligent action of those who use the field in the way intended that it should be used. The question then arises: What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field? Undoubtedly, they knew that the hitting of a cricket ball out of the ground was a possible event, and, therefore, that there was a conceivable possibility that someone would be hit by it, but so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely fly an aeroplane or drive a motor car since the possibility of an accident could not be overlooked, and, if it occurred, some stranger might well be injured. Cases of that kind, however, pre-suppose the happening of an event which the flyer or driver desires to do everything possible to avoid, whereas the hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about. In order that the act may be negligent there must be not only a reasonable possibility of its happening, but also of injury being caused. In the words of LORD THANKERTON ([1942] 2 All E.R. 399) in *Bourhill v. Young* (1) the duty is to exercise

"... such reasonable care as will avoid the risk of injury to such persons

as he can reasonably foresee might be injured by failure to exercise such reasonable care."

LORD MACMILLAN used words to the like effect (*ibid.*, 403). So, also, LORD WRIGHT in *Glasgow Corpn. v. Muir* (2) ([1943] 2 All E.R. 50), quoted the well-known words of LORD ATKIN in *Donoghue v. Stevenson* (3) ([1932] A.C. 580):

A "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

It is not enough that the event should be such as can reasonably be foreseen. The further result that injury is likely to follow must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough. There must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

B It must be remembered, and cannot too often be repeated, that there are two different standards to be applied. When one is considering whether an appeal should be allowed or not, the first is whether the facts relied on are evidence from which negligence can in law be inferred; the second is whether, if negligence can be inferred, those facts do constitute negligence. The first is a question of law on which the judge must actually or inferentially rule; the second, a question of fact on which the jury, if there is one, or, if not, the judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the surrounding circumstances of the case. In the present instance the learned trial judge came to the conclusion that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question and I cannot say that that conclusion was unwarranted. In arriving at this result I have not forgotten the view entertained by SINGLETON, L.J., that the appellants knew that balls had been hit out of the ground into the road, though on very rare occasions —six were proved in about thirty years—and it is true that a repetition might at some time be anticipated. Its happening, however, would be a very exceptional circumstance, the road was obviously not greatly frequented, and no previous accident had occurred, nor do I think that the respondent improves her case by proving that a number of balls were hit into Mr. Brownson's garden. It is danger to persons in the road, not to Mr. Brownson or his visitors, which is being considered. In these circumstances I cannot say that as a matter of law the decider of fact, whether judge or jury, must have come to the conclusion that the possibility of injury should have been anticipated. I cannot accept the view that it would tend to exonerate the appellants if it were proved that they had considered the matter and decided that the risks were very small and that they need not do very much. In such a case I can imagine it being said that they entertained an altogether too optimistic outlook. They seem to me to be in a stronger position if the risk was so small that it never even occurred to them.

H I am not assisted by any reliance on the doctrine of "*res ipsa loquitur*." Where the circumstances giving rise to the cause of the accident are unknown, that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application. It is known exactly how the accident happened, and it is unnecessary to ask whether this accident would have happened had there been no negligence. The only question is: Do the facts or omissions which are known and which led up to the injury amount to negligence? I may add that the suggestion that it would have been a wise precaution to move the pitch to a position equally between the north and south boundaries to my mind has little force. I do not think that it would have occurred to anyone that such an alteration would make for greater safety

or that there was any danger in allowing things to remain as they were. The golf club case (*Castle v. St. Augustine's Links, Ltd.* (4)) rested on a different set of circumstances in which a succession of players driving off alongside a road might be expected from time to time to slice a ball over or along the road, and, therefore, the possibility of injury to those using the highway was much greater. The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur. The question is: Would a reasonable man anticipate it? I do not think that he would, and in any case, unless an appellate body are of opinion that he clearly ought to have done so, the tribunal on whom the duty of finding the facts rests is the proper judge of whether he would or not. I need not discuss the alternative claim based on nuisance since it is admitted on behalf of the respondent that in the circumstances of this case nuisance cannot be established unless negligence is proved. For the reasons I have given I am of opinion that the appeal should be allowed, the judgment of the learned judge in the court of first instance should be restored, and the respondent should pay the costs in your Lordships' House and in the Court of Appeal.

LORD NORMAND: My Lords, it is not questioned that the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property who may be in the way of balls driven out of the ground by the batsman, but it is necessary to consider the measure of the duty owed. In the Court of Appeal, JENKINS, L.J., said that it was a duty to prevent balls being hit into Beckenham Road so far as there was any reasonably foreseeable risk of that happening. There can be no quarrel with this proposition, but one must not overlook the importance of the qualification "reasonably". It is not the law that precautions must be taken against every peril that can be foreseen by the timorous. In *Glasgow Corpn. v. Muir* (2) the decision turned on the standard of care, and LORD THANKERTON held that a person is bound to foresee only the reasonable and probable consequences of his failure to take care, judged by the standard of the ordinary reasonable man. He observed that the question whether a defender had failed to take the precautions which an ordinary reasonable man would take is essentially a jury question, and that it is the duty of the court to approach the question as if it were a jury and that a court of appeal should be slow to interfere with the conclusions of the trial judge. LORD MACMILLAN ([1943] 2 All E.R. 48) agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts. What ought to have been foreseen is the test accepted by LORD WRIGHT (*ibid.* 50), who quoted LORD ATKIN's words in *Donoghue v. Stevenson* (3) ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

LORD CLAUSON ([1943] 2 All E.R. 54) stated as the test whether the person having the duty of care ought, as a reasonable person, to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected. It is, therefore, not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road. She must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

Among the facts found by OLIVER, J., are: (i) that a house substantially nearer the ground than the place where the respondent was injured had been hit by a cricket ball driven out of the ground on certain occasions (vaguely estimated at five or six by a witness) in the previous few years; (ii) that the hit which occasioned the respondent's injury was altogether exceptional; and (iii) that it

was very rarely indeed that a ball was hit over the fence between the road and the ground. It is, perhaps, not surprising that there should be differences of opinion about the appellants' liability even if the correct test is applied. The whole issue is indeed finely balanced. On the one side there are, as we were told, records of much longer hits by famous cricketers than the drive which caused the injury to the respondent and it is, of course, the object of every batsman to hit the ball over the boundary if he can. Again, the serious injury which a cricket ball might cause must not be left out of account. On the other side, however, the findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight. The issue is thus one eminently appropriate for the decision of a jury, and OLIVER, J., dealt with it as a jury would and gave his decision without elaborating his reasons. I think that the observations of LORD THANKERTON in *Glasgow Corpn. v. Muir* (2) are apposite and that it is unfortunate that the Court of Appeal should have reversed the decision.

I do not think that the change which took place in 1910, when Beckenham Road was made and a small strip next to it was taken from the ground in exchange for a strip at the other end, has much relevance. That change was made thirty-seven years before this accident, and the evidence about the infrequency of hits out of the ground is directed to the period since 1910 and is a sufficient basis for a judgment on the degree of risk and on the duty resting on the appellants. It was said by SINGLETON, L.J., that the appellants might have escaped liability if in 1910 they had considered the matter and decided that the risks were so small that nothing need be done, but that since they did not consider it at all they must bear the consequences. I am not, with respect, disposed to agree with this reasoning. We are concerned with the practical results of deliberation, and the consequences of failing to consider the risk and of considering the risk but deciding to do nothing are the same. The precautions suggested by the respondent, being either the moving of the wickets a few steps further away from the Beckenham Road end or the heightening of the fencing, would have had little or no effect in averting the peril. The only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground. I doubt whether that fairly comes within para. (c) of the particulars of negligence,—“failure to ensure that cricket balls would not be hit into the said road.” That seems to point to some unspecified method of stopping balls from reaching the road while a game is in progress on the ground. Whatever view may be taken on these matters, however, my conclusion is that the decision of OLIVER, J., should have been respected as equivalent to a verdict of a jury on a question of fact. I agree that the appeal should be allowed.

LORD OAKSEY: My Lords, I have come to the conclusion in this difficult case that the decision of OLIVER, J., ought to be restored. Cricket has been played for about ninety years on the ground in question and no ball has been proved to have struck anyone on the highways near the ground until the respondent was struck, nor has there been any complaint to the appellants. In such circumstances was it the duty of the appellants, who are the committee of the club, to take some special precautions other than those they did take to prevent such an accident as happened? The standard of care in the law of negligence is the standard of an ordinarily careful man, but, in my opinion, an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded

against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor cars. It may very well be that after this accident the ordinarily prudent committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident. *Castle v. St. Augustine's Links, Ltd.* (4) is obviously distinguishable on the facts and there is nothing in the judgment to suggest that a nuisance was created by the first ball that fell on the road there in question. There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible, and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

LORD REID (read by LORD OAKSEY): My Lords, it was readily foreseeable that an accident such as befell the respondent might possibly occur during one of the appellants' cricket matches. Balls had been driven into the public road from time to time, and it was obvious that if a person happened to be where a ball fell that person would receive injuries which might or might not be serious. On the other hand, it was plain that the chance of that happening was small. The exact number of times a ball has been driven into the road is not known, but it is not proved that this has happened more than about six times in about thirty years. If I assume that it has happened on the average once in three seasons I shall be doing no injustice to the respondent's case. Then there has to be considered the chance of a person being hit by a ball falling in the road. The road appears to be an ordinary side road giving access to a number of private houses, and there is no evidence to suggest that the traffic on this road is other than what one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It follows that the chance of a person ever being struck even in a long period of years was very small.

This case, therefore, raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material? I do not know of any case where this question has had to be decided or even where it has been fully discussed. Of course there are many cases in which somewhat similar questions have arisen, but, generally speaking, if injury to another person from the defendants' acts is reasonably foreseeable the chance that injury will result is substantial and it does not matter in which way the duty is stated. In such cases I do not think that much assistance is to be got from analysing the language which a judge has used. More assistance is to be got from cases where judges have clearly chosen their language with care in setting out a principle, but even so, statements of the law must be read in light of the facts of the particular case. Nevertheless, making all allowances for this, I do find at least a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone.

The definition of negligence which has, perhaps, been most often quoted is that of ALDERSON, B., in *Blyth v. Birmingham Waterworks Co.* (5) (11 Exch. 784):

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

I think that reasonable men do, in fact, take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial. A more recent attempt to find a basis for a man's legal duty to his neighbour is that of LORD ATKIN in *Donoghue v. Stevenson* (3). I need not quote the whole passage: for this purpose the important part is ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."

Parts of LORD ATKIN's statement have been criticised as being too wide, but I am not aware that it has been stated that any part of it is too narrow. LORD ATKIN does not say "Which you can reasonably foresee could injure your neighbour": he introduces the limitation "would be likely to injure your neighbour." LORD MACMILLAN said in *Bourhill v. Young* (1) ([1942] 2 All E.R. 403):

"The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

LORD THANKERTON in *Glasgow Corpn. v. Muir* (2) ([1943] 2 All E.R. 47), after quoting this statement, said:

"In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man . . . The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened . . ."

The law of Scotland does not differ in this matter from the law of England.

There are other statements which may seem to differ but which I do not think are really inconsistent with this. For example, in *Fardon v. Harcourt-Rivington* (6), LORD DUNEDIN (146 L.T. 392) said:

"This is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it . . . people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."

I doubt whether LORD DUNEDIN meant the division into reasonable probabilities and fantastic possibilities to be exhaustive so that anything more than a fantastic possibility must be regarded as a reasonable probability. What happened in that case was that a dog left in a car broke the window and a splinter from the glass entered the plaintiff's eye. Before that had happened it might well have been described as a fantastic possibility and LORD DUNEDIN did not have to consider a case nearer the border-line. I do not think it necessary to discuss other statements which may seem to be at variance with the trend of authority which I have quoted because I have not found any which is plainly inconsistent with it, and I have left out of account cases where the defendant clearly owed a duty to the plaintiff and by his negligence caused damage to the plaintiff. In such cases questions have arisen whether damages can only be

recovered in respect of consequences which were foreseeable or were natural and probable, or whether damages can be recovered in respect of all consequences, whether foreseeable or probable or not, but remoteness of damage in this sense appears to me to be a different question from that which arises in the present case.

Counsel for the respondent in the present case had to put his case so high as to say that, at least as soon as one ball had been driven into the road in the ordinary course of a match, the appellants could and should have realised that that might happen again, and that, if it did, someone might be injured, and that that was enough to put on the appellants a duty to take steps to prevent such an occurrence. If the true test is foreseeability alone I think that must be so. Once a ball has been driven on to a road without there being anything extraordinary to account for the fact, there is clearly a risk that another will follow and if it does there is clearly a chance, small though it may be, that somebody may be injured. On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road and it would not matter whether the road was the busiest street or the quietest country lane. The only difference between these cases is in the degree of risk. It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. Of course, there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognised by the law, but I do not think that this case comes within any such special category. It was argued that this case comes within the principle in *Rylands v. Fletcher* (7), but I agree with your Lordships that there is no substance in this argument. In my judgment, the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger. In considering that matter I think that it would be right to take into account, not only how remote is the chance that a person might be struck, but also how serious the consequences are likely to be if a person is struck, but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. I think that this is in substance the test which OLIVER, J., applied in this case. He considered whether the appellants' ground was large enough to be safe for all practical purposes and held that it was. This is a question, not of law, but of fact and degree. It is not an easy question, and it is one on which opinions may well differ. I can only say that, having given the whole matter repeated and anxious consideration, I find myself unable to decide this question in favour of the respondent. I think, however, that this case is not far from the border-line. If this appeal is allowed, that does not, in my judgment, mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organise matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely small because I do not think that a reasonable man, considering the matter from the point of view of safety, would or should disregard any risk unless it is extremely small.

This case was also argued as a case of nuisance, but counsel for the respondent admitted that he could not succeed on that ground if the case on negligence failed. I, therefore, find it unnecessary to deal with the question of nuisance

and I reserve my opinion as to what constitutes nuisance in cases of this character. In my judgment, the appeal should be allowed.

LORD RADCLIFFE: My Lords, I agree that this appeal must be allowed.

I agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the appellants being required to compensate the respondent

A for the serious injury that she has received as a result of the sport that they have organised on their cricket ground at Cheetham Hill, but the law of negligence is concerned less with what is fair than with what is culpable, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case.

I think that the case is in some respects a peculiar one, not easily related

B to the general rules that govern liability for negligence. If the test whether there has been a breach of duty were to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk, I think that there would have been a breach of duty, for that such an accident might take place some time or other might very reasonably have been present to the minds of the appellants. It was quite foreseeable, and there would have been nothing

C unreasonable in allowing the imagination to dwell on the possibility of its occurring. There was, however, only a remote, perhaps I ought to say only a very remote, chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground, but it had also to coincide in its arrival with the presence of some person on what does not look like a crowded thoroughfare and actually to strike that person in

D some way that would cause sensible injury.

Those being the facts, a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as "reasonable care" or "ordinary care" or "proper care"—all these phrases are to be found in decisions of authority—but the fact remains that, unless there has been something which a reasonable man

E would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breach of legal duty, and here, I think, the respondent's case breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called on either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would

G have done what the appellants did. In other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability.

G I agree with the others of your Lordships that, if the respondent cannot succeed in negligence, she cannot succeed on any other head of claim.

Appeal allowed.

Solicitors: *Hall, Brydon, Harvey & Egerton*, agents for *Hall, Brydon & Co.*, Manchester (for the appellants); *L. Bingham & Co.*, agents for *Linder, Myers & Pariser*, Manchester (for the respondent).

[*Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.*]

BENNETT v. BENNETT.

[KING'S BENCH DIVISION (Devlin, J.), April 19, 27, 1951.]

Deed—Illegality—Public policy—Divorce—Undertaking by wife petitioner not to take proceedings for child's maintenance.

Divorce—Maintenance—Child—Undertaking in deed by wife petitioner not to take proceedings for maintenance—Covenant by husband to pay annuity for child—Illegality of wife's undertaking.

On Aug. 10, 1948, a wife presented a petition for the dissolution of her marriage in which she asked for the custody of the two sons of the marriage, maintenance of the younger son, and maintenance and a secured provision for herself. The petition was not defended. On Nov. 24, 1948, the parties, in anticipation of the decree, entered into a deed by which the husband undertook to pay two annuities, one for the wife and one for the younger son, in consideration of the wife's covenanting "(a) to accept the provision . . . made for her and the younger son in full satisfaction of all rights and claims" of herself and the two children for alimony, maintenance and secured provision included in the petition and other relief, "(b) not to proceed further with the prayer in her . . . petition" for such reliefs, and "(c) not to institute . . . or proceed with nor to procure suggest assist or encourage . . . either in her own right or on behalf of her said two children or either of them . . . proceedings for" such reliefs. On the same day, the husband having made provision for the maintenance of the wife and younger child, the prayer in the petition for such maintenance was dismissed. On Dec. 6, 1948, the decree *nisi* was granted and in due course it was made absolute. In an action by the wife for payment of instalments of the annuities,

HELD: it was contrary to public policy for the wife to promise that she would not "procure suggest assist or encourage" the taking of proceedings for maintenance on behalf of her child under s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, or otherwise, and, therefore, the deed was illegal and void, and the husband's covenants to pay the annuities could not be enforced.

Hyman v. Hyman ([1929] A.C. 601), applied.

AS TO CONTRACTS BETWEEN HUSBAND AND WIFE WHICH ARE CONTRARY TO PUBLIC POLICY, see HALSBURY, *Hailsham Edn.*, Vol. 7, pp. 157, 158, paras. 222, 223; and FOR CASES, see DIGEST, Vol. 27, pp. 221-223, Nos. 1924-1938, and Digest Supps.

Cases referred to:

- (1) *Hyman v. Hyman*, [1929] A.C. 601; 98 L.J.P. 81; 141 L.T. 329; 93 J.P. 209; Digest Supp.
- (2) *Gaisberg v. Storr*, [1949] 2 All E.R. 411; [1950] 1 K.B. 107; 2nd Digest Supp.
- (3) *Fisher v. Bridges*, (1854), 3 E. & B. 642; 118 E.R. 1283; *sub nom. Bridges v. Fisher*, 23 L.J.Q.B. 276; 23 L.T.O.S. 223; 18 J.P. 599; 12 Digest 277, 2272.
- (4) *Czarnikow v. Roth, Schmidt & Co.*, [1922] 2 K.B. 478; 92 L.J.K.B. 81; 127 L.T. 824; 16 Digest 116, 151.
- (5) *Mann v. Mann*, [1922] P. 238; 91 L.J.P. 204; 126 L.T. 222; 27 Digest 279, 2496.
- (6) *Mills v. Mills*, [1940] 2 All E.R. 254; [1940] P. 124; 109 L.J.P. 86; 163 L.T. 272; 2nd Digest Supp.
- (7) *Fisher v. Fisher*, [1942] 1 All E.R. 438; [1942] P. 101; 111 L.J.P. 28; 166 L.T. 225; 2nd Digest Supp.
- (8) *Ross v. Ross*, [1950] 1 All E.R. 654; [1950] P. 160.
- (9) *Combe v. Combe*, [1951] 1 All E.R. 767.
- (10) *Yates v. Starkey*, [1950] 2 All E.R. 614; [1951] Ch. 45.

ACTION for the payment of instalments of two annuities alleged to be due under a deed.

The plaintiff was the former wife of the defendant from whom she had obtained a divorce. In a deed entered into by the husband and wife in anticipation of the decree, the husband had covenanted, *inter alia*, to pay the wife two annuities in consideration of her undertaking not to proceed with the prayer in her petition for alimony, maintenance, and other relief for herself and her younger son and not to take other proceedings for those reliefs. The husband contended that the deed was illegal and void on the ground that the wife's undertaking not to invoke the rights conferred by s. 190 and s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, on behalf of herself and on behalf of her younger son was (i) contrary to public policy and (ii) an attempt to control the jurisdiction of the court. For the wife it was contended that the deed represented a compromise of the prayer for maintenance and other relief, that she had deprived herself of the right to apply for such relief by consenting to the dismissal of her petition in consideration of the deed, that the promise to refrain from further proceedings was otiose, and that it was not contrary to public policy merely to promise not to apply for maintenance on behalf of the younger son.

Fairweather for the wife.

Brodrick for the husband.

Cur. adv. vult.

Apr. 27. **DEVLIN, J.**, read the following judgment. This is a claim by a wife against her former husband for £262 10s., being the amount of the instalments, due on Dec. 25, 1950, of two annuities alleged to be payable to her under a deed dated Nov. 24, 1948. The defence is that the deed is void because it contains a clause seeking to oust the jurisdiction of the court.

The parties were married in 1926, and on Aug. 10, 1948, the plaintiff presented a petition for the dissolution of the marriage. She asked for the custody of the two sons of the marriage and for alimony pending suit, maintenance of the younger son, and maintenance and a secured provision for herself. The petition was not defended, and on Nov. 24, 1948, the parties, obviously in anticipation of the decree, entered into the deed on which the wife now sues. The deed recites the nature of the provision which the husband proposed to make, and continues:

"And whereas Mr. Bennett has agreed with Mrs. Bennett to make such provision for her and the younger son as hereinafter appears in consideration of Mrs. Bennett agreeing not to proceed with the prayer contained in her said petition that Mr. Bennett do pay to Mrs. Bennett alimony pending suit maintenance of the younger son maintenance and a secured provision and consenting to such prayer being dismissed and agreeing to enter into such covenant to refrain from presenting any further petition for maintenance or for the education or maintenance of either of the said children and otherwise as hereinafter contained."

The operative clauses of the deed provided for the wife to have the matrimonial home and furniture and for the husband to pay certain debts. Further, by cl. 6 the husband covenanted to pay to the wife an annuity of £750 after deduction of tax. By cl. 7 the husband covenanted with the wife and with the trustees of the deed that so long as the younger son was alive and under eighteen he would pay to the trustees an annuity of £300 after deduction of tax and that after the younger son became eighteen he would make certain further payments for his further education. The trustees agreed to pay the second annuity to the wife as long as she was alive, to be applied by her towards the maintenance and education of the younger son. Clause 10 is the one on which this matter turns, and it provides as follows in its material parts:

"Mrs. Bennett hereby covenants with Mr. Bennett: (a) To accept the provision hereby made for her and the younger son in full satisfaction of all

rights and claims of Mrs. Bennett and her said two children or any of them against Mr. Bennett in respect of alimony pending suit maintenance of her said two children or either of them maintenance of herself or secured provision for herself or any like relief whether under s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, or s. 10 of the Matrimonial Causes Act, 1937, or otherwise howsoever. (b) Not to proceed further with the prayer in her said petition that Mr. Bennett do pay to Mrs. Bennett alimony pending suit maintenance of the younger son maintenance and a secured provision and to consent to such prayer being dismissed. (c) Not to institute enter present or proceed with nor to procure suggest assist or encourage directly or indirectly either in her own right or on behalf of her said two children or either of them any petition summons or other proceedings for or in respect of any such alimony pending suit maintenance of her said two children or either of them maintenance of herself or secured provision for herself or any like relief."

The wife also agreed to provide out of the annuities or otherwise for the maintenance and education of the younger son during his infancy. By cl. 14 the deed was made revocable by the husband in the event of there not being a decree absolute. On the same day the registrar in chambers ordered that, the respondent having executed a deed making provision for the maintenance of the wife and younger child, the application for maintenance of the petitioner and the younger child contained in the petition be dismissed. The decree *nisi* was granted on Dec. 6, 1948. The decree absolute followed, and the instalments of both annuities were paid until, the husband says, financial difficulties rendered him unable to keep up the payments.

Section 190 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

"The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable . . ."

Section 193 (1) provides:

"In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children . . ."

In *Hyman v. Hyman* (1) a wife covenanted in a separation deed made during her marriage that she would not institute any action or take any proceedings to compel her husband to allow her maintenance beyond the sums provided for in the deed. Later, she was given grounds for divorce, obtained a decree *nisi*, and filed a petition for permanent maintenance. The appellant set up the provisions of the deed. The House of Lords held that the power conferred by s. 190 on the court to make a proper provision for the wife on the dissolution of her marriage was conferred not merely in the interests of the wife but also in those of the public, and that by her covenant the wife could not preclude herself from invoking, or the court from exercising, that jurisdiction. LORD HAILSHAM, L.C., said ([1929] A.C. 608):

"... the parties cannot validly make an agreement either (1) not to invoke the jurisdiction of the court, or (2) to control the powers of the court when its jurisdiction is invoked."

It is conceded by counsel for the wife that, unless *Hyman v. Hyman* (1) can be distinguished, the promise by the wife contained in cl. 10 of the deed would, in part at any rate, be void and unenforceable. It is this promise which is

described in the recitals as the consideration for the husband's bond to pay these annuities. If the wife's promise in cl. 10 is merely a nullity, the defence must fail, for the husband's promise is under seal and requires no consideration to support it. *Gaisberg v. Storr* (2), on which the husband relies, does not, therefore, really help him. Although no consideration is necessary, if the bond in fact provides for a consideration and that consideration consists of a promise to do an act which is illegal or contrary to public policy, the bond is void and cannot be enforced. The distinction has been clearly settled in deeds which provide for payments in consideration of past cohabitation, on the one hand, and future cohabitation, on the other, such as in *Fisher v. Bridges* (3).

I have first, therefore, to determine whether an agreement not to invoke the jurisdiction of the court is something which the law condemns as illegal or contrary to public policy. It is not in terms so stated to be in *Hyman v. Hyman* (1) but, in my judgment, it clearly is. *Czarnikow v. Roth, Schmidt & Co.* (4) is sufficient authority for that. There is nothing as immoral about such an agreement as there is about a promise to cohabit outside marriage, but, if the promise is contrary to public policy, the degree of moral obliquity is irrelevant. A covenant in restraint of trade would, perhaps, be a closer analogy. It is well settled that, if part only of the consideration for a promise is contrary to public policy, that promise cannot be enforced. Having regard to the terms of the recital, this deed cannot be construed so as to make the wife's promise in cl. 10 other than a part of the consideration for the husband's promise to pay the annuities. Counsel for the wife has not contended otherwise, and has not suggested that, if any part of the wife's promise is bad, it can be severed, leaving the rest of the deed good. I mention this so as to make it clear that the decision which I am about to give turns on the particular provisions of this deed which is, apparently, based on the precedent set out in KEY AND ELPHINSTONE'S PRECEDENTS IN CONVEYANCING, 14th ed., vol. 2, p. 541. In *Hyman v. Hyman* (1), for example, it may well be that the objectionable cl. 3 in the deed would have been severable from the husband's promise. This may explain, if any explanation be needed other than the fact that the point was not under consideration, why some of their Lordships, particularly LORD ATKIN ([1929] A.C. 626), referred to the husband's promise in that case as being still alive.

The propositions which I have so far enunciated have not been seriously disputed by counsel for the wife. His contention is that cl. 10 on its proper construction contains no promise of the sort that was condemned in *Hyman v. Hyman* (1). Two such promises are relied on by the husband, the first being a promise by the wife not to invoke the jurisdiction of the court with regard to her own maintenance, and the second being her promise not to procure, suggest, assist, or encourage on behalf of either of her children any proceedings in respect of maintenance for them, but to accept the provision made for the younger son in full satisfaction of his rights. As to the first promise, the argument of counsel for the wife is this. At the time of the deed there was pending a petition for maintenance. There was nothing objectionable in compromising that petition and in the wife's agreeing that she would consent to its being dismissed having regard to the provision made for her in the deed. Once she had consented to its dismissal, she deprived herself of the right to make any further application for maintenance under s. 190 and deprived the court of jurisdiction to grant it. Accordingly, the promise to refrain from future proceedings, in so far as it affects the wife herself, is otiose, and ought to be disregarded. No such proceedings could, in any event, have been taken, and the true effect of the clause is merely to compromise pending proceedings. In support of this argument I was referred to *Mann v. Mann* (5) and *Mills v. Mills* (6).

Counsel for the husband argued that the wife was not precluded from applying to the court under s. 190, relying on *Fisher v. Fisher* (7). He argued also that, even in relation to the pending petition, the promise not to proceed further with

it and to consent to its being dismissed was an attempt to control the jurisdiction of the court and thus bad. I shall not decide the case on this point, and shall not, therefore, express any views on matters which are unnecessary to my decision. I think that counsel for the wife clearly fails on the other point. It is, as I have said, sufficient that any part of the promise contained in cl. 10 should be contrary to public policy. Section 193 of the Act of 1925 clearly provides that the court may at any time make for the maintenance of the child such provision as it thinks just, and it is not, therefore, contended that a dismissal of a petition with regard to that can deprive the court of jurisdiction. The argument of counsel for the wife on this point is that it is not contrary to public policy for the wife to promise not to apply for such maintenance and that *Hyman v. Hyman* (1) is not in point. He contends that that decision must be restricted to its own facts and treated as relating only to a promise made during the coverture by a wife in relation to her own maintenance. I cannot, particularly with the guidance I receive from the judgments of WILLMER, J., in *Ross v. Ross* (8) and ASQUITH, L.J., in *Combe v. Combe* (9) give this decision such a restricted meaning. It decides that, although the wife is the primary beneficiary under s. 190, she cannot oust the jurisdiction that it gives to the court since it is in the public interest that former wives be adequately provided for. If this be the public interest in the case of the wife, it must be so also, and, indeed, *a fortiori*, in the case of the children under s. 193. It is conceded that the wife, who has the custody of the children, is the person to whom maintenance awarded under s. 193 is payable: see *Yates v. Starkey* (10).

It appears, therefore, to me to be plainly contrary to public policy for a wife, who has the custody of a child, and who is, therefore, the natural person to take such action as may be necessary to see that the child is adequately provided for, to promise that she will not procure, suggest, assist, or encourage the taking of any proceedings on behalf of her child under s. 193 or otherwise for maintenance. It is her duty to determine, if circumstances should change, whether the amount agreed between the parties is adequate or not, and, if it is not, to apply to the court for the necessary provision. She cannot rid herself of that duty nor deprive herself of that power nor promise not to invoke the jurisdiction of the court with regard to it. It is true that *Hyman v. Hyman* (1) is not directly applicable, but, if I had to consider the matter afresh and without the light that *Hyman v. Hyman* (1) throws on the topic, I should still conclude that a promise by a wife, particularly when made as part of a bargain under which she may herself derive benefits, never to re-open the matter of the maintenance of a child whose custody she has is contrary to public policy. In my judgment, the husband's covenant sued on in this case is unenforceable, and the claim must be dismissed. I am not indifferent to the consideration that, if all that counsel for the wife has argued is correct, the wife may have finally deprived herself of her rights to statutory maintenance in exchange for a deed that was never effective. I trust that as a matter of law this is not so, but it is not a consideration that I could allow to affect my mind on the issue which I have had to determine.

Judgment for the husband.

Solicitors: *John B. de Fonblanque* (for the wife); *Walter, Burgis & Co.* (for the husband).

[Reported by F. A. AMIES, Esq., Barrister-at-Law.]

Re BEDFORD (deceased). NATIONAL PROVINCIAL BANK, LTD.
v. AULTON AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), April 27, 1951.]

Will—Gift to the staff of company who shall have “had not less than five years, service”—Need for period to be continuous—Inclusion of war service.

By cl. 4 of his will, dated Dec. 31, 1947, a testator, who died on Oct. 15, 1948, gave “To each co-director of mine of John Bedford & Sons, Ltd., . . . and also to each member of the staff of such company who shall have at my death had not less than five years’ service with that company a sum representing three months’ salary and emoluments at the rate payable to him or her at the date of my death and to each co-director and member of the staff of the same company who shall have had less than five years’ service at my death a sum representing one month’s salary and emoluments as aforesaid.”

HELD: on the true construction of the will, the period of five years’ service need not be a continuous period and service with the company for periods aggregating five years was sufficient qualification for the larger legacy, but, as the qualification required service for the relevant period and not only employment, a period of war service with His Majesty’s Forces, during which period the company had resolved in certain circumstances to pay to employees serving with the forces half of their salaries, could not be taken into account.

Re Marryat ([1948] 1 All E.R. 796) and *Re Cole* ([1919] 1 Ch. 218), distinguished.

AS TO DESCRIPTION OF DONEES, see HALSBURY, Hailsham Edn., Vol. 34, pp. 323-325, paras. 373, 374; and FOR CASES, see DIGEST, Vol. 44, pp. 899-903, Nos. 7534-7640.

Cases referred to:

- (1) *Re Marryat*, [1948] 1 All E.R. 796; [1948] Ch. 298; [1948] L.J.R. 1237; 2nd Digest Supp.
- (2) *Re Lawson*, [1914] 1 Ch. 682; 83 L.J.Ch. 519; 110 L.T. 573; 44 Digest 900, 7593.
- (3) *Tyler v. London and India Docks Joint Committee*, (1892), 9 T.L.R. 11; 34 Digest 59, 355.
- (4) *Re Drake*, [1921] 2 Ch. 99; 90 L.J.Ch. 381; 125 L.T. 461; 44 Digest 900, 7602.
- (5) *Re Cole*, [1919] 1 Ch. 218; 88 L.J.Ch. 82; 120 L.T. 374; 44 Digest 472, 2912.

ADJOURNED SUMMONS to determine, *inter alia*, whether on the true construction of the will of Reginald Asline Bedford legacies given to persons who were qualified by having had not less than five years’ service with Messrs. John Bedford & Sons, Ltd., were payable to persons whose total service aggregated five years, and whether a period of service with H.M. Forces could be taken into account as part of the qualifying period.

A. F. M. Berkeley for the plaintiff, the executor of the will.

Salt, K.C., and T. A. C. Burgess for the first and ninth defendants, a member of the staff of John Bedford & Sons, Ltd., and a co-director.

Harold Christie, K.C., and Robert S. Lazarus for the second defendant, a member of the staff of John Bedford & Sons, Ltd.

M. J. H. Fairbairn for the third, fourth and fifth defendants, residuary legatees.

E. J. T. G. Bagshawe for the sixth, seventh and eighth defendants, specific legatees.

DANCKWERTS, J.: I have to decide whether the period of “five years’ service” referred to in cl. 4 of the will of the testator must be continuous or

whether separate periods may be added together so as to make up not less than five years' service with the company. The further question arises whether absence from the service of the company or from the company's business due to a period of service in His Majesty's Forces, may be included in calculating the necessary period to qualify for a legacy at a higher rate. The words in the clause are

"to each member of the staff of such company who shall have at my death had not less than five years' service with that company."

Smaller legacies are given to members of the staff "who shall have had less than five years' service at my death."

There are a number of authorities on similar provisions in other wills which were considered by JENKINS, J., in *Re Marryat* (1). In that case there was a bequest to each employee

"who shall have been in the service of such company at my death for a period of five years and upwards and shall not then be under notice,"

and the learned judge came to the conclusion that a continuous period was required in order to qualify for the legacy. The word "period" was to be found in that case, and obviously that was one of the reasons which induced the learned judge to reach the conclusion which he did. In *Re Lawson* (2), which was referred to in *Marryat's* case (1), there is no reference to the word "period," but EVE, J., came to the conclusion that a continuous period of two years before the death of the testator was required in order to qualify, though he decided in favour of the legatee in that particular case because he held that the service need not be from day to day. In *Tyler v. London and India Docks Joint Committee* (3), the Court of Appeal came to the conclusion that continuous service was necessary in the rather special circumstances of the rules in that particular case. On the other hand, in *Re Drake* (4), P. O. LAWRENCE, J., held that the period need not be continuous. There the words were "who should have been in his service for five years but less than ten years," or "who should have been in his service for ten years prior to his decease." Therefore, there is some difference in the results which have been reached in the cases.

In my view, none of these authorities is necessarily conclusive of the question which I have to decide in the present case, where the words are substantially different from the words in each of those cases. The qualification is simply that the legatee shall have had at the date of the testator's death not less than five years' service with the company. In my view, that denotes five years' aggregate service, and I see no reason whatever to imply, or, indeed, that there is any indication of, a condition that the five years' service shall have been continuous. Accordingly, it seems to me that several periods may be added together so as to qualify for the larger legacy if the aggregate is not less than five years' service with the company.

The question of service in the forces depends on the facts of this case to some extent as well as on the construction to be put on the clause. The facts are stated in an affidavit sworn by a director of the company:

"At a meeting of the directors held on Nov. 11, 1940, it was resolved that any member of the staff who had been or might be called up for service with H.M. Forces and who then had served the company for a period of not less than four years be granted an allowance from the date of joining the forces of half the salary he was then receiving and that the minimum should be not less than £1 per week. This grant should not apply to any member of the staff who volunteered for service who had not previously received permission from the board to do so."

It appears that there were fourteen persons who came within the provisions of the resolution, but in fact only three of them received assistance under it. The fact that there were only three out of the fourteen who had received assistance is immaterial if otherwise they would have been qualified under the terms of

the resolution, but, to my mind, the resolution is not equivalent to saying that service in the forces was to be equivalent to service with the company for the purpose of this testator's will. All that it amounted to was that the company out of its good will resolved to make payments which they were not in the least bound to make to the persons in question to help them with their expenses during the period of their war service. That factor does not seem to me to have any material effect when I come to construe the provisions of the testator's will.

In *Re Cole* (5) the legatee had entered into the service of the company in question and the terms of the will required him to enter the employ of the company and remain in such employ until the age of thirty-three. It was held that as, with the consent of the directors of the company, the individual in question joined His Majesty's Forces he had not ceased to be in the employ of the company. That seems to me to be a different matter from rendering service to the company. Indeed, one of the points mentioned in the headnote of that case is that he did not cease to be in the employ of the company though he had not actively served the company. It seems to me that a person might be still in employment without rendering service, but in the present case the condition is not employment, but service. A person who served in His Majesty's Forces is not during that period in the service of the company, and, accordingly, the period of war service of these members of the staff who would otherwise be qualified for these legacies cannot be included in the qualifying period of not less than five years as required by the will.

Order accordingly.

Solicitors: *Collyer-Bristow & Co.*, agents for *Ashington & Denton*, Sheffield (for the plaintiff and the sixth, seventh and eighth defendants); *Peacock & Goddard*, agents for *Broomhead, Wightman & Reed*, Sheffield (for the first, second and ninth defendants); *Bell, Brodrick & Gray*, agents for *Rodgers & Co.*, Sheffield (for the third, fourth and fifth defendants).

[*Reported by H. McL. MORRISON, Esq., Barrister-at-Law.*]

F *Re* SCHINTZ'S WILL TRUSTS. LLOYDS BANK, LTD. AND ANOTHER *v.* MORETON AND OTHERS.

[CHANCERY DIVISION (Wynn-Parry, J.), May 1, 2, 1951.]

Will—Incorporation of trusts of earlier settlement—Limited power of revocation and appointment reserved to testator by settlement—Reference in will to "deed or deeds" executed thereafter under power.

On Sept. 12, 1906, the testator, as settlor, executed a voluntary settlement in favour of his children and their issue, and by cl. 10 thereof he declared that "it shall be lawful for [the testator] at any time or times hereafter by any deed or deeds revocable or irrevocable to declare such new or other trusts of and concerning the trust premises or any part or parts thereof as he may think fit for the benefit of all or any to the exclusion of the others of the following persons namely the wife [of the testator] or his children or more remote issue or his collateral relations but not in favour of himself . . . or any other person or persons and for that purpose wholly or partially to revoke and make void the trusts powers and provisions herein declared and contained of and concerning the trust premises." The testator died on Aug. 5, 1912, and under his will, dated Apr. 16, 1912, his daughter, L., became entitled, in the events which happened, to a half share of his

residuary estate. By cl. 17 of the will the testator declared that L.'s share of the residue should not vest absolutely in her, but should be transferred to the trustees of the settlement of Sept. 12, 1906, to be held by them "upon the trusts and subject to the powers and provisions . . . upon and subject to which the share in the . . . settlement referred to as [L.'s] share shall be held under or by virtue of the . . . settlement and the deed or deeds (if any) which may hereafter be executed by me under the power of revocation and declaration of new trusts thereby reserved to me . . ."

HELD: as the direction in cl. 17 of the will was to transfer L.'s share of the residue to the trustees of the settlement and the power reserved to himself by the testator in cl. 10 of the settlement, to which he referred in the latter part of cl. 17 of the will, was only a limited power of revocation and a limited power of appointment, the words in the latter part of cl. 17, referring to "the deed or deeds" which he might thereafter execute under this limited power, were to be treated, not as containing an operative provision of the will, but as being merely descriptive of the powers contained in the settlement, and, therefore, cl. 17 was valid and effective, and L.'s share of the residue was to be held subject to the provisions of the settlement save that cl. 10 thereof would have no effect.

Re Edwards' Will Trusts ([1948] 1 All E.R. 821), applied.

Re Jones ([1942] 1 All E.R. 642), distinguished.

AS TO INCORPORATION OF OTHER DOCUMENTS IN A WILL, see HALSBURY, Hailsham Edn., Vol. 34, p. 167, para. 219; and FOR CASES, see DIGEST, Vol. 44, pp. 237-245, Nos. 624-712.

Cases referred to:

- (1) *Re Jones*, [1942] 1 All E.R. 642; [1942] Ch. 328; 111 L.J.Ch. 193; 167 L.T. 84; 2nd Digest Supp.
- (2) *Re Edwards' Will Trusts*, [1948] 1 All E.R. 821; [1948] Ch. 440; [1948] L.J.R. 1364; *revsd.* on one point [1947] 2 All E.R. 521; [1948] L.J.R. 60; 2nd Digest Supp.
- (3) *Webb v. Sadler*, (1873), 8 Ch. App. 419; 42 L.J.Ch. 498; 28 L.T. 388; 37 Digest 408, 181.

ADJOURNED SUMMONS to determine *inter alia* whether certain clauses of the testator's will, whereby he incorporated therein the provisions of a voluntary settlement made by him some years earlier, were valid. By a clause of the settlement the testator reserved to himself a limited power of appointment, and, in incorporating the settlement into his will, he referred to "the deed or deeds" which might thereafter be executed by him under that power.

R. R. A. Walker for the trustees of the will.

Russell, K.C., and *R. W. Goff* for the first and second defendants, the testator's grandchildren (being a son and daughter of the testator's daughter, Julia Lucy Moreton, who died on May 4, 1940).

Milner Holland, K.C., and *H. A. Rose* for the third and fourth defendants, an unmarried daughter of the testator and her trustee.

Cross, K.C., and *Arthur Bagnall* for the fifth, sixth, seventh, eighth and ninth defendants, great grandchildren of the testator (being the grandchildren of Julia Lucy Moreton).

WYNN-PARRY, J.: The question I have to decide on this summons raises the point whether or not the provisions contained in three clauses of the will, dated Apr. 16, 1912, of the testator, Hans Gaspard Schintz, who died on Aug. 5, 1912, are valid and effective or are void.

The material language is the same in each clause, and for the purpose of testing the matter I think that it will be sufficient to refer only to one of them, namely, cl. 17. It must be borne in mind in construing this will that the testator

had executed a voluntary settlement on Sept. 12, 1906, and by cl. 10 of that settlement it was provided that

"... it shall be lawful for ... Hans Gaspard Schintz at any time or times hereafter by any deed or deeds revocable or irrevocable to declare such new or other trusts of and concerning the trust premises or any part or parts thereof as he may think fit for the benefit of all or any to the exclusion of the others of the following persons namely the wife [of the testator] or his children or more remote issue or his collateral relations, but not in favour of himself ... or any other person or persons and for that purpose wholly or partially to revoke and make void the trusts powers and provisions herein declared and contained of and concerning the trust premises."

In the events which happened, his daughter, Julia Lucy Moreton, became entitled to a half share in the residue. Clause 17 of the will is as follows:

"Provided always and I declare that the share in my residuary estate which my daughter Julia Lucy Moreton shall take if she shall survive me shall not vest absolutely in her but shall be transferred by my trustees to the trustees or trustee for the time being of an indenture of settlement dated Sept. 12, 1906 (being a settlement in favour of my children and their issue and others) and I declare that the share so transferred shall be held by the trustees or trustee for the time being of the said settlement upon the trusts and subject to the powers and provisions (including provisions for accruer) upon and subject to which the share in the said settlement referred to as Lucy's share shall be held under or by virtue of the said settlement and the deed or deeds (if any) which may hereafter be executed by me under the power of revocation and declaration of new trusts thereby reserved to me or as near thereto as circumstances will admit subject nevertheless ..."

to the provisions of a later clause to which I need not refer. It is clear that, having regard to the operation of s. 9 of the Wills Act, 1837, the provision at the end of that clause cannot be operative, whether regarded as being in the will or as in cl. 10 of the settlement.

The question is whether the presence of that provision in cl. 17 of the will has the effect of invalidating the whole of that clause, and the answer depends on which side of the line this case falls, having regard to two relevant authorities to which reference has been made. The first is *Re Jones* (1), a decision of SIMONDS, J. The facts in that case were that the testator by his will directed his trustees to pay a legacy of £1,000 to

"... the Tettenhall College Investment Trustees appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute ..."

By deed poll of even date he declared the trusts on which the sum of £1,000 was to be held. SIMONDS, J., held that, if effect were to be given to such a direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the provisions of the Wills Act, 1837, and that, therefore, the gift failed for uncertainty. The basis of his reasoning appears conveniently in a passage towards the end of his judgment, where he said ([1942] 1 All E.R. 645):

"A bequest in the terms of that before me is invalid; (i) because evidence cannot be admitted to establish only the first but not the second of two alternatives which together are the expression of the testamentary intention; (ii) because, if evidence is admitted to establish the first but not the second alternative, the testator's intention as a whole cannot be ascertained,

and the gift must fail for uncertainty; (iii) because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil."

Before leaving that case, I would draw attention to the circumstance that, on the language of the relevant provision in the clause, the testator retained power to destroy altogether the trusts in favour of the Tettenhall College Investment Trustees and to substitute some entirely different trust relating to the £1,000 in question, whereas, in the trust in the case now before me, cl. 10 of the settlement, which is referred to in the will, is found to contain, not a complete power of revocation, but a limited power of revocation and appointment.

The other relevant authority is that of *Re Edwards' Will Trusts* (2), a decision of the Court of Appeal, in which *Re Jones* (1) was distinguished, but in no way adversely commented on, and it was clearly, by implication, approved. In *Re Edwards* (2) the settlor settled a sum of £100 to be invested and held as the trust fund. By cl. 2 he directed that the trust fund and the income thereof should be held on trust to pay the income and to transfer the capital to such persons as the settlor should by a memorandum direct and made other directions in default. By cl. 3 he provided that "subject to the provisions of the preceding clause" the trust fund and the income thereof should be held on trust for the benefit of his wife and children. By a will, made on the same date but after the settlement, the settlor as testator directed that his residuary estate should be held by the trustees of the settlement

"... upon the trusts and subject to the powers and provisions therein declared and contained so far as such trusts powers and provisions are subsisting and capable of taking effect."

By a memorandum, dated Dec. 21, 1937, under the settlor's hand, he directed that, pursuant to cl. 2 of the settlement, the trustees should raise and pay out of the trust fund the sum there mentioned to be applied as therein directed. He died on Feb. 6, 1944. JENKINS, J., held that the provisions in the memorandum and cl. 2 of the settlement could not be incorporated into the will, nor could the provisions in cl. 3 of the settlement in view of the testator's intention to incorporate the settlement as a whole into his will. The decision on the latter point was reversed by the Court of Appeal, distinguishing *Re Jones* (1). In his judgment, LORD GREENE, M.R., said ([1948] 1 All E.R. 823):

"The testator makes clear what his testamentary wishes are. He directs that those concerned with the administration of his estate shall turn to the settlement to find what those wishes are. The identification of that document is a simple matter. There is no question what the document is, and there is no rule of law which makes it impossible to lead evidence to identify it. I say that at the outset, because reliance has been placed on a decision of SIMONDS, J., in *Re Jones* (1). That was a case in which the testator directed payment of a legacy to trustees ..."

After quoting the words of the will in that case, LORD GREENE, M.R., continued (*ibid.*):

"In the very gift itself the testator was endeavouring to reserve power to himself to modify or alter the gift at some later date by a subsequent instrument not executed in accordance with the Wills Act, 1837. SIMONDS, J., pointed out that, whereas in the case of a document in existence it is always possible to lead evidence to identify the document, in the case before him it never would be possible to lead evidence to identify any subsequent document. On that ground he held that, if effect were given to the direction, it would be equivalent to giving a power to change a testamentary disposition by an unexecuted codicil in violation of the Wills Act, 1837, and, therefore,

that the gift failed for uncertainty. That seems to me to be a different case from that which we have here. This settlement was a document which can be identified and there is no rule of law to the contrary. It can, accordingly, be incorporated as a piece of writing into the testamentary disposition."

A LORD GREENE, M.R., went on to hold that, although (as JENKINS, J., held) the trusts declared by cl. 2 of the settlement failed, effect could be given to the provisions of cl. 3, reading the words "subject to the provisions of the preceding clause" as meaning "subject to the trusts declared by that clause so far as they shall have proved effective." In his judgment, COHEN, L.J., quoted ([1948] 1 All E.R. 826) the reasoning of JENKINS, J., including this passage ([1947] 2 All E.R. 529):

B " ' It is clear that the testator's intention was to incorporate as part of the trusts of his will the whole of the trusts subsisting under the settlement, including the trusts of any memorandum he might have executed or might thereafter execute. That was his intention. That intention fails, for the reasons I have stated. It seems to me impossible for the court to substitute another intention and, by rejecting that part of the disposition which is bad, arrive at some residual disposition which can be held to be good, because, by so doing, the court would be making a new will for the testator and would be doing something which there is no ground to suppose was his intention at all ... ' "

D COHEN, L.J., continued ([1948] 1 All E.R. 826):

E " It is with the last sentence that, with respect, I quarrel. It seems to me to be a *non sequitur*. Granted that it was the testator's intention to incorporate as part of the trusts of his will the whole of the trusts under a settlement, including trusts in any memorandum he might have executed after the date of the will. Granted that that intention fails for the reasons which JENKINS, J., gave, but it does not seem to me to follow that, by giving effect to cl. 3, we are making a new will for the testator in any sense whatsoever. The question is: In what event did the testator intend cl. 3 to operate? That depends on the words 'subject to the provisions of the preceding clause.' For the reasons that my Lord has given, I think those words mean 'subject to any effective disposition under the preceding clause '."

F COHEN, L.J., then quoted from a judgment of LORD SELBORNE, L.C. (8 Ch. App. 426), in *Webb v. Sadler* (3), and continued ([1948] 1 All E.R. 826):

G " Applying the principle of that passage to the documents with which we are concerned, as I read cl. 3 the declared intention of this testator is that, unless effective dispositions are made which would cut down the gift of the trust fund and the income thereof in favour of his widow and his children, then his widow and his children are to have the whole of that estate. No effective disposition was so made, and, therefore, in my view, cl. 3 operates on the whole of the residuary estate."

H The effect, as it appears to me, of those judgments is that, if cl. 17 of the will, which I have to consider, stands, it will incorporate the whole of the settlement, but the offending clause of the settlement, cl. 10, will not have effect so far as the dispositions made by the will are concerned. As I have observed earlier, there is a distinction between the will in *Re Jones* (1) and cl. 17 of the will which I have to consider, in that the power, given by cl. 10 of the settlement in the present case, of destroying the trusts created by that settlement is a very much more limited power than the power reserved to himself by the testator in *Re*

Jones (1), and the reference to "the deed or deeds" in the latter part of cl. 17 of the present will is, necessarily, a reference to that limited power. If cl. 17 had ended at the words

"... upon and subject to which the share in the said settlement referred to as Lucy's share shall be held under or by virtue of the said settlement . . ."

there could have been no doubt whatsoever that this case was governed by the decision of the Court of Appeal in *Re Edwards' Will Trusts* (2). What is the effect of the addition of the latter words of the clause? On the face of cl. 17, read with those words included, it can, of course, be said that part of the trusts on which the testator by his will has directed the share of the daughter Lucy to be held are the trusts which may be declared by the subsequent deed or deeds referred to at the end of the clause. If I am to treat that provision as being an operative provision so far as the will is concerned, then, following the decision of SIMONDS, J., in *Re Jones* (1), I must treat the whole clause as being invalid. On the other hand, however, it is argued by Mr. Cross that those words are completely otiose and are really no more than descriptive of the terms of the settlement. He points out with force that, if there had been written into the will which was being considered in *Re Edwards' Will Trusts* (2), after the words

"... to be held by them upon the trusts and subject to the powers and provisions therein declared and contained . . .",

some such words as "or any direction which may hereafter be executed by me," it would be difficult to see that the decision of the Court of Appeal would have been different from that which it was, and, in his submission, those words are to be treated on the same basis, *i.e.*, they are to be regarded as not decisive, but merely restrictive of the trusts created by the settlement.

The point, as will be seen, comes down to a very short one, and it is finally a question of construction of the particular will, construed against the background created by s. 9 of the Wills Act, 1837, and the judgments in the cases to which I have referred. I do not find the point an easy one to resolve, but, having given the matter the best consideration I can, I have come to the conclusion that the submission put forward by Mr. Cross is the one to be preferred and that, laying emphasis on the fact that the direction is to transfer the share in question to the trustees of the voluntary settlement and that the power reserved to himself by the testator in the offending clause in the voluntary settlement is a limited power of revocation and a limited power of appointment, I am justified in treating the latter part of cl. 17, which contains the offending words, as being merely descriptive of the powers contained in the settlement. Finally, I realise that, were those words not in cl. 17, exactly the same effect would have followed as regards the disposition of the share of Lucy when the settlement came to be considered.

Declaration accordingly.

Solicitors: *Travers Smith, Braithwaite & Co.* (for the trustees and the first and second defendants); *Tarry, Sherlock & King* (for the third and fourth defendants); *Lee, Ockerby & Co.* (for the remaining defendants).

[Reported by R. D. H. OSBORNE, Esq., Barrister-at-Law.]

R. v. LUMSDEN.

[COURT OF CRIMINAL APPEAL (Cassels, Byrne and Streatfeild, JJ.), May 7, 1951.]

Criminal Law—"Being found by night in a building with intent to commit a felony"
—"Found . . . in"—Prisoner seen to enter building and later to run out of it—
Larceny Act, 1916 (c. 50), s. 28 (4).

The appellant was seen by police officers to enter by night a recess in the side of a cinema theatre in which was the doorway of one of the side exits of the theatre. The officers entered and searched the cinema, but they found no trace of the appellant. Later, however, one of the officers saw him running out of the theatre through the open doorway and he was followed and arrested. He was convicted of being found by night in a building with intent to steal, contrary to s. 28 (4) of the *Larceny Act, 1916*.

HELD: to support a conviction under the sub-section evidence that the appellant was seen coming out of the cinema, from which it would be reasonable to infer that he must have been in it, was not sufficient; there must be clear and unmistakable evidence that the appellant had been found in the building; that evidence was lacking in the present case; and, therefore, the conviction must be quashed.

R. v. Parkin ([1949] 2 All E.R. 651), applied.

FOR THE LARCENY ACT, 1916, s. 28 (4), see HALSBURY'S STATUTES, Second Edn., Vol. 5, p. 1028.

Cases referred to:

(1) *R. v. Parkin*, [1949] 2 All E.R. 651; [1950] 1 K.B. 155; 113 J.P. 509; 2nd Digest Supp.

(2) *R. v. Goodwin*, [1944] 1 All E.R. 506; [1944] K.B. 518; 113 L.J.K.B. 476; 171 L.T. 14; 108 J.P. 159; 2nd Digest Supp.

APPEAL against conviction.

The appellant, Robert James Lumsden, was convicted before the deputy chairman at the County of London Sessions of being found by night in a building with intent to steal and was sentenced to six months' imprisonment. The ground of appeal was that the appellant had not been found in a building.

S. M. Stewart for the appellant.

J. N. Hutchinson for the Crown.

CASSELS, J., delivered the following judgment of the court. The appellant was convicted of being found by night in a building with intent to steal. On Jan. 10, 1951, about midnight, two police officers saw the appellant, who was alone, cross the New Kent Road, walk into an alley by the side of a cinema theatre, and enter a recess in which was the doorway of one of the side exits of the theatre. Two minutes later they saw a light appear, and when they got to the exit doors they were both open. They went inside and searched, but they did not find the appellant, so they kept observation on the alley and some time afterwards one of the officers saw the appellant running at full speed through the open doorway. Both officers pursued the appellant and caught him after about a two hundred yards' chase, but he at once denied that he had been near the cinema. On the way to the police station in the police van, according to the evidence of the police officers, he said: "Can't you forget what you saw. I did not have time to do any villainy." When charged he said he had been with a woman. There was no sign of any forcible entry, and the appellant denied that he was running or that he had made the observation about villainy.

This case calls for a consideration as a matter of law of the true meaning of a statute, s. 28 of the *Larceny Act, 1916*, which creates a criminal offence and provides:

"Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein: shall be guilty of a misdemeanour . . ."

There is no question about this case having arisen at night. The two important words are "found . . . in." Counsel for the appellant has contended that the word "found" means (i) apprehended in, or (ii) "seen in," or (iii) proved to have been in, the premises. This court considered this provision of the Larceny Act, 1916, in *R. v. Parkin* (1). In that case the appellant was seen half-way up some piping at the side of a building with his foot on the junction of two pipes and his head and shoulders near a window. The police officer could not see clearly, but it appeared to him that the appellant had one of his hands through the window for the purpose of pulling himself into the building. It was held that the language of the section must be given its ordinary meaning, and that, as the appellant had been found, not in the building, but outside it, trying to get into it, he was not guilty of an offence against s. 28 (4).

Applying that to this case, we have here no evidence fit for the consideration of a jury that the appellant was found in the building. There may be evidence from which it would be reasonable to infer that he must have been in it from the fact that he was seen coming out, but that is not the proper interpretation of this statute. "Found in" does not necessarily mean that he must be caught or apprehended in the building, or that the finder should be in the building as well as the person who is charged with the offence, but the sub-section must mean that, if a person is to be convicted of an offence under it, there must be clear and unmistakable evidence that he has been, as the sub-section says, found in the building. There was no such evidence in this case. The evidence could have been reasonably interpreted as showing that the appellant had been inside the building, but there was no evidence from either police officer that he had been seen in the building. He had been seen at the doorway, but that was no evidence that he was found in the building. In those circumstances this court has come to the conclusion that this conviction must be quashed.

Conviction quashed.

Solicitors: *Hawker & Wheatley* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

[Reported by H. McL. MORRISON, Esq., Barrister-at-Law.]

HARRISON v. NATIONAL COAL BOARD

Followed. ENGLAND v. NATIONAL COAL BOARD. [1953] 1 All E.R. 11

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord Macdonald and Lord Reid), February 13, 14, 15, 19, 20, May 8, 1951.]

Mine—Coal mine—Shot-firing—Breach of statutory duty by shot-firer—Liability of mine owner, manager and under-manager—General Regulations, 1913 (S. R. & O., 1913, No. 748), reg. 1, made under Coal Mines Act, 1911 (c. 50), s. 86 (1)—Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), cl. 2 (e), cl. 2 (h).

The appellant, who was employed by the respondents in their coal mine, was injured as a result of a breach of cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order, 1934, by a shot-firer, S., who was also an employee of the respondents. The appellant was driving a drift from one seam to another, and, it being necessary to loosen some stone, requested S. to fire a shot which he did without warning the appellant or ensuring that the appellant was in a place of safety. The respondents had taken all reasonable means, by publishing the regulations, to enforce and secure compliance with the

regulations made under the Coal Mines Act, 1911. In a claim by the appellant for damages for breach of statutory duty by the respondents, their servants or agents,

HELD (LORD REID *dissentiente*): on the true construction of reg. 1 of the General Regulations, 1913, and of cl. 2 (e) and cl. 2 (h) of the Order of 1934, there was no duty imposed on the respondents, or on the manager or under-manager of the mine, to carry out the provisions of cl. 2 (e) or cl. 2 (h); the failure to comply with those clauses was that of S. alone; the defence of common employment applied; and the appellant's claim must fail.

Decision of the COURT OF APPEAL ([1950] 1 All E.R. 171), affirmed.

AS TO REGULATIONS GOVERNING THE USE OF EXPLOSIVES IN MINES, see HALSBURY, Hailsham Edn., Vol. 22, p. 803, para. 1656; and FOR CASES, see DIGEST, Vol. 34, pp. 301-303, 744, 745, Nos. 2498-2505, 1190-1195.

Cases referred to:

- (1) *Wilson v. Merry*, (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675; 34 Digest 211, 1747.
- (2) *Hedley v. Pinkney & Sons S.S. Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 34 Digest 210, 1726.
- (3) *The Napier Star*, [1939] P. 330; 161 L.T. 285; Digest Supp.
- (4) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463; Digest Supp.
- (5) *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402; 67 L.J.Q.B. 862; 79 L.T. 284; 34 Digest 218, 1815.
- (6) *David v. Britannic Merthyr Coal Co.*, [1909] 2 K.B. 146; 78 L.J.K.B. 659; 100 L.T. 678; *affmd.*, [1910] A.C. 74; 79 L.J.K.B. 153; 101 L.T. 833; 34 Digest 740, 1168.
- (7) *Watkins v. Naval Colliery Co.* (1897), *Ltd.*, [1911] 2 K.B. 162; 80 L.J.K.B. 746; 104 L.T. 439; *reversd.*, [1912] A.C. 693; 81 L.J.K.B. 1056; 107 L.T. 321; 34 Digest 741, 1173.
- (8) *Black v. Fife Coal Co., Ltd.*, [1912] A.C. 149; 81 L.J.P.C. 97; 106 L.T. 161; 5 B.W.C.C. 217; 34 Digest 740, 1166.
- (9) *Yelland v. Powell Duffryn Associated Collieries, Ltd.*, [1941] 1 All E.R. 278; [1941] 1 K.B. 154; 110 L.J.K.B. 401; 164 L.T. 401; 2nd Digest Supp.
- (10) *Riddell v. Reid*, [1942] 2 All E.R. 161; [1943] A.C. 1; 111 L.J.P.C. 65; 167 L.T. 301; 2nd Digest Supp.
- (11) *London & North Eastern Ry. Co. v. Berriman*, [1946] 1 All E.R. 255; [1946] A.C. 278; 115 L.J.K.B. 124; 174 L.T. 151; 38 B.W.C.C. 109; 2nd Digest Supp.
- (12) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1937] 3 All E.R. 628; [1938] A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.
- (13) *Crane v. Baird (William) & Co.*, 1935 S.C. 715; Digest Supp.
- (14) *Bett v. Dalmeny Oil Co.*, (1905), 7 F. (Ct. of Sess.) 787.
- (15) *Tuck & Sons v. Priestler*, (1887), 19 Q.B.D. 629; 56 L.J.Q.B. 553; 52 J.P. 213; 13 Digest 211, 467.

APPEAL from an order of the Court of Appeal dated Dec. 21, 1949 (reported [1950] 1 All E.R. 171), affirming a decision of JONES, J., dated May 9, 1949 (reported [1949] 2 All E.R. 58), whereby he gave judgment for the respondents in an action by the appellant in respect of injuries sustained by him on Jan. 27, 1948, in the North Gawber Colliery, in which he was working as a collier in the employment of the respondents.

The appellant alleged that the accident was due to negligence or breach of statutory duty under cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order, 1934, by the respondents, their servants or agents. The respondents pleaded that the negligence (if any) was the negligence of one, Spence, a shot-firer in common employment with the appellant and that the statutory duty was only imposed

on the shot-firer and not the respondents. JONES, J., held that there was no breach of statutory duty by the respondents. The Court of Appeal affirmed this decision and dismissed the appeal.

Beney, K.C., and *McLusky* for the appellant.

Paull, K.C., *Hylton-Foster, K.C.*, and *Marven Everett* for the respondents.

The House took time for consideration.

May 8. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an order of the Court of Appeal which affirmed a judgment of JONES, J., in favour of the respondents.

The question arising for determination is whether the respondents are liable to pay damages to the appellant in respect of injuries suffered by him on Jan. 27, 1948, while working in their employment. The principal issue raised is whether, on a true construction of cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6), made under s. 61 (1) of the Coal Mines Act, 1911, and of reg. 1 of the General Regulations, 1913 (S.R. & O., 1913, No. 748), made under s. 86 (1) of that Act, the respondents are responsible for the wrongful firing of a shot in breach of the order of 1934, whereby the appellant was injured.

The following are the material provisions of the Coal Mines Act, 1911. Section 6 (1) provides:

"The Secretary of State may, by order of which notice shall be given in such manner as he may direct, regulate the supply, use, and storage of any explosives at mines or any class of mines, and may, by any such order, prohibit the use of any explosive which appears to him of a kind to be or to be likely to become dangerous in mines or any class of mines, either absolutely or subject to such conditions as may be prescribed by the order."

Section 74:

"Every person shall observe such directions with respect to working as may be given to him with a view to comply with this Part of this Act or the regulations of the mine or with a view to safety."

Section 75, which, together with the above two sections, is contained in Part II of the Act, provides:

"Any person who contravenes or does not comply with any of the provisions of this Part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and the manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance."

Section 86 (1):

"The Secretary of State may by order make such general regulations for the conduct and guidance of the persons acting in the management of mines or employed in or about mines as may appear best calculated to prevent dangerous accidents and to provide for the safety, health, convenience, and proper discipline of the persons employed in or about mines, and for the care and treatment of horses and other animals used therein, and any such regulations may vary or amend any of the provisions contained in Part II of, or sched. III to, this Act."

Section 89 (1):

"The general regulations applicable to a mine, as supplemented or

modified by the special regulations, if any, for the time being in force with respect to the mine shall be the regulations of the mine."

Section 90:

"If any person who is bound to observe the regulations of any mine, acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing the regulations, to prevent such contravention or non-compliance."

The following are the material paragraphs of the General Regulations, 1913, and the Explosives in Coal Mines Order, 1934:

General Regulations, 1913 (S.R. & O., 1913, No. 748):

"*Part I. General.* (1) It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said orders."

Explosives in Coal Mines Order, 1934 (S.R. & O., 1934, No. 6):

"*Part I. General Provisions* . . . 2 (e). The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot . . . (h). Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person shall not use, for the purpose of firing, a cable which is less than twenty yards in length. He shall himself couple up the cable to the fuse or detonator wires and shall do so before coupling the cable to the firing apparatus. He shall take care to prevent the cable coming into contact with any power or lighting cables. He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

Part II. Special Provisions. 6. In all cases in which permitted explosives are required by this order to be used:—(a) Competent persons (in this order called shot-firers) shall be appointed in writing by the manager for the purpose of firing shots, and no shot shall be fired except by a shot-firer."

The facts which give rise to the appellant's claim can be shortly stated. On Jan. 27, 1948, the appellant was employed by the respondents at their North Gawber Colliery as a stone contractor and coal-face worker, and was driving a drift from one seam to another when it became necessary to have a shot prepared and fired to loosen the stone. The appellant bored three holes in which the charges should be placed, and sent for the deputy, one Joseph Spence, who was the authorised shot-firer for that part of the mine. Spence came to the drift soon after and prepared to charge and fire the shots. The appellant was then engaged, in accordance with his duties, in making the place ready for the firing of the shots by removing tools from the vicinity and laying down iron sheets known as flags. After Spence had put in the shots, stemmed them, and coupled his shot-firing gear to the detonator wires, he ran out his cable and went out of the drift, leaving the appellant in the drift. Spence then fired a shot without giving any warning to the appellant, who suffered severe lacerations and abrasions.

On these facts the appellant alleged that his injuries were caused by breaches of duty on the part of the respondents or on the part of those for whose acts

and omissions the respondents were liable. In the court of first instance the appellant also alleged a breach of common law duty on the respondents' part, but as admittedly the appellant and Spence were engaged in a common employment and that fact constituted a defence at the time of the accident he confined his claim in the Court of Appeal to a breach or breaches of statutory duty. By their defence and at the trial the respondents alleged that the duties imposed by cl. 2 (e) and cl. 2 (h) of the said order were imposed, not on the respondents, but on Spence personally, and that if he was in breach of such duties the defence of common employment applied. The action was tried by JONES, J., at Leeds Assizes. At the trial the respondents did not call Spence as a witness, but called evidence, which the learned judge accepted, that they took all reasonable means by publishing the regulations relating to shot-firing to secure compliance with them and that they took all precautions to ensure that shot-firing should be carried out with care.

The contention on behalf of the appellant (I quote from his Case) was that on the proper construction of cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order the duty, though imposed on the shot-firer to whom the work of shot-firing was entrusted, was also a duty imposed on the mine owner, inasmuch as such work was a necessary part of the mine owner's operations, and that unless the language used in the order was such as clearly to confine the duty to the shot-firer in his personal capacity it ought not to be so read. The learned judge held that the duty was merely personal to the shot-firer. In the Court of Appeal the appellant contended that the duty infringed was also one imposed on the manager by the express terms of reg. 1 of the General Regulations, 1913. It was said that this point was not covered by the statement of claim, and the Court of Appeal took that view. Nevertheless, they heard full argument on it and decided it. In their view the obligation imposed on the manager under reg. 1 of the General Regulations was, in the circumstances, merely to do his best to enforce the regulations, and, the learned judge having found that he had done so, the manager was not in fault.

Since the appellant could not succeed in an action for common law negligence it was incumbent on him to show that the duty, the breach of which is relied on, was imposed on his employers or, at any rate, on someone who was not his fellow workman. To establish this right he put forward two alternative propositions: (i) that the duty lay on the employers themselves; (ii) that it was imposed on the manager and that the manager was not a fellow workman. Apart from authority there is something to be said for the second contention, but *Wilson v. Jerry* (1), *Hedley v. Pinkney & Sons S.S. Co.* (2), and *The Napier Star* (3) are authorities to the contrary, and, in my opinion, your Lordships' House should not now depart from the principles there laid down. This statement may, indeed, be subject to some qualification. The manager may not in all cases be a fellow workman, e.g., when appointing a shot-firer or in cases in which he acts as the *alter ego* of the employer. Where, however, the alleged breach of duty is that of a subordinate to whom the manager is assumed to have delegated the performance imposed on him (e.g., the shot-firer whom he has appointed) he is the fellow servant of that shot-firer inasmuch as each is engaged in performing directly or by delegation the same task.

Quite apart from the defence of common employment, however, the further question has to be considered: What duty in this matter is, in fact, laid on the manager? This problem is not the same as that which involves the liability imputed to an owner, on whom it is said the duty is imposed because he is the owner and not by any general provision of the Act or regulations. No general duty, however, is suggested to exist on the part of the manager by reason of his position as manager. In individual cases the regulations do lay a specific obligation on him, but the only general provision as to his liability is that contained in reg. 1 of the General Regulations of 1913, viz., "to carry out and to the

best of [his] ability enforce the regulations." With these words may be contrasted the obligation contained in the same regulations on all other persons employed to *comply* with them and the provisions of reg. 117 which has reference solely to the electricity portion of the regulations, *viz.*:

A "It shall be the duty of the mine owner, agent, and manager to comply with and enforce the following regulations, and it shall be the duty of all workmen and persons employed to conduct their work in accordance with the regulations."

B Even in the case of regulations, I cannot bring myself to believe that the three expressions "carry out", "to the best of their ability enforce", and "comply with" have the same meaning, more particularly when they all appear in one short paragraph. In reg. 1 the manager and under-manager are not enjoined to comply with, but only to carry out and to the best of their ability enforce. If this were, as the appellant suggested, a double obligation in the sense that liability attaches unless both limbs of the requirement are enforced, then the second part, *viz.*: "to the best of their ability to enforce", is otiose. The manager is in fault if he has not carried them out and it is no excuse to say that he has done his best and meaningless to say he shall do so. If, on the other hand, the true meaning is that he has to carry out those imposed on him and do his best to enforce those imposed on others the whole matter falls into place and every portion of the regulations receives an appropriate meaning. On the learned judge's finding, the manager was not in fault. He had done his best and, therefore, even if he was not a fellow servant of the appellant he had not failed to enforce the regulations to the best of his ability.

D The question whether the duty which is laid on the shot-firer is one for the carrying out of which the owner is personally liable or whether he has some lesser responsibility is a difficult and contentious matter. There is a considerable body of authority on the question which must be considered in its place, but ultimately the decision rests on the true construction of the Act and regulations and I think it of assistance to consider first at what conclusion I should have arrived in the absence of authority. Before, however, one analyses the relevant wording it is necessary to consider the proper approach to the matter.

E It was suggested on behalf of the respondents that the Coal Mines Act, 1911, is a measure imposing criminal liability, and, therefore, should be interpreted as throwing no greater burden on the employer than its words compel. It has, however, to be remembered that this Act is also a remedial measure passed for the protection of the workman and must, therefore, be read so as to effect its object so far as the wording fairly and reasonably permits. This, in my opinion, is the view expressed by LORD WARRINGTON OF CLYFFE in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (4), where he says ([1934] A.C. 13):

G "Section 49 of the Coal Mines Act, 1911, is in the following terms:—'The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure.' This involves, it will be noted, an absolute obligation on the owner to make secure the roof and sides referred to, and a further obligation that no person shall work in a travelling road or working place which is not so made secure. As to the law on the subject of the liability of owners for breach of obligations imposed by statute for the protection of those employed by them, I think the following propositions are supported by authority:—(1) If the obligation is to do or abstain from doing a particular thing and on the construction of the statute the obligation is created for the protection of a particular class, *e.g.*, workers in a mine or factory, then a member of that class injured by the non-performance of the obligation is entitled to sue the owner in an ordinary action founded on

personal negligence. (2) The fact that the obligation has not been performed is in itself evidence of personal negligence on the part of the owner. (3) That the owner cannot relieve himself of his obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part, nor was it open to him at common law to plead common employment. (4) There appears to be no material difference in this respect between the law of England and that of Scotland. In the present case I have no doubt that the obligation in question was imposed for the protection of the particular class. Neither have I any doubt that it is imposed as a personal obligation on the owner not capable of delegation."

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It will be observed that LORD WARRINGTON ends by saying that he has no doubt that s. 49 of the Act of 1911 imposes a personal obligation on the owner to make the roof secure. Such a conclusion is warranted by a consideration of the substance of the duty imposed in that case, but it does not follow that all the other duties prescribed by the Act are also laid on the owner himself. The relevant provisions of the Explosives in Coal Mines Order, 1934, differ in that in terms they impose an obligation on the shot-firer and on him alone.

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It was at first contended on behalf of the respondents that no obligation under either Act or regulations rested on the owner unless he was specifically referred to. Having regard, however, to the decision in *Groves v. Lord Wimborne* (5) and *M'Mullan's* case (4), it was conceded that there were certain duties which devolved on the employer though the language used was in impersonal form. The submission was then modified to the extent that where impersonal language was used the substance of the sections of the Act or regulation might show that the employer was aimed at, but that where the duty was specifically imposed on a particular person no such liability arose. In terms no general duty is laid on the owner to perform or cause to be performed the requirements of the Act and regulations except that contained in a number of sections in similar wording of which s. 75 and s. 90 of the Act are examples. Those sections make any breach of the Act an offence on the part of the owner unless he proves that he had taken all reasonable means, by publishing and to the best of his power enforcing, the regulations, to prevent a contravention or non-compliance with them. They are concerned, however, in terms with criminal offences only and still leave open the question whether the owner has broken the regulations and is, therefore, liable in damages though he is not criminally responsible. The regulations are numerous and lack precision. They were intended, I fancy, as a working guide and their exact meaning left to elucidation by a court of law in case any dispute arose. I have, however, read through the whole of them and am not prepared as at present advised to draw a general inference that the owner is not personally liable in a case where the person whose duty it is to carry out the obligation is specifically named. It is not, however, in my opinion, necessary to come to a final conclusion on that matter and I should prefer to pronounce on it if and when such a decision is essential.

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The first two sentences of Part I, cl. 1 (a) of the order of 1934 in themselves show the difficulty of so distinguishing the persons on whom the duty is imposed. Is the owner under a duty to provide a suitable place for storage of explosives above ground, but under no duty to see that no explosive substance is stored underground because that duty is expressly imposed on the manager and not on him? The true view is, I think, that each regulation must be considered on its own merits and judgment given accordingly. Counsel for the appellant was inclined to concede this reasoning up to a point, but said that, *prima facie*, the owner would be liable unless the wording or substance of the regulation freed him from liability. As an example he instanced the taking by a workman of a match or matches concealed on his person into a mine. Such an obligation, he said, could not readily be supposed to have been imposed on the owner inasmuch as only a limited right of search was permitted and an owner could not be

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expected to do the impossible. The concession may well be justified in a case where it is almost impossible for the owner or manager to prevent the breach, but, having regard to the duties imposed on a shot-firer which he alone can carry out, with which even a manager is not allowed to interfere and which moreover it would be difficult if not impossible to oversee, the same argument is equally applicable in the case of shot-firing. One has only to look through the duties placed on shot-firers, *e.g.*, cl. 6 (a) and cl. 6 (b) of the Explosives in Coal Mines Order, 1934, to see how personal the obligations imposed are. The same observations are true of the General Regulations, 1913. Even if it be true that the regulations as a whole, *prima facie*, bind the owner, there are grounds on which it can be said in many cases that the owner as owner is not affected. Instances may be found in regs. 9, 10 and 12 of the General Regulations which no owner or manager could carry out or enforce.

I have given these examples and they could be amplified, but the case of the shot-firer is, perhaps, as good as any. The manager and no one else must appoint him. He alone can fire the shot and the *minutiae* of his task are such that no oversight which is practicable could ensure their performance. The regulations material to this case, *viz.*, those contained in the order of 1934, cl. 2 (e) and cl. 2 (h), are imposed on the shot-firer personally and in their essence are capable of being carried out by him alone. With these provisions may be contrasted Part III, cl. 11, which states:

"A 'permitted explosive' shall comply in every respect with the prescribed definition, and any explosive that does not so comply shall not be deemed to be a permitted explosive; Provided that an owner, agent or manager shall not be responsible for such non-compliance if he shows that he has in good faith purchased an explosive marked on the packages and the cartridges as a permitted explosive, and that he has taken all reasonable means to prevent deterioration of the explosive while stored."

Here the duty to use only permitted explosives is imposed generally. Nevertheless, the owner, agent or manager is obviously intended to be made liable since if he were not it would be unnecessary to provide an excuse. My conclusion, therefore, apart from authority, would be that there is no universal rule making the owner liable civilly for the non-fulfilment of the regulations. Unless he is specially charged or excused, his liability or non-liability must depend on a careful analysis of the particular regulation which has been broken. I am fortified in this view by considerations similar to those which are applicable to the case of a manager. If the owner is always liable I can see no reason for placing a specific liability on him in certain cases and not in others, *e.g.*, in reg. 117 an absolute obligation on the owner is imposed in terms. If that obligation already existed in all cases I can see no reason for a further and unnecessary reiteration of a duty by which he was already bound.

These considerations bring me to an analysis of the more important cases in which the subject has been discussed. If *David v. Britannic Merthyr Coal Co.* (6) had not been appealed to your Lordships' House, I should have experienced great difficulty in distinguishing the principle on which its main point was decided from this case. FLETCHER MOULTON, L.J., at any rate, says in terms that the owner is liable for any breach by any of his employees unless that employee is acting outside the scope of his duty. BUCKLEY, L.J., on the other hand, thinks him liable if he does not prove that he took all reasonable means to prevent the breach. The case was sent back for a new trial, which is consistent only with the latter view. Your Lordships' House dismissed the appeal, but dissented from many of the reasons for judgment without specifying those they rejected. An order, however, sending the case to be re-tried is consistent only with the view that the owner's responsibility was not absolute but could be discharged if he showed that he had done his best to enforce the regulations. If he was absolutely

liable judgment should have been given in the plaintiff's favour. VISCOUNT HALDANE, L.C., in *Watkins v. Naval Colliery Co.* (1897), *Ltd.* (7) ([1912] A.C. 703) explains the order for a new trial on the ground that that was all that was asked. I have examined the record in your Lordships' House and think that probably that was the only remedy asked for in the House of Lords though, as TUCKER, L.J., points out, both grounds were relied on in the Court of Appeal. I think, however, that the grounds of the decision in *David's* case (6) are to be found elsewhere and emerge in the speech of LORD KINNEAR in *Black v. Fife Coal Co., Ltd.* (8), where he points out ([1912] A.C. 163) that the obligations referred to in s. 49 of the Coal Mines Regulation Act, 1887, which was then in force, are prefaced by the statement: "The following general rules shall be observed, so far as is reasonably practicable . . .", and that from that general requirement is to be inferred a duty on the part of the owner to see that the regulations are so obeyed. It does not make him personally liable in all cases, and, accordingly, in cases where no personal duty is cast on the owner he would escape all liability were it not for the provisions of s. 50 which make him responsible for the negligence of his employees. That section, however, does not impose a general liability if the rules are not carried out, only an obligation to use due care and diligence to see that they are obeyed. The onus, however, was on the owners to show that they had been diligent. If they did so they would have performed their obligations under the Act, but, if they could not do so, they would be liable. The case, therefore, was rightly sent back in order that it might be ascertained whether they had fulfilled that duty or not. But, though I am not sure that LORD SHAW OF DUNFERMLINE took the same view, LORD KINNEAR held that certain of the rules did not create a personal duty on the owners themselves. He instances the case of a miner who neglects the instructions as to the use of a safety lamp or his possession of safety matches in certain parts of the mine. In his view, however, the owners were *prima facie* liable if they did not use due diligence, because of the general enactment that the rules were to be observed and this meant that they were to be observed by all—owner, agent, manager, and individual workman so far as they applied to him, alike.

In the Act or regulations now under consideration there is no general requirement that they shall be observed, merely a provision either that certain persons shall do certain things or an impersonal requirement that certain things shall be done. No doubt, a duty is to be inferred to have been placed in some cases on the owner personally to see that the requirements are complied with, but in others, including the safety provisions contained in Part II of the Act with which your Lordships are concerned, the duty in many cases appears to me to be prescribed by the Act itself or regulations themselves and in this case by s. 74 and s. 75. Those sections, in my opinion, impose an obligation, but not an absolute one. Section 75 is primarily concerned with criminal liability and does not specifically place a liability for damages for negligence on the owner. It is common ground, however, that the existence of criminal liability also imposes a civil liability for damages for statutory negligence in circumstances which would not, apart from its provisions, give rise to either criminal or civil liability.

In cases where a personal duty is laid on the owner under other provisions of the Act or regulations, the owner may be absolutely bound to answer for the faults of his subordinates, but where such an obligation does not exist, he would, in my view, be under no duty at all, either civilly or criminally, were it not for the provisions of s. 74 and s. 75 or other sections to the like effect. In such a case the liability, both civil and criminal, is imposed by those sections and by them alone. In my opinion, therefore, the true meaning of these provisions is that the owner is guilty of a criminal offence and liable also for damages unless he has taken all reasonable means by publishing and, to the best of his ability, enforcing these provisions. If, however, he has done his best he is neither guilty of a crime nor in breach of a statutory enactment. His civil and criminal duties

are commensurate. In the present case where the duty is specifically laid on the shot-firer, whom the owner cannot himself appoint and with whose activities he cannot interfere, I cannot see any reason for thinking that the owner has any duty beyond that resulting from the provisions of those sections.

A It is to be observed that s. 75 deals only with a breach of the provisions of Part II of the Act and does not in terms mention the regulations even though made under a provision contained in s. 61 of that Part. I am inclined to agree with DU PARCQ, L.J., when he says in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9) ([1941] 1 All E.R. 284) that reg. 117 of the General Regulations must be read as part of the Act and thereby, as I think, takes the view that regulations made under the Act must be so read, but whatever may be its truth I think any possible gap is filled up by the provisions in s. 74. "Such directions" cannot, I think, be confined to some specific direction given to the workman concerned over and above general directions given to him as a member of a class. Under them, in my opinion, are to be included the directions contained in the Explosives in Coal Mines Order, 1934, nor do I think that they are confined to ensure compliance with Part II of the Act or, indeed, with the regulations of the mine, however that phrase may be interpreted since the section also contains the words "or with a view to safety." Such an expression contained in that context appears to me to impose the widest obligation on the owner who has not done his best to enforce the duties laid on his employees. I have, accordingly, purposely refrained from expressing an opinion whether, when s. 89 refers to the general and special regulations, it refers to those contained in the Explosives in Coal Mines Order, 1934, or whether that section only refers to the general regulations made under s. 86 (1) of the Act and such special regulations as apply to a particular mine only. In my opinion, the decision of your Lordships' House in *Riddell v. Reid* (10) is not in any way inconsistent with this view. That decision turned on the terms of s. 137 (1) of the Factories Act, 1937, under which there could be no question but that a personal duty was placed on the owner. The Building Regulations, 1926, the construction of which was in question, in terms imposed such an obligation. They are introduced by the words:

E "It shall be the duty of every contractor and employer of workmen to observe such of the requirements in Part I of these regulations as affect any workman engaged by him."

Part I is headed "Duties of Employers". Plainly, therefore, they cast on employers themselves the burden of fulfilling them. The only matter in dispute F was whether they were excused under the terms of s. 137 (1) of the Act. That section, however, imposed no obligation. It was aimed, not at lessening the duties of the owner, but at excusing him from certain sanctions if he failed to carry them out. Admittedly it freed him from any criminal offence in certain events and the only dispute was whether it also excused him from liability to pay damages in a civil action. It was held that it did not. Such a decision, however, has nothing G to do with the question whether the Act put the task of fulfilling the requirements of the Factory Acts and Building Regulations on him personally. It assumed that there was a personal liability and decided that if he took all reasonable steps to prevent the infraction it freed him from criminal liability but did not affect his civil responsibility. The attempt to find an escape from civil liability H in the wording of that section would have its counterpart in a suggestion that, in the present case, s. 102 (3) of the Coal Mines Act, 1911 (which also is confined to excusing a criminal liability for a recognised breach) would be a defence to a civil action. A contrary view was held by your Lordships in *London & North Eastern Ry. Co. v. Berriman* (11) and no similar contention was put forward in the present case. Section 102 (8) was neither pleaded nor relied on, and, therefore, it is unnecessary for your Lordships to decide the extent of the protection it affords.

Of the other cases cited, *Wilsons & Clyde Coal Co., Ltd. v. English* (12) is an

authority in respect of the obligation of a master to provide a safe system of working and is not germane to the matters now in issue. *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9) dealt with a breach of a different set of regulations, viz., reg. 131 and reg. 132 of the General Regulations, 1913. In that case a specific obligation was laid on the owner personally by reg. 117 which says: "It shall be the duty of the mine owner . . . to comply with and enforce the following regulations", and regs. 131 and 132 form part of the regulations referred to. No question, therefore, could arise whether a personal duty was laid on the owner or not. The regulations themselves specifically imposed it. Moreover, as I read the judgment of DU PARCQ, L.J., in that case, he recognises that certain of the obligations in the regulations are not so imposed though those to which reg. 117 refers are not included among them. I should agree with this view and not with that of MACKINNON, L.J., who appears to hold that all the duties which the regulations prescribe are a direct obligation of the owners.

Finally, *Lochelly Iron & Coal Co., Ltd. v. M'Mullan* (4) is an example of that class of personal duty which a regulation imposes on the owner by reason of the substance it contains. As LORD WRIGHT said ([1934] A.C. 22):

"The provisions of s. 49 of the Coal Mines Act clearly belong to the class which imposes a duty on the employer to take certain precautions for the protection of his workmen; it is absolute in its terms, save as modified by the later s. 102 (8) . . ."

The obligation in question was that of making the roof secure and ran:

"The roof . . . of every . . . working place shall be made secure, and a person shall not . . . work in any . . . working place which is not made so secure."

The form is impersonal, but the substance such as would naturally place an obligation on the owner.

The general effect of these considerations, in my opinion, warrant the conclusion that the Act and regulations create two sets of duties, one placed on the owner personally and the other on his employees. The first may exist either by direct enactment or be derived from the substance of the relevant section or regulation. Where, however, neither of these circumstances exist the only obligation of the owner is to be found in sections such as s. 75 which impose a qualified duty on the owner making him responsible both civilly and criminally unless he has used due care. In the present case the learned judge has found that all due care was exercised, and, as I think that no personal liability was imposed directly on the owner, he is not, in my view, responsible for the omissions of the shot-firer and the consequent injury to the appellant. Having regard to the opinion which I entertain, the further argument on behalf of the respondents that, as no duty is imposed on the owner personally or at any rate only a duty of care, no liability rests on the employer for a breach of a statutory duty by his servant and, therefore, no question of common employment arises, does not require a solution. All I need say at this juncture is that I must not be taken to accept it, and, though I express no final opinion, I have read at least with sympathy the observations on it contained in the speech of LORD MACDERMOTT. My Lords, I am conscious that the wording of the Act and regulations is difficult and obscure and I am by no means sure that the recorded cases speak with one voice. Nevertheless, I am of opinion, for the reasons I have given, that the Court of Appeal were right and I should dismiss the appeal with costs.

LORD NORMAND: My Lords, I agree with my noble and learned friend on the Woolsack. The sole foundation of this appeal is breach of cl. 2 (e) and cl. 2 (h) of the Explosives in Coal Mines Order, 1934, made under s. 61 (1) of the Coal Mines Act, 1911, in respect of failure to see that the appellant had taken

proper shelter before the shot was fired and failure to see that he had taken proper shelter before the cable was coupled to the firing apparatus. The appellant cannot succeed unless he shows that the breach was a breach of duty directly laid on the respondents, as the mine owners, by the regulations. If that duty was by the regulations directly laid on Spence, the authorised person who fired the shot, and on him alone, the respondents can rely on the defence of common employment. That defence is no less available to them if, on a sound construction of the General Regulations, 1913, made under s. 86 (1) of the same Act, the duty was laid directly on the manager and under-manager, for, in my opinion, these officials, though of higher grade than the shot-firer, must also be regarded in a case like the present as fellow servants of the appellant: *Wilson v. Merry* (1), *Hedley v. Pinkney & Sons S.S. Co.* (2) and *The Napier Star* (3).

My Lords, there is, I think, support in the books for the view that all regulations made for the safety of employees in factories or coal mines under the relevant Acts should be construed if possible as imposing a direct obligation on the occupier of the factory or on the owner of the mine. *Groves v. Lord Wimborne* (5) supports this view so far as the Factory Acts are concerned, and so far as the Acts providing for safety in mines are concerned the judgments of FLETCHER MOULTON, L.J., in *David v. Britannic Merthyr Coal Co.* (6), of MACKINNON, L.J., in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9) and of LORD WARRINGTON OF CLYFFE in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (4) were all influenced by it. The underlying reason is that, unless a regulation imposes a direct obligation on the employer, the workman injured by its breach was without the full protection of a remedy against his employer, while the defence of common employment subsisted. Even under the amendment of the law brought about by s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948, it may be that the workman is still without this full protection if his injury is caused solely by a breach of a regulation committed by another workman and if there has been no negligence, unless the duty to comply with the regulation is directly laid on the employer. On this question, however, I do not find it necessary to express an opinion.

The appellant relied rather on the considerations to which I have adverted than on any universal proposition that every regulation for the safety of miners made under the Coal Mines Act, 1911, must be deemed to impose a duty on the mine owner directly. If the universal proposition had been put forward it would have been found impossible to reconcile it with s. 75 and s. 90 of the Act, both of which distinguish between persons who are bound to observe a regulation and other persons, including the mine owner, who have a duty under these sections to take all reasonable means of publishing and to the best of their powers enforcing the regulation to prevent a contravention. The universal proposition is also inconsistent with the provisions of reg. 1 and of reg. 117 of the General Regulations, which, in my opinion, should be read together as connected and related enactments, though they do not have the same provenance, and as if they were provisions of the statute under which they are made. Regulation 1 imposes on the manager and under-manager a duty to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives. Regulation 117 imposes on the mine owner, agent and manager a duty to comply with and enforce the regulations dealing with electricity. If every regulation imposes a duty directly on the mine owner, there was no need to mention him in reg. 117, but if some regulations do not impose a duty directly on the mine owner the omission of the mine owner in reg. 1 and his inclusion in reg. 117 is intelligible.

On the narrower proposition maintained by the appellant my conclusions may be stated in three heads. First, assuming a presumption in favour of a direct obligation on the mine owner, I think that it is rebutted by the terms of the regulations infringed in this case. Secondly, the terms of the Act and of the regulations thereunder are difficult to reconcile with the presumption. Thirdly, the decided cases do not establish the presumption.

First, then, cl. 2 (e) of the order of 1934 prescribes three precautions which "the person firing the shot" shall take—(i) that before firing the shot he shall see that all persons in the vicinity have taken proper shelter, and shall take suitable steps to prevent any person approaching the shot; (ii) that he shall himself take proper shelter; and (iii) that if he has reason to believe that there is a possibility of the shot blowing through into an adjoining place he shall send verbal warning to the persons in that adjoining place to take proper shelter. These duties are in a peculiar degree duties appropriate only to the person firing the shot, and the express terms by which they are imposed are not apt to impose a duty on the mine owner. If there is a presumption such as is suggested, it is displaced by the express terms of the regulation. On the contrary assumption the person firing the shot and failing to take proper shelter could complain of the mine owners' breach of duty, a result which I think could be achieved only by express enactment or by necessary implication arising from some other provision of the Act or regulations. The same is true of the other two duties, the first of which is contingent on the readiness and intention of the shot-firer to fire the shot, and the last on his reasonable belief that there is a possibility of the shot blowing through into an adjoining place. Both these contingencies are personal to the person firing the shot, and if it had been intended that the duty should be artificially imposed on the mine owner, express words would surely have been used to make the intention effective. The duty expressly imposed on the authorised person by cl. 2 (h) of seeing that all persons in the vicinity have taken proper shelter before he couples the cable to the firing apparatus, is expressly laid on the authorised person, and on him alone, and it is a duty personal to him. Any presumption that the duty is also directly imposed on the owner, would, in my opinion, be displaced. A B C D

Secondly, a presumption that the obligations imposed by the Act of 1911 and the regulations are laid directly on the owners would not be in harmony with the provisions of s. 2 (4) of the Act by which the mine owner is forbidden to take any part in the technical management of the mine unless he has special qualifications and is bound to appoint a manager who shall be responsible for the control, management and direction of the mine. There is, it may here be noted, no corresponding provision in the Factory Acts. It is also apparent that the provisions of the Act and of the regulations purport to impose particular duties on particular persons. Sometimes the duty is laid upon the subordinate workmen, sometimes on those with "responsible duties," sometimes on the manager and under-manager, sometimes on the owner, agent and manager, sometimes on the owner. Where the regulation is impersonally expressed, as often happens, the person or persons on whom the duty rests can be discovered only by construction, and, in my opinion, the sound rule is to consider each regulation, taking into account not only the terms in which it is expressed, but also the character of the duty which it creates and the relation of the regulation to any provisions of the Act and of other regulations which may throw some light on it, and so to ascertain (without recourse to presumption) the persons on whom the duty is imposed. E F G

Lastly, the cases on which the appellant relied do not, in my opinion, support the supposed presumption. In *Groves v. Lord Wimborne* (5) there had been a breach of duty under the Factory and Workshop Act, 1878, in allowing dangerous machinery to remain unfenced. The questions were whether the duty was an absolute duty and one imposed directly on the occupier of the factory, and whether the occupier was civilly liable to an employee injured as a consequence of the breach. The duty to fence dangerous machinery was expressed impersonally in s. 6 (2) and s. 6 (4). It is a duty, like most of the duties under the Act, which falls within the province of the occupier of the factory and one which without his authority and action could not be performed. These sub-sections were construed as imposing a direct and absolute duty on the occupier, who was, H

therefore, responsible for injury caused by the breach, though the fencing had been removed by the negligent act of the plaintiff's fellow servant. *Riddell v. Reid* (10) is a case of the same kind and carries the appellant no further. These cases do not, in my opinion, help the appellant. He relied on *David v. Britannic Merthyr Coal Co.* (6). In that case it was held by the Court of Appeal that the rules referring to shot-firing in s. 49 of the Coal Mines Regulation Act, 1887, imposed a duty on the mine owner. FLETCHER MOULTON, L.J., arrived at this

- A conclusion on a consideration of s. 49 and the rules themselves and he held that the duty was absolute. That was not the view taken in this House, which ordered a new trial, with a direction that the onus was on the owner of the mine to prove that the authorities of the mine had taken proper care of the safety of the miners. No evidence of this kind would have been competent if an absolute duty was directly imposed on the mine owner. *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9) is more germane to the present case. In it there had been a breach of reg. 131 (e) and reg. 132 (iii) of the General Regulations, 1913, made under s. 86 (1) of the Coal Mines Act, 1911. These regulations require that if there is a fault in an electric circuit the part affected shall be made dead and remain so till the fault has been remedied. It was held that the regulations, which are impersonally expressed, impose a direct and absolute obligation on the mine owner. The respondents specially referred to the judgment of DU PARCQ, L.J. He relied on reg. 117 which provides, *inter alia*, that: "It shall be the duty of the mine owner, agent, and manager to comply with and enforce the following regulations . . .", which include reg. 131 and reg. 132, and he held that the mine owner was bound to comply with reg. 131 (e). I find it difficult to accept this construction of reg. 117, and, though it is not necessary to decide the point, D it may be thought a sounder construction to read the words "to comply with" and "to enforce" distributively, so that the mine owner, agent and manager are bound to comply with those regulations which lay duties on them respectively and to enforce according to their functions and their spheres of duty the duties which are laid on other persons such as the electricians or the subordinate employees. In any case, the regulations infringed in the present case are affected, E not by reg. 117, but by reg. 1, and that regulation lays on the manager and under-manager the duty "to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives . . ." but it lays no duty on the owners. Since the respondents did not found on s. 90 and had not pleaded s. 102 (8) of the Act, it is not necessary to refer to the observations of DU PARCQ, L.J., on them. I F desire, however, to say that, in my opinion, proof of facts sufficient under s. 90 to prevent conviction of an offence does not constitute a defence in civil proceedings for damages. I have in *Crane v. Baird (William) & Co.* (13) expressed an opinion on the meaning and effect of s. 102 (8), which agrees with the opinion of DU PARCQ, L.J. MACKINNON, L.J., in his judgment in *Yelland's* case (9), took the view that *Groves v. Lord Wimborne* (5) established a *prima facie* rule G that all regulations for the safety of employees impose a duty directly on the employer. I must respectfully say that it is extremely hazardous to apply judicial observations on regulations made under the Factory Acts to regulations made under the Coal Mines Act, 1911, that *Groves v. Lord Wimborne* (5) does not warrant the broad proposition which the learned lord justice deduced from it, and that *Yelland's* case (9) may call for further consideration hereafter. In H *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (4) it was decided that the obligation to make secure the roof of travelling roads in mines (s. 49 of the Act) was laid on the owner and that negligence in maintaining the roof was "personal negligence" of the owner, but, with the exception of LORD WARRINGTON OF CLYFFE, the noble and learned Lords decided the case on the terms of the regulation and the character of the duty to be performed. LORD WRIGHT said ([1934] A.C. 22):

"The provisions of s. 49 of the Coal Mines Act clearly belong to the

class which impose a duty on the employer to take certain precautions for the protection of his workmen."

LORD ATKIN similarly said (*ibid.*, 8):

"It is further beyond question that these provisions [*i.e.*, the provisions of s. 49] impose a special duty upon the employer towards those for whose safety they are designed."

One of the cases referred to by LORD ATKIN is *Black v. Fife Coal Co., Ltd.* (8). In that case LORD KINNEAR, in a powerfully reasoned judgment, drew a distinction between the rules which by their nature directly affected the mine owner, such as those providing for the safety of roads and roofs, and the rules which did not directly affect the mine owner, such as those prohibiting the taking of lucifer matches into the mine. The distinction is a real one, and in the Act of 1911 and the regulations under it the distinction is preserved.

I am of opinion that the Court of Appeal rightly held that the regulations infringed in the present case by their explicit terms and by the nature of the duty imposed belong to the class of regulations which do not directly affect the mine owner. I would, therefore, dismiss the appeal.

LORD OAKSEY: My Lords, I have had the advantage of reading in print the opinions which have just been delivered and the opinion of my noble and learned friend LORD MACDERMOTT which is about to be read and I agree with them.

LORD MACDERMOTT (read by LORD NORMAND): My Lords, on Jan. 27, 1948, the appellant sustained personal injuries in the course of his employment by the respondents at their North Gawber Colliery as a stone contractor and coal-face worker. His injuries were caused by one Joseph Spence, the authorised shot-firer for the part of the mine where the accident occurred, who fired a shot, by means of electrically operated apparatus, near to where the appellant was working and before he had taken proper shelter. It was conceded that in so doing Spence had acted negligently and also in breach of a statutory duty imposed on him by para. (e) and para. (h) of cl. 2 of the Explosives in Coal Mines Order, 1934, an order which regulates the supply, use and storage of explosives at mines and was made (in so far as material) under the powers conferred by s. 61 (1) of the Coal Mines Act, 1911. I must refer to the wording of paras. (e) and (h) in more detail later, but for the moment it will suffice to say that both contain a clear direction to the shot-firer to see, before firing the shot, that all persons in the vicinity have taken proper shelter. It was also conceded—necessarily as it seems to me on the authorities—that the appellant had a right to sue in tort for damages occasioned by a breach of this statutory duty subject, of course, to such defences as might be open to those sued. The appellant was injured before the defence of common employment was abolished by s. 1 (1) of the Law Reform (Personal Injuries) Act, 1948. The respondents were, therefore, entitled to rely on that defence and they did so. It was, indeed, their main answer to the appellant's claim and I will turn to the issues it raises at once.

It was not disputed that Spence and the appellant were in common employment or that, had the only fault attributable to Spence in regard to what he did been one of common law negligence, the defence of common employment would have succeeded. What was in dispute was whether the statutory duty to which I have referred rested exclusively on the shot-firer, as the respondents contended, or whether, as the appellant submitted, it rested not only on the shot-firer, but also directly and as a personal obligation on the respondents as owners of the mine. If the former, the defence of common employment would be effectual to defeat the claim on the view that the doctrine of common employment covered risks arising from the breach of such a statutory duty by a fellow servant no less than from some act of casual negligence on his part. This was

the view taken by TUCKER, L.J., in the Court of Appeal and by DU PARCQ, L.J., ([1941] 1 All E.R. 284) in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9). It was not challenged before your Lordships and is, I think, clearly right. But if, on the other hand, the appellant's submission is well founded, the doctrine would afford no defence and the respondents would remain liable for the reasons enunciated by this House in *Wilsons & Clyde Coal Co., Ltd. v. English* (12).

- A The immediate question, then, is whether para. (e) and para. (h) of cl. 2 of the order of 1934 cast a direct and personal obligation on the respondents. This, to my mind, is entirely a matter of construction. It goes without saying that the legislature may by the use of appropriate language impose an obligation of this nature on employers irrespective of personal default or of whether they have the capacity or the means to act for themselves or to regulate or supervise the
- B conduct of their subordinates. The statute book is not lacking in examples of this sort of enactment and the underlying policy is often discernible. But whether the policy of the legislation is manifest or obscure bears only on the difficulties of interpretation, and the true intention has still to be gathered from the text according to the ordinary canons of construction. The first step, therefore, is to see what the paragraphs in question say. With the omission of certain
- C immaterial words they read thus:

"(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot. He shall also himself take proper shelter . . . (h) Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person shall not use, for the purpose of firing, a cable which is less than twenty yards in length . . . He shall also himself couple the cable to the firing apparatus. Before doing so, he shall see that all persons in the vicinity have taken proper shelter."

- D
- E In the opinion of the learned trial judge and of the Court of Appeal these provisions laid the duty which Spence failed to observe on the shot-firer exclusively and did not involve the respondents in any direct or personal obligation with regard thereto. I respectfully agree. Looking only to the wording of these paragraphs I have difficulty in seeing how the draftsman desiring to place this duty on the shot-firer alone could well have been more explicit. Does, then, the context in which these paragraphs must be set justify a different conclusion?
- F I do not think so. For this purpose I include in the relevant context the Act of 1911, the order of 1934, and the General Regulations made under s. 86 (1) of the said Act other than reg. 1 thereof which I must deal with separately. This context shows a great variation in the nature of the numerous obligations imposed. It also shows a considerable diversity in the manner of their imposition. Some are positive, others negative. Some are placed on designated persons—
- G e.g., by cl. 1 (a) of the order of 1934:

"The owner, agent or manager shall provide a suitable place or places of storage . . ."

- Some are placed on members of a particular class doing a particular operation—e.g., by reg. 5 of the General Regulations:

- H "Every workman engaged at the face . . . shall carefully examine his working place before commencing work."

Some apply to anyone in or about the mine—*vide* the recurrent "No person shall . . ."; and some are imposed quite impersonally—e.g., by cl. 2 (f) of the order of 1934:

"No shot shall be fired in any mine except by means of an efficient

electrical apparatus or by means of a fuze complying with the conditions and ignited in the manner specified in sched. II hereto."

I am in agreement with the view expressed by JENKINS, L.J., in the Court of Appeal when he said ([1950] 1 All E.R. 179):

"There are, of course, some provisions of the order and regulations which do impose statutory duties on the owner in express terms. There may well be others which should be construed as doing so, even though the owner is not expressly mentioned as the person responsible, and, in general, I think a regulation to the effect that this or that shall or shall not be done in any coal mine, without any reference to the person by whom it is to be done or prevented, would *prima facie* cast on the owner, acting personally or through his agents, the duty of doing or preventing the act in question."

This view recognises the mine owner as the source of authority and serves to support, or, perhaps, I should say explain, the decision of the Court of Appeal as to the nature of the obligations imposed by the now repealed s. 49 of the Coal Mines Regulation Act, 1887, in *David v. Britannic Merthyr Coal Co.* (6). This case, which was strongly relied on by counsel for the appellant, is in some ways obscure and difficult to follow, and its value as an authority is not enhanced by the fact that on appeal to this House, according to the report ([1910] A.C. 74), the reasoning of the Court of Appeal was dissented from in certain unspecified respects though the order appealed against was affirmed. Nevertheless, it is, I think, correct to say that in so far as the Court of Appeal in *David's* case (6) held s. 49 to impose a direct and personal, if not an absolute, obligation on mine owners its decision is authoritative: see *Black v. Fife Coal Co., Ltd.* (8) and, in particular, the opinion of LORD KINNEAR therein. Counsel's argument on this aspect of the matter depended necessarily on establishing a substantial degree of similarity between the relevant parts of s. 49 and the paragraphs of the order of 1934 now under consideration. When the respective provisions are compared, however, they seem to me to reveal a difference in expression which is significant and amply sufficient to distinguish *David's* case (6). Section 49 commences with the words:

"The following general rules shall be observed, so far as is reasonably practicable, in every mine . . ."

Then there is set out a series of rules directed to specific activities including one (r. 12 (i)) which says:

"... no shot shall be fired there unless ... all workmen have been removed from the seam ..."

The impersonal nature of the important opening sentence of s. 49 will be noted. The distinction between that sort of direction and the direction to a specifically described person such as that with which this appeal is concerned is more than a matter of phraseology. Its significance and effect are clearly recognised in the passage in LORD KINNEAR'S opinion in *Black's* case (8), where he says ([1912] A.C. 163):

"Now the 49th section, as I have already said, imposes certain specific duties upon particular persons, but it begins with a general imperative enactment that the rules which are thereafter to be stated in detail shall be 'observed so far as is reasonably practicable in every mine.' I think that is an enactment expressly directed not only to people who are charged with the actual performance of specific duties, but also to the owners who have the ultimate control of the mine. There is nothing in the form of the language to limit its application to particular persons. It is addressed to all whom it

may concern; and I think it impossible to suppose that the mine owners are outside the scope of that general enactment."

So far, the relevant context here presents no such "general enactment" or any escape that I can see from the conclusion that para. (e) and para. (h) of cl. 2 of the order of 1934 do not cast a direct or personal duty on the respondents.

A I must now refer to reg. 1 of the General Regulations on which counsel for the appellant founded a further submission. This regulation reads thus:

"It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said orders."

B The general effect of the argument here was to attribute to this regulation much the same function as that attributable to the opening words of s. 49 of the Act of 1887. More particularly, it rested on two propositions—(i) that reg. 1 imposes an absolute duty on the manager and under-manager to carry out the provisions of, *inter alia*, paras. (e) and (h) of cl. 2 of the order of 1934, and (ii) that the manager and under-manager were not in common employment with the appellant and their breach of reg. 1 must, therefore, be imputed to the respondents. On C the authorities I doubt if your Lordships would be disposed to hold that the manager, under-manager and appellant were other than fellow servants for the purposes of the doctrine of common employment, but on the view I take of the first of these propositions it will be convenient to regard the second as well D founded and I shall proceed on that assumption. The learned trial judge found as a fact that the respondents and their officials had taken all proper precautions to enforce the provisions of the shot-firing regulations and it was for this reason that counsel for the appellant laid stress on the words "carry out" and argued that reg. 1 imposed an obligation of a strict or absolute character. The difficulty in his way is that, assuming the expression "carry out" would of itself import E an obligation of that nature—and such, I think, may well be the case—the following words "and to the best of their ability enforce" obviously do not do so. The result of this, if the two expressions are to be read as coupled and applied together to all the provisions of the order of 1934, is to produce a contradiction in terms sufficiently glaring to justify the rejection of that construction. In my opinion, the proper meaning of the regulation is that obtained by reading the words in question distributively, that is to say, the words "carry out" being F taken as applying to those provisions which, expressly or impliedly, cast a duty on the manager or under-manager, and the words "to the best of their ability enforce" as applying to those provisions (including para. (e) and para. (h)) which G cast a duty on others for whose compliance the manager and under-manager are, as such, responsible. This gives a reasonable meaning to the regulation and does not entail any undue straining of its language. It might have been better to write "or, as the case may be," instead of "and," but the conjunctive cannot, according to ordinary usage, be taken as necessarily negating a distributive interpretation, as witness the common use of "observe and perform" in relation to a series of covenants, some negative and some positive. I think, therefore, H if one were to regard only the terms of this regulation, the argument under discussion ought not to succeed. Counsel, however, called in aid the decision of the Court of Appeal in *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9) that reg. 117 of the General Regulations, 1913, placed a direct and absolute obligation on the mine owner. This regulation reads as follows:

"It shall be the duty of the mine owner, agent, and manager to comply with and enforce the following regulations, and it shall be the duty of all workmen and persons employed to conduct their work in accordance with the regulations."

The language of this regulation is in such marked contrast to that of reg. 1 that I do not think it necessary to discuss the facts or the conclusions in *Yelland's* case (9). It is enough to observe that reg. 117 is capable of being regarded as imposing an absolute obligation, throughout, and, further, that it mentions the owner specifically, a consideration which makes the absence of such mention in reg. 1 all the more significant. For these reasons I conclude that the relevant statutory duty never attached to the respondents directly or personally, and that, in consequence, the defence of common employment must prevail. A

Counsel for the respondents advanced a further and alternative argument to the effect that, the duty in question being placed on Spence exclusively, the respondents could not be made responsible for his breach thereof even if the doctrine of common employment did not apply. In other words, the maxim *respondeat superior* had no applicability in the case of a statutory duty so laid on a servant. My Lords, on the views already expressed it is not strictly necessary to deal with this submission, but it was debated at sufficient length at the Bar to lead me to think that to reserve it for consideration on some future occasion might give it more encouragement than it deserves. It comes to saying that (apart, of course, from the doctrine of common employment) a master is not vicariously responsible in respect of his servant's statutory negligence. To my mind this, as a general proposition, finds no support in principle or authority. Vicarious liability is not confined to common law negligence. It arises from the servant's tortious act in the scope of his employment and there can now be no doubt that Spence in breaking the shot-firing regulations committed a tort. B

My Lords, the possibility of establishing a defence in suits such as this either under s. 102 (8) of the Act of 1911 or by proving facts which would exculpate an owner if charged under the penal provisions of that Act was canvassed to some extent in the course of the debate. But as the respondents did not seek to rely on either of these possible defences I refrain from expressing any opinion on them. On the grounds stated I would dismiss the appeal. C

LORD REID (read by **LORD OAKSEY**): My Lords, the Explosives in Coal Mines Order, 1934, made by the Board of Trade under s. 61 (1) of the Coal Mines Act, 1911 (and subsequently amended), provides with regard to shot-firing in cl. 2 (e) and cl. 2 (h): D

"(e) The person firing the shot shall, before doing so, see that all persons in the vicinity have taken proper shelter, and he shall also take suitable steps to prevent any person approaching the shot. He shall also himself take proper shelter. If he has reason to believe that there is a possibility of the shot blowing through into an adjoining place he shall send verbal warning to the persons in that adjoining place to take proper shelter. (h) Where shots are fired electrically they shall only be fired by a person authorised in writing by the manager for the purpose. The authorised person shall not use, for the purpose of firing, a cable which is less than twenty yards in length. He shall himself couple up the cable to the fuse or detonator wires and shall do so before coupling the cable to the firing apparatus. He shall take care to prevent the cable coming into contact with any power or lighting cables. He shall also himself couple the cable to the firing apparatus. Before doing so he shall see that all persons in the vicinity have taken proper shelter." E

On Jan. 27, 1948, Spence, a person duly authorised for the purpose, fired a shot in the respondents' mine, but he failed to see that persons in the vicinity had taken shelter, and the appellant, who was in the vicinity, was injured by the explosion. There is no doubt that Spence fired the shot in breach of the statutory duty imposed by the enactment which I have quoted, and that that breach caused the appellant's injuries. The question is whether that statutory duty was imposed on the respondents so that they are liable in damages to the appellant and the defence of common employment is not open to them. F

The case must ultimately be decided on the true meaning of those provisions read in their context in the order of 1934, and that order must be read together with the Act of 1911 which authorised it. Before considering the terms of that legislation, however, I think that it is necessary to have in mind what has been said in earlier cases, and it is necessary to start with cases under the Coal Mines Regulation Act, 1887. Although the terms of that Act differ materially from the terms of the Act of 1911, the earlier cases have always been cited and discussed in cases under the Act of 1911. I must start with *David v. Britannic Merthyr Coal Co.* (6). There had been breaches of several of the provisions of s. 49 of the Act of 1887 and also of an order which prohibited the use of gunpowder in the mine and as a result there was an explosion which killed the plaintiff's husband. The provisions of the Act with which the case was concerned were expressed in an impersonal way. The important words were in s. 49, r. 12 (f):

"... no shot shall be fired except by or under the direction of a competent person appointed by ..."

In r. 12 (h):

"If the place where a shot is to be fired is dry and dusty, then the shot shall not be fired unless ..."

certain things were done which had not been done in that case; and in r. 12 (i):

"... no shot shall be fired there unless ... all workmen have been removed from the seam in which the shot is to be fired ..."

The plaintiff's husband had not been so removed. Before evidence was led, CHANNELL, J., intimated that he would rule that the company was not liable if they had done their best to enforce the rules and that the burden was on the plaintiff to prove that they had neglected to do so. No evidence was led about this and judgment was entered for the defendants. Before the Court of Appeal it was argued that the law as to the onus of proof was wrongly stated to the jury by CHANNELL, J. It does not appear to have been argued that the provisions to which I have referred imposed absolute obligations on the company. The Court of Appeal (LORD COZENS-HARDY, M.R., dissenting) ordered a new trial. BUCKLEY, L.J., said ([1909] 2 K.B. 168):

"... had the defendants taken all reasonable means to prevent the breach and yet had the breach taken place? The onus upon this part of the case was placed upon the wrong shoulders. The defendants had *prima facie* upon the language of the statute committed an offence under the Act. It was for them to adduce evidence to show that they had a statutory defence, namely, that they had taken all reasonable means, etc., to prevent such contravention. Under these circumstances the logical result would be that, inasmuch as the defendants did not call any evidence and there was no evidence upon which the jury, if properly directed, could have found for the defendants, judgment ought to be entered for the plaintiff. But I am impressed by the fact that the defendants elected to call no evidence after and consequent upon the ruling of the judge. Under these circumstances it is only fair that there should not be judgment for the plaintiff but that there should be a new trial."

The statutory defence to which BUCKLEY, L.J., referred was that set out in s. 50, the terms of which correspond with those of s. 75 and s. 90 of the Act of 1911. That was a section which afforded a defence to an owner if he was prosecuted, and it is not easy to see why BUCKLEY, L.J., thought that it afforded also a defence in a civil action, because he had said a little earlier (*ibid.*, 166):

"Apart, therefore, from s. 50, I think that s. 49 creates a statutory duty

in the owner to observe not some only but all of the rules therein contained; and I think this is a statutory duty in the owner towards the workman."

I would observe in passing that if this is right it is very far-reaching because by no means all of these rules are obviously addressed to the owner. The judgment of FLETCHER MOULTON, L.J., is long and in parts not very easy to follow, but his view was that the defence under s. 50 only applied in criminal proceedings and was not available in a civil action. Nevertheless, he agreed that there should be a new trial. When the case came before this House it does not appear to have been argued that the defence under s. 50 was not available in civil proceedings, or that there was absolute liability on the company, or that no new trial was necessary. The speech of the EARL OF HALSBURY was short and he did not discuss the question of absolute liability. He made it clear that he disagreed with some of the opinions expressed in the Court of Appeal, but he did not say which they were. The decision of the Court of Appeal was affirmed. I find it very difficult to determine what was decided in this House, particularly in view of what was said about this case in two later cases.

In *Black v. Fife Coal Co., Ltd.* (8) the owners had failed to have in charge of the mine persons competent to deal with carbon monoxide gas and a miner died from inhaling it. In the course of his speech LORD KINNEAR dealt at some length with the rules in s. 49 of the Act of 1887. With regard to *David's* case (6) he said ([1912] A.C. 160), after discussing the nature of an absolute duty:

"That such an absolute duty may be imposed by statute I have no doubt whatever, and probably there may be some such duties imposed upon mine owners by the statute in question. But I find no such absolute duty in the statute with reference to the two rules which are said to have been infringed. The table of rules in which they occur is introduced by the general enactment that the following general rules are to be observed, not absolutely and in any event, but 'so far as reasonably practicable in every mine'. Nor are the two rules in dispute addressed directly to the mine owners. Section 49 imposes a variety of obligations upon a variety of persons, some upon managers and inspectors, some upon working colliers, some upon owners, and some upon anybody who goes down into the pit; and the particular rules with which we are concerned are imposed expressly and directly not upon the owners themselves, but upon the manager in charge for the time being, or upon the person specially appointed by him or the owners for a certain specific purpose. But it is unnecessary to argue whether rules so qualified and so directed import an absolute duty on the respondents or not, because the point is decided by the judgment of this House in *David v. Britannic Merthyr Coal Co.* (6) . . . It appears to me that by ordering a new trial on these grounds this House has negatived the absolute statutory liability for which the appellants contend. For if each of the rules contained in s. 49 imposes on the mine owners an absolute duty irrespective of negligence, it would have been no answer to say that they had taken all reasonable means to prevent contravention and no question of onus could have arisen. But then the case decided at the same time that although it be not absolute duty there is still a duty cast upon the mine owners in respect of the performance of the statutory rules even when these are to be actually carried out by other persons than the mine owners themselves, and farther, that if an injury be caused by a breach of the rules, the burden of proving that they have done all in their power to prevent such breach lies upon the mine owners themselves."

In *Watkins v. Naval Colliery Co. (1897), Ltd.* (7) various explanations of *David's* case (6) were given. A man had been killed owing to the winding machinery being inadequate. Breaches of various rules in s. 49 of the Act of 1887 were proved. PICKFORD, J., thought that the result of *David's* case (6)

was that not all the rules were of equal stringency, that there were two classes of rule, one of which imposed obligations directly on the owner, while the other did not. He said, however ([1911] 2 K.B. 176):

"I must say that I find some difficulty in seeing the underlying principle which makes the distinction between those two classes of rules. The one class is said to impose an obligation directly upon the mine owner. The other class is said to impose an obligation upon the servant of the mine owner. In nearly all these cases the provisions contained in the rules have to be carried out by servants, whatever the rule may be. In the case of a limited company, which is by far the most frequent case now, everything must be done by servants, whether it be the fencing of machinery, or the provision of adequate machinery or appliances, or the attending to the shot firing, or the use of explosives."

He thought that the rule then in question was a direct obligation on the owners. This decision was reversed by the Court of Appeal on the grounds that *David's* case (6) was conclusive in favour of the company. VAUGHAN WILLIAMS, L.J., used substantially the same argument as that used by LORD KINNAR in *Black's* case (8) and added (*ibid.*, 182):

"It is argued that some of these rules may impose statutory duties and that some may not do so, and that it does not follow that, because r. 12 (f), (h) and (i) were, by necessary inference, held by the House of Lords not to impose an absolute statutory duty, r. 30 does not impose such a statutory duty. But the judgment of LORD HALSBURY makes no such distinction between the rules, and I think that the preliminary words of s. 49, 'The following general rules shall be observed, so far as is reasonably practicable, in every mine,' apply at all events to every affirmative rule . . ."

In this House the judgment of the Court of Appeal was reversed on a ground that had received little attention in the courts below. It was held that there had been a breach of s. 16 of the Act and that that section imposed an absolute duty. VISCOUNT HALDANE, L.C., gave a new explanation of *David's* case (6). He said that in *David's* case (6) a new trial was all that was asked for, and that LORD HALSBURY had expressed no opinion on the construction of s. 49. I think that this is the best explanation of *David's* case (6), and I am reinforced in this opinion because I can find no later case in which a defendant has been held entitled to avoid civil liability by means of the statutory defence set out in s. 50 of the Act of 1887 and now set out in s. 75 and s. 90 of the Act of 1911.

In *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (4) a man had been killed by the fall of a roof. His father brought an action of damages founding on s. 49 of the Act of 1911. In defence s. 29 (1) of the Workmen's Compensation Act, 1925, was founded on, and it became necessary to determine the meaning and effect of s. 49 of the Act of 1911. This section enacts:

"The roof and sides of every travelling road and working place shall be made secure, and a person shall not, unless appointed for the purpose of exploring or repairing, travel on or work in any travelling road or working place which is not so made secure."

This corresponds with r. 21 of s. 49 of the Act of 1887. After quoting the section LORD WARRINGTON OF CLYFFE said ([1934] A.C. 13):

"This involves, it will be noted, an absolute obligation on the owner to make secure the roof and sides referred to, and a further obligation that no person shall work in a travelling road or working place which is not so made secure."

So he appears to regard an enactment in the form "a person shall not work . . ."

as a direction to the owner which imposes an obligation on him. Then LORD WARRINGTON went on (*ibid.*):

"As to the law on the subject of the liability of owners for breach of obligations imposed by statute for the protection of those employed by them, I think the following propositions are supported by authority:—(1) If the obligation is to do or abstain from doing a particular thing and on the construction of the statute the obligation is created for the protection of a particular class, *e.g.*, workers in a mine or factory, then a member of that class injured by the non-performance of the obligation is entitled to sue the owner in an ordinary action founded on personal negligence. (2) The fact that the obligation has not been performed is in itself evidence of personal negligence on the part of the owner. (3) That the owner cannot relieve himself of his obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part . . ."

This makes it quite clear that the defence which this House allowed to be proved in *David's* case (6) is not now available to an owner who is subject to a statutory duty, because, if that were available, he would escape liability in spite of negligence of his servants if he could show "that he had taken all reasonable means by publishing and to the best of his power enforcing" the obligation. LORD MACMILLAN specifically dealt with this point. He said (*ibid.*, 18):

"It is plain in the first place that s. 49 imposes an obligation on the defenders personally for breach of which they are liable, unless they can bring themselves within the protection of s. 102 (8). If the defenders do not comply with s. 49 they are rendered by s. 75 personally guilty of an offence against the Act unless they establish the defence which the statute leaves open to them."

I read this as meaning that s. 75 affords a defence in criminal proceedings only, and that the only defence available in civil proceedings is that set out in s. 102 (8). LORD WRIGHT in the same case says (*ibid.*, 22):

"The provisions of s. 49 of the Coal Mines Act clearly belong to the class which impose a duty on the employer to take certain precautions for the protection of his workmen. It is absolute in its terms, save as modified by the later s. 102 (8) . . ."

Section 102 (8) is in these terms:

"The owner of a mine shall not be liable to an action for damages as for breach of statutory duty in respect of any contravention of or non-compliance with any of the provisions of this Act if it is shown that it was not reasonably practicable to avoid or prevent the breach."

This is a re-enactment in a different and wider form of the initial words of s. 49 of the Act of 1887. "The following general rules shall be observed, so far as is reasonably practicable . . ." I have no doubt that to establish a defence under s. 102 (8) it is not enough to show that it was not reasonably practicable for the owner to prevent the breach. It must be shown that it was not reasonably practicable for him or any of his servants. This is a matter of decision both in England and in Scotland: *Yelland v. Powell Duffryn Associated Collieries, Ltd.* (9); *Crane v. Baird (William) & Co., Ltd.* (13); and I think that a comparison of s. 102 (8) with s. 102 (3) clearly shows that this is right. Section 102 (3) provides a defence in criminal proceedings if the owner, agent or manager proves that

"the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

The insertion of the words "for him" after "impracticable" here and the absence of those words from sub-s. (8) are, I think, conclusive. If that be so the

defence afforded by s. 102 (8) is much more limited than that afforded by s. 75 or s. 90 where it is sufficient to prove that the owner has done all in his power to enforce the statute. If he has done this, that defence succeeds although it may have been perfectly practicable for his servants to avoid the breach.

I have found no later case which in any way qualifies what was said on this matter in *M'Mullan's* case (4), and I, therefore, think that it must now be held that, whether or not *David's* case (6) established any general principle applicable to the Act of 1887, the decision in that case cannot be applied to the Act of 1911. So I must now turn back to *Black's* case (8). LORD KINNEAR founded his opinion very largely on his interpretation of *David's* case (6). His opinion has frequently been quoted with approval, but on this matter it was *obiter*, as indeed was the contrary opinion of LORD HALDANE regarding *David's* case (6) in the later case of *Watkins* (7). In any case LORD KINNEAR was dealing with a different Act. It is, I think, necessary to see how far LORD KINNEAR was influenced by *David's* case (6) and also to what extent his opinion was founded on features which were present in the Act of 1887 but are absent from the Act of 1911. He lays stress ([1912] A.C. 163) on a feature not present in the later Act. He says:

"Now the 49th section, as I have already said, imposes certain specific duties upon particular persons, but it begins with a general imperative enactment that the rules which are thereafter to be stated in detail shall be 'observed so far as is reasonably practicable in every mine.' I think that is an enactment expressly directed not only to people who are charged with the actual performance of specific duties, but also to the owners who have the ultimate control of the mine."

Later he says (*ibid.*, 164):

"... in so far as it is addressed to the mine owners that provision in my opinion imposes upon them a duty to use due care and diligence to secure that the rules shall be obeyed."

I think that the passage which follows shows that LORD KINNEAR reached the opinion that the owner's duty was of that limited character largely because he was of opinion that the latter part of s. 50 of the Act of 1887 was available to an owner in civil as well as in criminal proceedings. There is another reason given by LORD KINNEAR which later authority does not support. He says (*ibid.*, 163):

"It may be that certain of the other rules of a different character directly affect the mine owner, as was held by the Court of Session in *Bett v. Dalmeny Oil Co.* (14). But the two with which we are now concerned are not among these, because mine owners are absolutely debarred by the statute from interfering personally with the management of the mine."

And he says (*ibid.*, 168):

"I apprehend it might very reasonably be said that mine owners, who are themselves precluded from interfering with the working in the mine, could do no more than take due care to see that the people whom they employed were competent and had qualifications adequate to meet the particular danger which they had to consider."

This view has been rejected by this House in *Wilsons & Clyde Coal Co., Ltd. v. English* (12) in regard to the provision of a safe system of working, and I do not think that it can still be valid as a consideration tending to narrow the scope of an owner's statutory duty. It was also rejected in that connection by my noble and learned friend LORD NORMAND (1935 S.C. 730) when Lord President in *Crane v. Baird (William) & Co.* (13). In view of these considerations I find it difficult to say what the opinion of LORD KINNEAR would have been if he had

been considering the nature of duties under the later Act in light of the later authorities.

I must, therefore, return to the question at issue in this case without any very clear guidance from authority. It is clear that many of the provisions in and under the Act of 1911 for the safety of workmen impose absolute obligations on the mine owner. The rule broken in this case is an important provision for the safety of workmen, and it seems to me that the real question in this case is whether there is any essential difference between this rule and those other provisions which admittedly impose an absolute obligation on the owner. I put the question in that way because there have been many cases where a provision making for safety has been held to impose an absolute obligation on the owner, but we were not referred to any case under the Act of 1911 where a safety provision was held not to impose such an obligation. One must look first at the language of the order.

In the present case JENKINS, L.J., said ([1950] 1 All E.R. 179):

"There are, of course, some provisions of the order and regulations which do impose statutory duties on the owner in express terms. There may well be others which should be construed as doing so, even though the owner is not expressly mentioned as the person responsible, and, in general, I think a regulation to the effect that this or that shall or shall not be done in any coal mine, without any reference to the person by whom it is to be done or prevented, would *prima facie* cast on the owner, acting personally or through his agents, the duty of doing or preventing the act in question. The duties with which this case is concerned, however, were duties in terms laid on the shot-firer, by whom alone they were capable of being performed, and there is no regulation purporting to lay them on the owner as well."

My Lords, I would be content to find a sufficient distinction in the form of language used if I found, on looking at the rest of the order, that it led to results which were not unreasonable, but I do not find that. For example, there are in this order two other clauses which deal with almost exactly the same point. Clause 6, as amended by the Explosives in Coal Mines Order, 1938 (S.R. & O., 1938, No. 1409), provides:

"In all cases in which permitted explosives are required by this order to be used : . . . (f) (i) No shot shall be fired unless, immediately before the shot is to be fired, the shot-firer has examined the place where the shot is to be fired and all contiguous accessible places within a radius of twenty yards from the place, and has found them clear of inflammable gas and in all respects safe for firing."

And cl. 8 provides:

"The foregoing provisions shall apply in the case of sinking operations with the following addition :—(c) The firing cable shall not be coupled up to the fuse or detonator wires until the kettle, kibble, tub, bowk or hoppet is conveniently placed for the men in the shaft to enter and the chargeman has received a signal from the surface that the engineman is ready to draw away on receipt of the signal to do so, and the cable shall not be coupled to the firing apparatus until all persons are in a position of safety."

So, if the matter is to turn on the form in which the enactment is drafted, in the general case to which cl. 2 applies the duty to see that other workmen are in a position of safety would only be imposed on the shot-firer, but in the special cases to which cl. 6 and cl. 8 apply it would not, because it is stated in general terms in cl. 6 "No shot shall be fired unless . . ." and in cl. 8 "the cable shall not be coupled . . . until all persons are in a position of safety." And this is not an isolated case. I have gone through the whole order several times and I find many duties stated in the form that a certain thing shall or shall not be

done and many others similar in character and equally essential for safety stated in the form that the person concerned shall or shall not do a certain thing. To attribute to the Board of Trade an intention that in the one case the duty shall affect the owner, but that in the other it shall not, is to attribute to them an intention so capricious that I would not accept this interpretation if any other is reasonably possible. Anyone who has attempted to draft complicated provisions knows the difficulty of keeping to a consistent form of expression, and in this case I am satisfied that differences of expression have only been adopted for convenience of drafting. If a distinction is to be found between duties which are only imposed on a particular servant of the owners and duties which also affect the owners themselves, it must, I think, be on some other basis than the form in which the duty is expressed. I find in the Act itself very much the same difficulty. "Provisions as to safety" form Part II of the Act and include s. 29 to s. 75. These provisions vary very much in character. Some deal with matters which can readily be supervised and others deal with matters which may be known only to an individual workman, but in general they are expressed in the same absolute and general way. I cannot find from the manner in which the various duties are expressed any clear-cut distinction to indicate that some are and some are not intended to affect the owner. It is clear on authority that a number of these duties are to be regarded as being absolute duties of the owner. If I take the form in which these duties are expressed and then look at the rest I can find no significant change of expression. The difficulty, however, is even greater than that. There is one instance which has some resemblance to the present case. Section 64 (1) provides:

"The firemen, examiners, or deputies of a mine shall, within such time not exceeding two hours immediately before the commencement of work in a shift as may be fixed by the regulations of the mine, inspect every part of the mine . . . and shall ascertain the condition thereof so far as the presence of gas, ventilation, roof and sides, and general safety are concerned."

Section 65 then provides:

"A similar inspection shall be made twice at least in the course of each shift . . ."

Section 64 (1) is expressed as a duty placed on the firemen, examiners, or deputies and on no one else just as r. 2 of the order of 1934 is expressed as a duty placed on the shot-firer and on no one else. But s. 65 which deals with precisely the same matter is expressed differently—"a similar inspection shall be made . . ." It is not credible that Parliament intended the duties enacted in s. 64 and s. 65 to differ in character, and I am confirmed by this instance, in my opinion that little weight can be attached to distinctions based on the forms of expression used in this legislation.

There is one other matter which I must deal with in this connection. There was much argument about the bearing of the General Regulations, 1913, on this case. Those regulations were made by the Home Secretary under s. 86 (1) of the Act, and the only reference which they make to explosives is contained in reg. 1. This provides:

"It shall be the duty of the manager and under-manager to carry out and to the best of their ability enforce the provisions of every order in force under the Act regulating the supply, use and storage of explosives, and it shall be the duty of all persons employed in or about the mine to comply with the provisions of the said orders."

It will be observed that there is here no mention of the owner and to my mind the inference is that the position of the owner is left to be determined by such orders and by the Act itself. It was sought to draw an inference from the fact that the owner is expressly mentioned in Part III of the General Regulations which deals with electricity. It is there provided in reg. 117:

"It shall be the duty of the mine owner, agent, and manager to comply with and enforce the following regulations, and it shall be the duty of all workmen and persons employed to conduct their work in accordance with the regulations."

A possible inference from the fact that the owner is mentioned in the latter, but not in the former, regulation might be that the intention was that the owner should have no duties at all with regard to explosives, but that was not argued and is plainly wrong. If that is not the inference then I am at a loss to understand what it can be except that it has been made plain in the General Regulations that the owner has duties with regard to electricity, but left to be determined elsewhere what his duties are with regard to explosives. The fact that the duty of the manager is stated more absolutely in reg. 117 than in reg. 1 appears to me to throw little light on the duties of the owner with regard to explosives. The conception of absolute liability of owners is somewhat artificial. It has been developed largely in order to mitigate the unfortunate consequences of the adoption by the courts in the last century of the doctrine of common employment and the fictions which underlie it. Entirely different considerations apply in the case of the manager and I think that it would be hazardous to argue from the one to the other.

Regulation 117 was also used in another way. It was said, I think, that if it was necessary to mention owners there in order to impose absolute liability on them, and if there is no corresponding mention of owners in the order of 1934, that must mean that there is no general imposition of absolute liability by the order of 1934. I do not think that this is a strong argument. I do not think that it is right to assume that, because something is inserted in a legislative provision, it must have been necessary to insert it in order to achieve the result intended. It often happens that a draftsman thinks that a word is unnecessary, but would like to insert it to make sure and to relieve those who will have to operate the enactment of the difficulty of having to investigate the position if the word is omitted. I do not think that any principle of construction should be established which would prevent this. Moreover, even if the Home Secretary and his advisers thought that it was necessary to mention owners they may have been wrong. Then it is necessary to notice a further argument that the Board of Trade's order must be interpreted in the light of what the Home Secretary did and that, if the Board of Trade did not make any similar mention of owners in their order, they cannot have intended their order to impose absolute liability. I do not think that there is a proper inference. I do not see why the order and the regulations should be read together as if they were parts of a single document. I do not see why, when a department has exercised its delegated power to legislate under one section, another department exercising a different power under a different section should have to draft its order so that it can be construed along with the other as if the two were parts of the same order. The Board of Trade had to take note of reg. 1 in the Home Secretary's regulations because it was also dealing with explosives, but I can see no reason why the Board of Trade had to take note of the form in which reg. 117 was drafted. I am, therefore, of opinion that little assistance towards the interpretation of the order of 1934 can be got from contrasting it with reg. 117.

If the form in which a duty is expressed does not determine whether the duty directly affects the mine owner, can that be determined from the nature of the duty? It might have been possible to adopt the view of LORD KINNEAR, to which I have already referred, and to hold that duties relating to the technical management of the mine do not put any absolute obligation on the owner who is prohibited from dealing with that matter. A direction that a certain thing shall be done cannot, one might think, impose an absolute duty on a person who is prohibited from doing it, but that view has not been adopted. If it had been, there would be no absolute duty on the owner

with regard to such vital matters as the maintenance of proper ventilation or the maintenance of roofs in a safe condition, because technical management is involved. If, then, it be accepted that a duty which only qualified servants are allowed to perform can nevertheless be an absolute duty on the owner, and if it be further accepted that the form in which the duty is enacted is in this legislation comparatively unimportant, it appears to me that the duty in question in the present case must be held to be an absolute duty on the owner. The duty in this case is vital for the safety of those in the mine, and it must be carried out in the course of the ordinary work of the mine. I cannot see what more is required.

It is relevant to consider what the position will be if this appeal is dismissed. If in that event the owner is still under an obligation to do his best to enforce these regulations, then it is easier to reach the conclusion that the regulations do not impose absolute liability on the owner than it would be if the alternative to absolute liability is that the owner has no duty at all. The only sources of a lesser statutory duty are s. 75 and s. 90 of the Act. Where they apply they provide that any contravention of a duty by any person has the effect of making the owner guilty of an offence unless he proves that he has done his best to prevent the contravention. It is now, I think, settled law that, if an employer is made criminally liable in respect of something which affects the safety of his workmen, civil liability to an injured workman will follow. So, if either s. 75 or s. 90 applies to these regulations, there will also be civil liability. At first sight s. 90 appears to cover this case because it applies:

"If any person who is bound to observe the regulations of any mine, acts in contravention of or fails to comply with any of them . . ."

Section 89 (1), however, enacts that:

"The general regulations applicable to a mine, as supplemented or modified by the special regulations, if any, for the time being in force with respect to the mine shall be the regulations of the mine."

The general and special regulations there referred to are, I think, clearly those made under s. 86 and s. 87 of the Act. Part V of the Act is headed "Regulations" and includes only s. 86 to s. 90. The provisions in question in this case are in an order made under s. 61 (1) of the Act. This section empowered the Secretary of State to

"regulate the supply, use, and storage of any explosives at mines or any class of mines . . ."

The powers of the Secretary of State were transferred to the Board of Trade in 1920, and in 1934 the order now in question was made by that department. There is no reference in this order to any section in Part V of the Act of 1911,

and I cannot see how, as a matter of construction, the provisions of this order can be held to be part of "the regulation of any mine" within the meaning of s. 90. Section 61 occurs in Part II of the Act, and Part II ends with s. 75, which is similar in character to s. 90, but only applies "in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever." Accordingly, the criminal liability which it imposes on the owner and the consequent civil liability which the law will infer

can only arise if the provisions of the order of 1934 which Spence contravened in this case can be held to be "provisions of this Part of this Act." It appears to me that there is a clear distinction between a provision of the Act and a provision of an order made under the Act. In the first case Parliament has the provision before it when it creates the offence and enacts the penalty; in the second case Parliament is imposing vicarious criminal liability in respect of any provision which the appropriate government department may thereafter see fit to enact within the scope of its delegated legislative authority. Of course,

Parliament may, and frequently does, delegate authority to create new criminal offences, but I think that an accused person is entitled to require that it shall appear with reasonable clarity that Parliament has delegated power to create the offence with regard to which he is charged. I would adopt the observations of LORD SIMONDS in *London & North Eastern Ry. Co. v. Berriman* (11), where, after citing authorities to the effect that, where there are two reasonable interpretations of an enactment, one of which involves the imposition of a penalty while the other does not, the latter interpretation should be adopted, he said ([1946] 1 All E.R. 270):

"It was suggested, my Lords, that some distinction is to be made in the application of this rule according to the avowed purpose of the Act. It would, I think, be unfortunate if any decision of this House gave any colour to such a suggestion. Wherever the legislature prescribes a duty and a penalty for the breach of it, it must be assumed that the duty is prescribed in the interests of the community or some part of it and the penalty is prescribed as a sanction for its performance. Whether the purpose is, as it was in *Tuck's* case (15), the protection of copyright, or, as in the case before your Lordships, the protection of the life and limb of certain workers, the same principle prevails. A man is not to be put in peril upon an ambiguity, however much or little the purpose of the Act appeals to the predilection of the court."

In the present case, if an owner were charged under s. 75 with an offence in respect that someone else had contravened a provision of the order of 1934, that being a provision which was not addressed to the owner, I am of opinion that that charge must fail. Section 61 does not state that orders made under it are to be deemed to be part of the Act or are to have effect as if they were part of the Act, and I can find nothing from which it can be inferred, and certainly nothing from which it can be clearly inferred, that provisions of such orders are "provisions of this Part of this Act" within the meaning of s. 75. So there can in this case be no civil liability arising out of criminal liability, and I am, therefore, of opinion that, unless the provisions now in question are held to be addressed to the owner as well as to the shot-firer, the owner is under no civil liability under the statute even if he does nothing at all to see that they are complied with. I am, therefore, of opinion that the duty in question in this case must be held so to affect the owner as to make the respondents liable to the appellant for its breach and that this appeal should be allowed.

There is one other matter to which I should refer. As the defence of common employment has now been abolished it might seem that, apart from the financial interest of the parties, this case has now only academic importance. Counsel for the respondents, however, made it clear that that is not necessarily so. If his argument is right, whenever a workman is in breach of a statutory duty which is purely personal to the workman it will be necessary to determine whether the workman in failing to carry out his statutory duty was also guilty of negligence at common law. If he was, then his master must answer for his negligence to a fellow servant who had been injured by it, but, if he was not and his only fault was breach of his statutory duty, then it is said that his master is not answerable for that. If Parliament has put no duty on the employer or if the only duty which Parliament has put on the employer is that he shall do his best to see that his servant carries out his statutory duty, and if the employer has done his best, then he has done all that is required of him although he has not been able to prevent the breach. On what ground, then, is he liable in damages? In the ordinary case a servant is acting for his master in doing what his master has given him, or must be held to have given him, to do. Then *qui facit per alium facit per se* and the master is liable for the servant's fault. In performing a statutory duty, however, which is purely personal to the servant, the servant is not acting for his master. His right and duty to act do not flow from his master's orders or authority. He is doing something which Parliament has directed him and no

one else to do, and he is doing it only because Parliament ordered him to do it, so his failure to do it cannot be attributed to his master so as to make his master liable in damages. That is the argument as I understand it. I do not propose to express any opinion about that argument, but it is not one which I can dismiss summarily as unworthy of consideration. *Appeal dismissed.*

Solicitors: *Corbin, Greener & Cook*, agents for *Raley & Pratt*, Barnsley (for the appellant); *R. S. S. Allen*, Solicitor to the National Coal Board (for the respondents).

[Reported by J. D. PENNINGTON, Esq., Barrister-at-Law.]

CROWTHER v. CROWTHER.

[HOUSE OF LORDS (Lord Porter, Lord Normand, Lord Oaksey, Lord MacDermott and Lord Reid), February 27, 28, May 9, 1951.]

Divorce—Desertion—Insanity—Intention to continue desertion—No irrebuttable presumption of inability to form or retain animus deserendi.

On July 20, 1949, the wife filed a petition for divorce against her husband on the ground that he had deserted her on June 26, 1946. From July 28, 1948, to Oct. 11, 1948, the husband was detained in a mental hospital under a reception order as a person of unsound mind, and it was contended that during that period he was incapable of forming or retaining an *animus deserendi*, and, therefore, he had not been guilty of desertion for a continuous period of three years immediately preceding the presentation of the petition.

HELD: there was no reason for imputing an irrebuttable inability on the part of the husband to form an *animus deserendi* or keep it, and (LORD OAKSEY, dissenting) it was open to the wife to prove that throughout the statutory period the husband was capable of having an *animus*. The case must be remitted to the Divorce Court so that evidence, if offered by the wife, might be received and a conclusion reached on the principles stated.

Per LORD OAKSEY: If the original desertion is proved, the onus shifts to the deserting spouse to prove that he or she has had the intention to resume cohabitation and to show good cause why he or she has not in fact resumed it.

Williams v. Williams ([1939] 3 All E.R. 825), overruled.

AS TO DIVORCE ON THE GROUND OF DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-656, paras. 963, 964 and Cumulative Supp., 1951; and FOR CASES, see DIGEST, Vol. 27, pp. 319-321, Nos. 2978-2999, and Digest Supps.

Cases referred to:

- (1) *Williams v. Williams*, [1939] 3 All E.R. 825; [1939] P. 365; 108 L.J.P. 140; 161 L.T. 202; *affg.* [1939] 2 All E. R. 13; [1939] P. 315; 160 L.T. 366; Digest Supp.
- (2) *Rushbrook v. Rushbrook*, [1939] 4 All E.R. 73; [1940] P. 24; 109 L.J.P. 1; 162 L.T. 222; 2nd Digest Supp.
- (3) *Drew v. Drew*, (1888), 13 P.D. 97; 57 L.J.P. 64; 58 L.T. 923; 27 Digest 319, 2975.
- (4) *Cohen v. Cohen*, [1940] 2 All E.R. 331; [1940] A.C. 631; 109 L.J.P. 53; 163 L.T. 183; Digest Supp.
- (5) *Bowron v. Bowron*, [1925] P. 187; 94 L.J.P. 33; 132 L.T. 773; 89 J.P. 43; 27 Digest 561, 6168.
- (6) *Pratt v. Pratt*, [1939] 3 All E.R. 437; [1939] A.C. 417; 108 L.J.P. 97; 161 L.T. 49; Digest Supp.
- (7) *Jones v. Newtown & Llanidloes Guardians*, [1920] 3 K.B. 381; 89 L.J.K.B. 1161; 124 L.T. 23; 84 J.P. 237; 27 Digest 76, 601.

- (8) *Yonge v. Toynbee*, [1910] 1 K.B. 215; 79 L.J.K.B. 208; 102 L.T. 57; 42 Digest 53, 438.
- (9) *Bennett v. Bennett*, [1939] 2 All E.R. 387; [1939] P. 274; 108 L.J.P. 119; 161 L.T. 96; Digest Supp.

APPEAL from an order of the Court of Appeal, dated June 14, 1950, affirming a decision of ORMEROD, J., given on Feb. 15, 1950, that the wife was not entitled to a decree of divorce on the ground of her husband's desertion because during the statutory three years' period alleged in the petition he had been detained for several months as a person of unsound mind in a mental hospital, and while so detained had been incapable of forming or retaining an intention to desert.

Noel Middleton, K.C., and *R. J. A. Temple* for the wife.

Ormerod for the husband.

The House took time for consideration.

May 9. The following opinions were delivered.

LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal affirming a decision of ORMEROD, J., in a matrimonial matter. On July 20, 1949, the wife, Mrs. Crowther, filed a petition for divorce against her husband on the ground of desertion. The desertion was said to have begun on June 26, 1946. The date was denied, but, as it was admitted that the husband deserted his wife on July 8, the exact date is immaterial, provided that she is able to establish, in accordance with the provisions of s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 2 of the Matrimonial Causes Act, 1937, that the desertion was "without cause" and continued "for . . . at least three years immediately preceding the presentation of the petition." In answer it was alleged that the desertion was terminated on July 28, 1948, when the husband was admitted to Banstead Hospital under a reception order of that date made under the Lunacy and Mental Treatment Acts, 1890 to 1930, and was there detained until Oct. 11, 1948, as a person of unsound mind. The existence of the reception order is admitted, and the only question, therefore, which your Lordships have to determine is whether it presents an absolute bar to the prayer of the petition.

It is said, on the one hand, that desertion is a continuous process involving on the part of the deserting spouse an *animus deserendi* as well as absence in fact, and that in the present case there was a withdrawal of consortium but no *animus deserendi* for three years inasmuch as during the period of his detention the husband was a certified lunatic, and, it was said, as such, incapable of forming or retaining an *animus*. To this plea various answers were made: (i) that the only material time to consider on the question of intention is that at which desertion in fact took place; (ii) that in any case the husband, having formed the intention and withdrawn himself, could only put an end to his desertion by some action showing an intention to return and by returning if there was nothing to prevent his doing so. It may be that the husband was physically prevented from returning for some three months, but before and after that time he could have come back and could have endeavoured to take up his matrimonial position again, whereas he had never attempted to do so; (iii) furthermore, it was maintained that the certification was not conclusive. Medical evidence might establish that, though unable to form any intention in some matters, he might be capable of a lucid determination on others, and that whether during his incarceration he could continue to maintain an intention to desert could not be determined without such evidence.

ORMEROD, J., took the view that the existence of the certificate was an absolute bar to the grant of the prayer in the petition. The certificate, in his opinion, established that the husband was, during the time that he was detained, incapable of forming or retaining any intention of deserting, and desertion was a continuing state requiring proof that the husband left with the intention of

remaining absent and continued to retain that intention. It could not exist in the absence of a capacity to form a determination. Nor, as he thought, could any evidence alter the inference which must be drawn, and, therefore, the husband was not in desertion for the necessary three years whether immediately preceding the petition, or, indeed, for three full years. In my view, he was obliged to reach this conclusion having regard to the decision of the Court of Appeal in *Williams v. Williams* (1). No doubt, a distinction in fact can be drawn between the two cases, since in *Williams v. Williams* (1) the husband was still under restraint when the petition was presented and heard, so that, if certification involves an inability to form a resolve, the husband was unable either to resolve to stay away or determine the desertion at the time of the hearing, whereas, in the present case, the husband had recovered, been released for some seven months, and, as it seems, neither returned to his wife nor evinced any inclination to do so. Any such distinction, however, is inadmissible having regard to the opinion expressed by SIR WILFRID GREENE, M.R., with whom FINLAY, L.J., agreed. He said ([1939] 3 All E.R. 828):

“ . . . there is [in a certified lunatic] generally speaking, no capacity to have the *animus* necessary to take such a step, or to give to it the quality of volition required to produce a legal result . . . I thought at one time that the court might be at liberty, upon the facts of a particular case, to draw an inference as to what the conduct of the lunatic would have been, if he or she had remained of sound mind. If it were permissible to draw such an inference, the question whether in any particular case it ought to be drawn would not present any insuperable difficulty. However, I do not think that this is a permissible solution. What must be proved is desertion for the necessary period. If I am right in what I have said as to the necessity of the *animus deserendi*, and the impossibility of its existence in the case of a person who by reason of lunacy is incapable of having it, that proof can never be given.”

It is true that MACKINNON, L.J., was inclined to think that long-continued desertion, even if followed by lunacy before the presentation of the petition, might enable a court to draw the inference that the intention persisted to the end and might have taken an even stronger view in a case where a husband, after his mental stability was restored still continued to remain absent, but he was in a minority and the other view prevailed. The case was originally heard by LANGTON, J., who later followed his own view and that of the Court of Appeal in *Rushbrook v. Rushbrook* (2). On the other hand, it has been held that physical inability to end the desertion does not prevent its remaining desertion: e.g., *Drew v. Drew* (3) where the husband was in prison. This result has, however, been explained on the ground that the deserting spouse might form an intention to return, express his intention, and take such steps as are open to an imprisoned person to carry out the resolve. *Drew v. Drew* (3), it is said, depends on physical incapacity, not on intention.

I get little assistance from the other cases which were quoted to your Lordships and, like BUCKNILL, L.J., can find no support for either side in *Cohen v. Cohen* (4), nor, indeed, from *Bowron v. Bowron* (5), which decides that desertion, if there be an original intention to desert, continues until it is brought to an end, but does not help to a conclusion whether certification as a lunatic *ipso facto* brings about that result, any more than do LORD MACMILLAN's words in *Pratt v. Pratt* (6) ([1939] 3 All E.R. 438):

“ The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period.”

There are, however, two cases which require careful consideration. The first is *Jones v. Newtown & Llanidloes Guardians* (7). In that case a wife had left her husband without any legal justification and later became a lunatic. The question was whether the husband or the guardians were liable to maintain her. It was

held that the obligation rested on the husband. In the course of his judgment the EARL OF READING, C.J., said ([1920] 3 K.B. 384):

"Here the wife has become a lunatic and continues to be insane. She is therefore unable to exercise any judgment. She cannot elect to return home . . ."

And SHEARMAN, J., used words to the like effect (*ibid.*, 385):

"Here, she might have returned to her husband and called upon him to maintain her at any time before she became insane. Upon her becoming insane her freedom of will came to an end, her absence from home ceased to be wilful, with the consequence that her husband's obligation to maintain her revived."

Those expressions, however, weighty as they are, were used in reference to another Act and a different set of circumstances, and their import as such may be confined to the law and facts of the particular case in which the physical inability to return was of more importance. They would not in any circumstances bind your Lordships. Still less assistance is, to my mind, to be obtained from the decision in *Yonge v. Toynbee* (8), in which certain solicitors were ordered to pay the costs of litigation which they had continued on behalf of a madman, but without knowledge of his state. In that case his incapacity was accepted as withdrawing the solicitors' authority to act for him.

The other case is a decision of BUCKNILL, J., *viz.*, *Bennett v. Bennett* (9). In the course of his judgment he suggests that the question in issue is ([1939] 2 All E.R. 390):

"Did the wife, during the time she was insane, intend to desert her husband . . . ?"

and puts as a possible answer that it may be that no irrebuttable presumption exists, but adds that the wife's insanity raises a rebuttable presumption that the wife's desertion had come to an end, and, accordingly, the deserted spouse may prove, if he can, that the wife was capable of retaining an intention to desert and retained that intention. I agree with this view, which, as I understand, BUCKNILL, L.J., only discarded in the present case because he was bound by the subsequent case of *Williams v. Williams* (1). I see no reason for imputing an irrebuttable inability on the part of a husband, who has been the subject of certification, to form an intention or to keep it. Persons abnormal in some respects may be normal in others and evidence alone can solve the question in which category the individual is to be placed. A lunatic is capable of making a will in a lucid interval, and, though a continuous intention is harder to establish, I cannot regard it as impossible. I am not prepared to go further and say that desertion continues where the deserting spouse is a lunatic because a lunatic cannot form an opposite intention, or even that an *animus deserendi*, formed before the lunacy, and a continuance of physical desertion after it has come to an end, admits a legitimate inference without further evidence that the intention to desert continues during the intermediate period when he was a lunatic. If, in fact, a petitioner is unsuccessful in proving that the lunatic was capable of forming an intention, or if no evidence is called, in my opinion, the court is not entitled to draw an inference of continued desertion from the intention shown in the pre- and post-certification periods. In accordance with these views I would allow the appeal and send the case back in order that evidence, if offered, may be received and a conclusion reached in conformity with the principles set out above.

LORD NORMAND: My Lords, I agree with the opinion which has been delivered by my noble and learned friend on the Woolsack. I have had the advantage of reading in print the opinion which will be delivered by my noble and learned friend LORD REID and I concur also with it.

LORD OAKSEY: My Lords, the question in this appeal is whether the detention of the husband in a mental institution for some months during the period

of three years immediately preceding the filing of the wife's petition for divorce on the ground of the husband's desertion makes it impossible to grant the divorce; secondly, whether, if not, the onus is on the husband to show that he intended to put an end to his desertion; and, lastly, whether in any event the wife is entitled to call evidence to show that the husband intended during his detention to continue his desertion. It is not disputed for the purposes of this appeal that the husband deserted the wife without lawful cause from July 8, 1946, up to the time when he was detained in a mental institution on July 28, 1948, and that on his release from the institution he continued his desertion up to the date of the presentation of the petition of divorce on July 20, 1949. In these circumstances ORMEROD, J., and the Court of Appeal have held that the petition could not be granted because the intention to desert must continue throughout the period, and that while the husband was detained he must be assumed to have been incapable of forming any intention and that during the period of detention there was lawful cause for his absence from his marital home.

I agree with your Lordships that the appeal must be allowed, but I take a different view from your Lordships as to the onus of proof. In my opinion, if the original desertion is proved, the onus shifts to the deserting spouse to prove that he or she has had the intention to resume cohabitation and to show good cause why he or she has not in fact resumed it. I cannot think it is reasonable to cast the burden on the deserted spouse of proving the intention of the deserter which *ex hypothesi* has not been carried out. It is for the husband to show that he altered his intention: see *Pratt v. Pratt* (6); and there is no evidence as yet to suggest that he did. In my opinion, therefore, this case should be sent back to the Divorce Court to try whether the husband can prove that he formed the intention at any time during his detention to return to his wife, and if he does not satisfy the court of that fact the wife should be granted a divorce.

The assumption which has been made in the cases cited and in the courts below, that persons detained in mental institutions are mindless, is, in my belief, unfounded in fact and there is nothing in the Lunacy Acts to which your Lordships' attention has been drawn which suggests that every person admitted to a mental institution is incapable of forming an intention to resume consortium with his or her spouse or any other intention.

LORD MACDERMOTT (read by LORD OAKSEY): My Lords, I have had the advantage of reading the opinion of my noble friend LORD REID, in which I concur.

LORD REID (read by LORD NORMAND): My Lords, in this case I think it right to state at the outset that I have tried to put out of my mind entirely the Scots law of divorce for desertion. I do not say that there are not some fields within the law of divorce where, if used with caution, Scots authorities may not be of assistance in considering English cases and *vice versa*, but the whole history and background of the laws of the two countries regarding desertion are so different that, in my judgment, it can be of no assistance to the proper decision of a case in this field in the one country to import principles or authorities from the other.

I do not think that it has ever been denied that desertion in English law requires as an essential ingredient an *animus deserendi* at least to this extent, that without it desertion cannot commence. The argument for the wife was that after desertion has commenced it can continue without there being any such *animus* in the deserting spouse, and that there is in this respect an essential difference between the act of desertion which starts the desertion and the subsequent state of desertion which continues it. I am unable to find any support for this distinction in the statute. The statute requires that the respondent shall have "deserted the petitioner without cause for a period of at least three years . . .". It does not say that the respondent must have deserted the petitioner and then remained in desertion or remained absent from the petitioner for three years. Whatever

"desert" may mean, the statute, taken by itself, appears to me to indicate clearly that all the necessary ingredients of desertion must continue to exist throughout the period, and I can find nothing to suggest that the words of the statute ought to be given any other meaning even if they were capable of having any other meaning. I can see very good reason for holding that once desertion has begun it will be presumed to continue in the absence of evidence to the contrary, but that is a very different thing from saying that desertion changes its legal character after it has begun. It may well be that once an initial *animus deserendi* has been proved there must be evidence from which it ought to be inferred that that *animus* has ceased before it can be held that the desertion has come to an end. I need not consider what would be sufficient evidence for this purpose, but I have no doubt that if there is such evidence that is an end to the desertion. It was argued that this might lead to such unreasonable results that it could not be right. It was said that if it is necessary to have a continuous *animus deserendi*, then any illness or accident which made the deserting spouse unconscious or incapable of thought even for a day would terminate his desertion because during that day he could not have the necessary *animus*. I think that this argument disregards the way in which sane people do, in fact, maintain a continuing intention. To maintain such an intention it is not necessary to think about it every hour or even every day, and I think it would be contrary to the ordinary good sense of mankind to hold that a person who had an intention before and has the same intention after a short period of unconsciousness must be regarded as not having maintained that intention throughout. I think, however, that an intention must come to an end when the person no longer has a mind capable of entertaining it. I am, therefore, of opinion that the first argument for the wife fails.

Another and quite different argument was also submitted. The wife argues that she is entitled to prove that, although the husband was detained under a reception order for nearly three months during 1948, in fact during that period his mental capacity was such that he was capable of maintaining his *animus deserendi* and that he did maintain it. It was held in *Williams v. Williams* (1) that a respondent detained under a reception order was incapable of having an *animus deserendi*. The petitioner in that case does not appear to have offered to prove that in spite of the reception order the respondent had, in fact, sufficient mental capacity. The ground of judgment appears to have been quite general. It was that a person detained under a reception order is never capable of having the necessary *animus*. I do not see why that should necessarily be so. There are many degrees of mental incapacity and there appears to be no definition of that degree of mental incapacity which is necessary to justify a reception order. In the absence of any such definition it is not obvious to me that there cannot be a case where a reception order is justified, but where, nevertheless, the person detained still has a mind capable of maintaining an *animus deserendi*, and, therefore, I am of opinion that this wife ought to be allowed to prove, if she can, that this is such a case. I think that it can be taken to be common knowledge that persons so detained do not generally have such a mind, so, if it appears that the husband has been detained under a reception order, that does raise a presumption against the wife. I can see no ground for holding that it is more than a presumption. I, therefore, think that, in so far as the decision in *Williams v. Williams* (1) goes farther than that, it goes too far. I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Jaques & Co.* (for the wife); *Kenneth Brown, Baker, Baker* (for the husband).

[Reported by J. D. PENNINGTON, ESQ., Barrister-at-Law.]

END OF VOLUME ONE.





UL 14 SEP 1971

